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THE

SUPREME COURT REPORTER,

VOLUME 13.

CASES ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1892.

PERMANENT EDITION.

DECEMBER, 1892—JULY, 1893.

ST. PAUL:
WEST PUBLISHING CO.
1893.

7-1967

JUSTICES
OF THE
UNITED STATES SUPREME COURT.

OCTOBER TERM, 1892.

CHIEF JUSTICE:

HON. MELVILLE W. FULLER.

ASSOCIATES:

HON. STEPHEN J. FIELD.
HON. JOHN M. HARLAN.
HON. HORACE GRAY.
HON. SAMUEL BLATCHFORD.[1]
HON. LUCIUS Q. C. LAMAR.[2]
HON. DAVID J. BREWER.
HON. HENRY BILLINGS BROWN.
HON. GEORGE SHIRAS, JR.[3]
HON. HOWELL E. JACKSON.[4]

ATTORNEY GENERAL:

HON. WILLIAM H. H. MILLER.[5]
HON. RICHARD OLNEY.[5]

SOLICITOR GENERAL:

HON. CHARLES H. ALDRICH.

[1] Died July 7, 1893.
[2] Died January 23, 1893.
[3] Mr. Justice SHIRAS was commissioned July 28, 1892, to succeed Mr. Justice BRADLEY, who died January 29, 1892.
[4] Mr. Justice JACKSON was commissioned February 18, 1893, to succeed Mr. Justice LAMAR.
[5] Hon. RICHARD OLNEY was commissioned March 6, 1893, to succeed Hon. WILLIAM H. H. MILLER, resigned.

ALLOTMENT OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES.

MARCH 13, 1893.

FIRST CIRCUIT.

Comprising Maine, Massachusetts, New Hampshire, and Rhode Island.

JUSTICE HORACE GRAY, of Massachusetts. Appointed December 20, 1881, by President Arthur.

SECOND CIRCUIT.

Comprising Connecticut, New York, and Vermont.

JUSTICE SAMUEL BLATCHFORD, of New York. Appointed March 27, 1882, by President Arthur.[1]

THIRD CIRCUIT.

Comprising Delaware, New Jersey, and Pennsylvania.

JUSTICE GEORGE SHIRAS, JR., of Pennsylvania. Appointed July 26, 1892, by President Harrison.

FOURTH CIRCUIT.

Comprising Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

CHIEF JUSTICE MELVILLE W. FULLER, of Illinois. Appointed July 20, 1888, by President Cleveland.

FIFTH CIRCUIT.

Comprising Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

JUSTICE HOWELL E. JACKSON, of Tennessee. Appointed February 18, 1893, by President Harrison.[2]

SIXTH CIRCUIT.

Comprising Kentucky, Michigan, Ohio, and Tennessee.

JUSTICE HENRY BILLINGS BROWN, of Michigan. Appointed December 29, 1890, by President Harrison.

SEVENTH CIRCUIT.

Comprising Illinois, Indiana, and Wisconsin.

CHIEF JUSTICE MELVILLE W. FULLER, of Illinois. Appointed July 20, 1888, by President Cleveland.[3]

EIGHTH CIRCUIT.

Comprising Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wyoming.

JUSTICE DAVID J. BREWER, of Kansas. Appointed December 18, 1889, by President Harrison.

NINTH CIRCUIT.

Comprising California, Idaho, Montana, Nevada, Oregon, and Washington.

JUSTICE STEPHEN J. FIELD, of California. Appointed March 10, 1863, by President Lincoln.

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1 Died July 7, 1893.

2 Justice LUCIUS Q. C. LAMAR, of Mississippi, formerly allotted to this circuit, died January 23, 1893.

3 Justice JOHN M. HARLAN, of Kentucky, (appointed November 29, 1877, by President Hayes,) and formerly allotted to this circuit, was absent during the greater portion of the term as a member of the Bering Sea Arbitration Commission.

Supreme Court Reporter References

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60	13	14	140	13	50	227	13	64	314	13	105	370	13	136	524	13	166	646	13	190
71	13	26	153	13	47	233	13	88	325	13	60	387	13	110	543	13	184	657	13	224
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1	13	239	118	13	206	230	13	318	342	13	321	467	13	358	538	13	429	664	13	434
14	13	246	133	13	201	238	13	298	360	13	350	476	13	403	550	13	495	669	13	425
36	13	236	147	13	282	242	13	244	370	13	348	486	13	512	557	13	503	672	13	437
47	13	217	149	13	279	248	13	289	374	13	350	490	13	394	571	13	557	676	13	439
69	13	254	150	13	288	261	13	303	375	13	340	494	13	406	591	13	444	685	13	443
73	13	211	165	13	271	268	13	327	396	13	306	500	13	416	623	13	472	687	13	442
87	13	194	177	13	275	282	13	361	413	13	333	508	13	418	640	13	549	691	13	478
91	13	267	190	13	293	322	13	312	431	13	396	525	13	527	647	13	466	692	13	465
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31	13	458	134	13	570	197	13	542	301	13	595	412	13	640	556	13	719	654	13	679
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60	13	491	148	13	564	228	13	611	360	13	585	490	13	634	581	13	684	664	13	754
71	13	451	157	13	572	246	13	582	372	13	758	502	13	640	591	13	706	674	13	768
80	13	457	162	13	572	255	13	591	389	13	602	503	13	728	603	13	691	682	13	771
84	13	552	167	13	555	262	13	590	390	13	602	529	13	695	615	13	672	691	13	742
92	13	485	173	13	608	266	13	594	391	13	650									

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17	13	738	216	13	850	298	13	900	473	13	1008	608	13	906	769	13	1044	780	13	1049
40	13	750	224	13	864	304	13	881	481	13	950	629	13	993	769	13	1045	781	13	1050
43	13	748	231	13	833	308	13	876	505	13	998	645	13	959	770	13	1045	782	13	1050
48	13	774	237	13	843	315	13	886	532	13	979	648	13	960	771	13	1045	783	13	1060
60	13	765	242	13	841	327	13	892	532	13	983	649	13	960	771	13	1046	783	13	1061
70	13	793	248	13	856	346	13	891	541	13	981	652	13	961	772	13	1046	784	13	1051
79	13	796	259	13	840	350	13	875	541	13	983	662	13	985	773	13	1046	785	13	1051
95	13	834	261	13	836	355	13	879	544	13	982	662	13	1041	774	13	1046	785	13	1052
117	13	796	262	13	840	364	13	870	544	13	983	680	13	970	774	13	1047	786	13	1052
122	13	803	263	13	845	368	13	871	550	13	941	698	13	977	775	13	1047	787	13	1052
144	13	817	264	13	837	368	13	914	557	13	939	698	13	1016	776	13	1047	788	13	1053
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191	13	793	277	13	850	436	13	944	580	13	934	767	13	1043	778	13	1048	790	13	1054
192	13	826	278	13	872	451	13	883	586	13	932	767	13	1044	778	13	1049	791	13	1054
194	13	859	287	13	874	451	13	977	592	13	1011									

CASES REPORTED.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1892.

(146 U. S. 196)

STOTESBURY et al. v. UNITED STATES.

(November 21, 1892.)

No. 30.

INTERNAL REVENUE—ILLEGAL TAXATION—POWER OF COMMISSIONER—FINAL DETERMINATION.

Rev. St. § 3220, authorizes the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, on appeal to him, to refund all taxes erroneously collected. Regulation 3 prescribed by the secretary of the treasury requires the commissioner, after hearing an appeal, to make a formal certificate of his decision, with the amount in writing which should be refunded; regulation 4 requires the entry of the decision in a docket; regulation 5 requires a weekly transmission of the list of awards, with the vouchers, to the first comptroller of the treasury; and regulation 7 requires the transmission of the case, with the evidence in support of it, to the secretary of the treasury, for his consideration and advisement, before final decision of an appeal involving over $250. *Held*, that the examination and allowance of a claim exceeding $250 by the commissioner without complying with regulations 3, 4, and 5, and the subsequent transmission of the claim to the secretary of the treasury for his consideration and advisement, did not constitute a final award by the commissioner, which was binding on the government. 23 Ct. Cl. 285, affirmed.

Appeal from the court of claims. Affirmed.

Statement by Mr. Justice BREWER:

On December 19, 1870, the firm of Harris & Stotesbury appealed to the commissioner of internal revenue for the refunding of $67,335.85, internal revenue taxes claimed to have been erroneously assessed and collected from them. This claim was examined and rejected, and notice thereof given to the claimants. An application for a rehearing was made and sustained. On July 26, 1871, the commissioner, having examined the claim, signed and transmitted to the secretary of the treasury the following schedule:

"No. 99.—A schedule of claims for the refunding of taxes erroneously assessed and paid, which have been examined and allowed, and are transmitted to the secretary of the treasury for his consideration and advisement in accordance with regulations dated January 12, 1866.

District.	Claimants.	Amount.	Disposition.	Reason of Disposition.
1st Penn...	Harris & Stotesbury...	$67,335 85	Allowed.	Were not sugar refiners within the definition of section 75 of "An act to provide internal revenue," etc., approved July 1, 1862, as amended by the act approved March 3, 1863.
" "	Harris, Heyle & Co...	26,642 96	"	

"I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the secretary of the treasury for his consideration and advisement. A. PLEASONTON, Commissioner."

*On August 8, 1871, Commissioner Pleasonton resigned, and on the next day J. W. Douglass, having been duly appointed his successor, entered upon the discharge of the duties of the office. On that day the secretary of the treasury sent to him this letter:

"Treasury Department,

"Washington, D. C., August 9, 1871.

"Sir: The inclosed refunding claims of Harris & Stotesbury and Harris, Heyle & Co., transmitted by your predecessor to this office for approval, would seem to have been passed by a reversal of the construction of the law relative to sugar manufactures which obtained during the whole period of its existence.

"Under these circumstances, I deem it proper to return them to you for re-examina-

tion, declining to consider them unless again submitted by your office. Respectfully yours,

"GEO. S. BOUTWELL,
"Secretary of the Treasury.

"Hon. J. W. Douglass, Com'r of Int. Revenue."

And on the 9th of November, 1871, the commissioner indorsed on the claim these words: "November 9, 1871. Rejected on re-examination. J. W. Douglass, Commissioner,"—notice of which action was duly given to the claimants. On the wrapper or jacket inclosing the papers in this claim appear the following indorsements:

"(Office of Internal Revenue. Rec'd Dec. 19, '70. Div. 1, sec. 3.)
Coll'r not'd Dec. 20, '70. J. D. 3395.
Wrote claimants Nov. 13, '71. J. D. 12, 21, '70.
(46) Claim for refunding taxes collected.
Serial No. 18. No. of draft, ——. $67,-335.85.
Harris & Stotesbury, claimant —.
Post-office address, Philadelphia.
Verified by— W. J. POLLOCK, Collector.
1 district of Penna.
*Assessed upon sp. tax sugar refiners.
Basis of claim: Claims that they do not refine sugar.
Nov. 9, 1871, rejected on re-examination.
[Signed] J. W. DOUGLASS, Comm'r.
Examined and rejected Dec. 19, 1870, by—
[Signed] CHS. CHESLEY.
Allowed by commissioner, July 26, 1871.
[Signed] A. PLEASONTON, Commissioner."

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No notice was given to the claimants of the action of Commissioner Pleasonton, and it does not appear that they were aware of it until 1880, when, on being informed thereof, they made application for the payment of the money as having been duly allowed them by such decision of Commissioner Pleasonton. This application was denied, but the question of the liability of the government was transmitted by the secretary of the treasury to the court of claims. A petition in that court was filed in the name of Thomas P. Stotesbury, sole surviving partner of Harris & Stotesbury, and afterwards, on his death, the suit was revived in the name of the present appellants, his executors. The decision was in favor of the government, (23 Ct. Cl. 285,) from which decision the executors brought this appeal.

Enoch Totten and Thomas W. Neill, for appellants. Asst. Atty. Gen. Cotton, for the United States.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The court of claims decided that the action of Commissioner Pleasonton did not constitute a final award binding the government; and whether it was so or not is the question presented to us for decision.

The law under which the commissioner acted is found in section 3220, Rev. St.: "The commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected." Regulations were prescribed by the secretary of the treasury, the only ones of importance in this case being the 3d, 4th, 5th, and 7th, as follows:

"(3) When the appeal has been fully heard and examined, the commissioner of internal revenue must put into the case a certificate of his decision or judgment, with the amount in writing which should be paid back.

"(4) A proper book or docket must be carefully kept in the office of the commissioner of internal revenue, in which should be entered, under its proper date, the name of the claimant, with the amount of the tax which is the subject of appeal, and the final decision of the said commissioner.

"(5) When, from time to time, and as the commissioner of internal revenue in the course of his public duties shall complete his examination and give his judgment on these appeal cases, he will transmit a weekly list of them to the first comptroller of the treasury, together with all the vouchers upon which, as evidence, he rests his decision, as a matter of account, giving upon the list the proper date, the name of the claimant, and the amount found due each claimant."

"(7) Where the case of an appeal involves an amount exceeding two hundred and fifty dollars, and before it is finally decided, the commissioner of internal revenue will transmit the case, with the evidence in support of it, to the secretary of the treasury for his consideration and advisement."

It is contended by appellants that the duty of determining whether any, and, if so, how much, shall be returned to claimants, is committed by section 3220 to the commissioner; that the secretary has no revising power; and that the regulations which he may prescribe are in respect to the manner of payment, and cannot determine the procedure to be followed by the commissioner in hearing and deciding upon claims. It may be conceded that the power of final decision is vested in the commissioner, and that there is no appeal from him to the secretary of the treasury; but without inconsistency the power of decision may be vested in one person, and the ordering of rules of procedure in another. Indeed, in ordinary litigation the one is given to the judiciary, while the other is largely prescribed by the legislature. Here the authority to the secretary to prescribe regulations is given in full and general terms, and certainly it is a very reasonable regulation

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that the chief financial officer of the government shall be heard by the commissioner before a final decision is made.

Further, the original internal revenue act, in which, by section 44, "the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury," was authorized to pay back duties erroneously and illegally collected by the government, etc., was enacted on June 30, 1864. 13 St. pp. 223, 239. These regulations were prescribed by the secretary of the treasury on January 12, 1866, and on July 13, 1866, the internal revenue act was amended, (14 St. pp. 98, 111,) section 44 being amended by striking out all after the enacting clause, and inserting in lieu thereof that which now appears as section 3220 of the Revised Statutes. It might well be held that congress, having knowledge of the secretary's regulations of January, 1866, by re-enacting in modified form section 44 approved these regulations, among them the seventh,—the one in question. If that be so, of course there could have been no final action by the commissioner, but only a transmission of the matter to the secretary for his consideration and advice.

But, if this be not so, and the regulation be considered as in excess of the authority vested in the secretary of the treasury, in that it is an attempt to regulate the procedure before the commissioner, still it cannot be held that there was a final determination by the commissioner. Whether these regulations were valid or invalid, the commissioner acted under them, and therefore the meaning and scope of his action must be interpreted by them. The schedule purports to be transmitted to the secretary for consideration and advisement, in accordance with the regulations. The certificate made to the secretary repeats the statement. Read in the light of the seventh regulation, it is as though the commissioner said: "I have examined this claim, and think it should be allowed, but before final decision I await your consideration and advisement." Certainly, if the commissioner was waiting for such consideration and advisement, he was not making or intending to make a final decision. Not only is this the plain import of the language of the schedule, but the further fact that the commissioner did not comply with either the 3d, 4th, or 5th regulations emphasizes the correctness of such construction. He made no formal certificate of his decision or judgment, with the amount in writing which should be paid back; no entry of a decision appears in any docket; and no list including this award was ever transmitted by him to the first comptroller of the treasury; and the fifth regulation surely is within the competency of the secretary of the treasury. The facts that he ignored those three provisions, and that he expressly adopted the seventh regulation as the guide to his procedure, make it perfectly clear that no final determination was made or intended by Commissioner Pleasonton. Therefore the matter was one still pending until the action of Commissioner Douglass, on November 9, 1871, rejecting the claim.

The decision of the court of claims was right, and its judgment is affirmed.

(146 U. S. 1)

McPHERSON et al. v. BLACKER, Secretary of State.

(October 17, 1892.)

No. 1,170.

SUPREME COURT—JURISDICTION—POLITICAL QUESTIONS—CONSTITUTIONAL LAW—APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS—TIME OF MEETING.

1. Whether or not Pub. Acts Mich. 1891, No. 50, providing for the election of presidential electors by congressional districts instead of by the people of the state at large, is repugnant to the constitution and laws of the United States, is a judicial, and not a political, question, which the supreme court has power to determine, the validity of the act having been sustained by the Michigan supreme court.

2. Such act does not violate Const. art. 2, § 1, which declares that "each state shall appoint, in such manner as the legislature may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress," since, by the construction placed on the constitution contemporaneously with and for many years after its adoption, such constitutional provision conferred on the state legislature plenary power to prescribe the method of choosing electors, and did not require the state, in appointing electors, to act as a unit. 52 N. W. Rep. 469, affirmed.

3. The fact that all the states gradually adopted a uniform method of popular election for presidential electors by general ticket, and that such system has prevailed among the states for many years, have not deprived the legislature of any state of its power to adopt a different method. 52 N. W. Rep. 469, affirmed.

4. The power thus confided to the states by the constitution has not ceased to exist because the original expectation of the framers of the constitution in respect to the independence of electors may be said to have been frustrated in practice.

5. The power of a state to change its mode of choosing presidential electors was not taken away by the fourteenth and fifteenth amendments, because of the additional rights and guaranties therein secured to citizens in respect to voting at national elections, although at the time of their adoption all the states chose their electors by elections at large. 52 N. W. Rep. 469, affirmed.

6. The provision of Pub. Acts Mich. 1891, No. 50, which conflicts with Act Cong. Feb. 3, 1887, in that it fixes a different date for the electors to meet and give their votes, is separable from and does not vitiate the whole act. 52 N. W. Rep. 469, affirmed.

In error to the supreme court of the state of Michigan. Affirmed.

Statement by Mr. Chief Justice FULLER:

William McPherson, Jr., Jay A. Hubbell, J. Henry Carstens, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, Henry A. Haigh, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock filed their petition and affidavits in the supreme court of the state of Michigan on May 2, 1892, as nominees for presidential electors.

against Robert R. Blacker, secretary of state of Michigan, praying that the court declare the act of the legislature, approved May 1, 1891, (Act No. 50, Pub. Acts Mich. 1891,) entitled "An act to provide for the election of electors of president and vice president of the United States, and to repeal all other acts and parts of acts in conflict herewith," void and of no effect, and that a writ of mandamus be directed to be issued to the said secretary of state, commanding him to cause to be delivered to the sheriff of each county in the state, between the 1st of July and the 1st of September, 1892, "a notice in writing that at the next general election in this state, to be held on Tuesday, the 8th day of November, 1892, there will be chosen (among other officers to be named in said notice) as many electors of president and vice president of the United States as this state may be entitled to elect senators and representatives in the congress."

The statute of Michigan (1 How. Ann. St. Mich. § 147, c. 9, p. 133) provided: "The secretary of the state shall, between the 1st day of July and the 1st day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this state a notice in writing that, at the next general election, there will be chosen as many of the following officers as are to be elected at such general election, viz.: A governor, lieutenant governor, secretary of state, state treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of state land office, members of the state board of education, electors of president and vice president of the United States, and a representative in congress for the district to which each of such counties shall belong."

A rule to show cause having been issued, the respondent, as secretary of state, answered the petition, and denied that he had refused to give the notice thus required, but he said "that it has always been the custom in the office of the secretary of state, in giving notices under said section 147, to state in the notice the number of electors that should be printed on the ticket in each voting precinct in each county in this state, and following such custom with reference to such notice, it is the intention of this respondent in giving notice under section 147 to state in said notice that there will be elected one presidential elector at large and one district presidential elector and two alternate presidential electors, one for the elector at large and one for the district presidential elector, in each voting precinct, so that the election may be held under and in accordance with the provisions of Act No. 50 of the Public Acts of the state of Michigan of 1891."

By an amended answer the respondent claimed the same benefit as if he had demurred.

Relators relied in their petition upon various grounds as invalidating Act No. 50 of the Public Acts of Michigan of 1891, and, among them, that the act was void because in conflict with clause 2 of section 1 of article 2 of the constitution of the United States, and with the fourteenth amendment to that instrument, and also in some of its provisions in conflict with the act of congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of president and vice president, and to provide for and regulate the counting of the votes for president and vice president, and the decision of questions arising thereon." The supreme court of Michigan unanimously held that none of the objections urged against the validity of the act were tenable; that it did not conflict with clause 2, § 1, art. 2, of the constitution, or with the fourteenth amendment thereof; and that the law was only inoperative so far as in conflict with the law of congress in a matter in reference to which congress had the right to legislate. The opinion of the court will be found reported, in advance of the official series, in 52 N. W. Rep. 469.

Judgment was given, June 17, 1892, denying the writ of mandamus, whereupon a writ of error was allowed to this court.

The October term, 1892, commenced on Monday, October 10th, and on Tuesday, October 11th, the first day upon which the application could be made, a motion to advance the case was submitted by counsel, granted at once in view of the exigency disclosed upon the face of the papers, and the cause heard that day. The attention of the court having been called to other provisions of the election laws of Michigan than those supposed to be immediately involved, (Act No. 190, Pub. Acts Mich. 1891, pp. 258, 263,) the chief justice, on Monday, October 17th, announced the conclusions of the court, and directed the entry of judgment affirming the judgment of the supreme court of Michigan, and ordering the mandate to issue at once, it being stated that this was done because immediate action under the state statutes was apparently required and might be affected by delay, but it was added that the court would thereafter file an opinion stating fully the grounds of the decision.

Act No. 50 of the Public Acts of 1891 of Michigan is as follows:

"An act to provide for the election of electors of president and vice president of the United States, and to repeal all other acts and parts of acts in conflict herewith.

"Section 1. The people of the state of Michigan enact that, at the general election next preceding the choice of president and vice president of the United States, there shall be elected as many electors of president and vice president as this state may be entitled to elect of senators and representatives in congress in the following manner, that is to say: There shall be elected by the electors of the districts hereinafter defined one elector of president and vice president of the United States in each district, who shall be known and designated on the ballot, respectively, as 'east-

ern district elector of president and vice president of the United States at large,' and 'western district elector of president and vice president of the United States at large.' There shall also be elected, in like manner, two alternate electors of president and vice president, who shall be known and designated on the ballot as 'eastern district alternate elector of president and vice president of the United States at large,' and 'western district alternate elector of president and vice president of the United States at large;' for which purpose the first, second, sixth, seventh, eighth, and tenth congressional districts shall compose one district, to be known as the 'Eastern Electoral District,' and the third, fourth, fifth, ninth, eleventh, and twelfth congressional districts shall compose the other district, to be known as the 'Western Electoral District.' There shall also be elected, by the electors in each congressional district into which the state is or shall be divided, one elector of president and vice president, and one alternate elector of president and vice president, the ballots for which shall designate the number of the congressional district and the persons to be voted for therein, as 'district elector' and 'alternate district elector' of president and vice president of the United States, respectively.

"Sec. 2. The counting, canvassing, and certifying of the votes cast for said electors at large and their alternates, and said district electors and their alternates, shall be done as near as may be in the same manner as is now provided by law for the election of electors of president and vice president of the United States.

"Sec. 3. The secretary of state shall prepare three lists of the names of the electors and the alternate electors, procure thereto the signature of the governor, affix the seal of the state to the same, and deliver such certificates thus signed and sealed to one of the electors, on or before the first Wednesday of December next following said general election. In case of death, disability, refusal to act, or neglect to attend, by the hour of twelve o'clock at noon of said day, of either of said electors at large, the duties of the office shall be performed by the alternate electors at large, that is to say: The eastern district alternate elector at large shall supply the place of the eastern district elector at large, and the western district alternate elector at large shall supply the place of the western district elector at large. In like case, the alternate congressional district elector shall supply the place of the congressional district elector. In case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session for such purpose immediately upon such determination by said board of state canvassers.

"Sec. 4. The said electors of president and vice president shall convene in the senate chamber at the capital of the state at the hour of twelve o'clock at noon, on the first Wednesday of December immediately following their election, and shall proceed to perform the duties of such electors as required by the constitution and the laws of the United States. The alternate electors shall also be in attendance, but shall take no part in the proceedings, except as herein provided.

"Sec. 5. Each of said electors and alternate electors shall receive the sum of five dollars for each day's attendance at the meetings of the electors as above provided, and five cents per mile for the actual and necessary distance traveled each way in going to and returning from said place of meeting, the same to be paid by the state treasurer upon the allowance of the board of state auditors.

"Sec. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." Pub. Acts Mich. 1891, pp. 50, 51.

Section 211 of Howell's Annotated Statutes of Michigan (volume 1, c. 9, p. 145) reads:

"For the purpose of canvassing and ascertaining the votes given for electors of president and vice president of the United States, the board of state canvassers shall meet on the Wednesday next after the third Monday of November, or on such other day before that time as the secretary of state shall appoint; and the powers, duties, and proceedings of said board, and of the secretary of state, in sending for, examining, ascertaining, determining, certifying, and recording the votes and results of the election of such electors, shall be in all respects, as near as may be, as hereinbefore provided in relation to sending for, examining, ascertaining, determining, certifying, and recording the votes and results of the election of state officers."

Section 240 of Howell's Statutes, in force prior to May 1, 1891, provided: "At the general election next preceding the choice of president and vice president of the United States, there shall be elected by general ticket as many electors of president and vice president as this state may be entitled to elect of senators and representatives in congress."

The following are sections of article 8 of the constitution of Michigan:

"Sec. 4. The secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors, to examine and adjust all claims against the state, not otherwise provided for by general law. They shall constitute a board of state canvassers, to determine the result of all elections for governor, lieutenant governor, and state officers, and of such other officers as shall by law be referred to them.

"Sec. 5. In case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill

such office. When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected." 1 How. Ann. St. Mich. p. 57.

Reference was also made in argument to the act of congress of February 3, 1887, to fix the day for the meeting of the electors of president and vice president, and to provide for and regulate the counting of the votes. 24 St. p. 373.

Henry M. Duffield, W. H. H. Miller, and Fred A. Baker, for plaintiff in error. Otto Kirchner, A. A. Ellis, and John W. Champlin, for defendant in error.

*22 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

*23 *The supreme court of Michigan held, in effect, that if the act in question were invalid, the proper remedy had been sought. In other words, if the court had been of opinion that the act was void, the writ of mandamus would have been awarded.

And having ruled all objections to the validity of the act urged as arising under the state constitution and laws adversely to the plaintiffs in error, the court was compelled to, and did, consider and dispose of the contention that the act was invalid because repugnant to the constitution and laws of the United States.

We are not authorized to revise the conclusions of the state court on these matters of local law, and, those conclusions being accepted, it follows that the decision of the federal questions is to be regarded as necessary to the determination of the cause. De Saussure v. Gaillard, 127 U. S. 216, 8 Sup. Ct. Rep. 1053.

Inasmuch as, under section 709 of the Revised Statutes of the United States, we have jurisdiction by writ of error to re-examine and reverse or affirm the final judgment in any suit in the highest court of a state in which a decision could be had, where the validity of a statute of the state is drawn in question on the ground that it is repugnant to the constitution and laws of the United States, and the decision is in favor of its validity, we perceive no reason for holding that this writ was improvidently brought.

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress.

But the judicial power of the United States extends to all cases in law or equity arising under the constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. *Boyd v. State, 143 U. S. 135, 12 Sup. Ct. Rep. 375. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U. S. 672.

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state, as revised by our own.

On behalf of plaintiffs in error it is contended that the act is void because in conflict with (1) clause 2, § 1, art. 2, of the constitution of the United States; (2) the fourteenth and fifteenth amendments to the constitution; and (3) the act of congress, of February 3, 1887.

The second clause of section 1 of article 2 of the constitution is in these words: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve congressional districts into which the state of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment, because the state is to appoint as a body politic and corporate, and so must act as a unit, and cannot delegate the authority to subdivisions created for the purpose; and it is argued that the *appointment of electors by districts is not an appointment by the state, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors.

"A state, in the ordinary sense of the constitution," said Chief Justice Chase, (Texas v. White, 7 Wall. 700, 731,) "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The

legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that "each state shall;" and if the words, "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket, and not by districts. In other words, the act of appointment is none the less the act of the state in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the state, and the combined result is the expression of the voice of the state, a result reached by direction of the legislature, to whom the whole subject is committed.

By the first paragraph of section 2, art. 1, it is provided: "The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature;" and by the third paragraph, "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." Section 4 reads: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Although it is thus declared that the people of the several states shall choose the members of congress, (language which induced the state of New York to insert a salvo as to the power to divide into districts, in its resolutions of ratification,) the state legislatures, prior to 1842, in prescribing the times, places, and manner of holding elections for representatives, had usually apportioned the state into districts, and assigned to each a representative; and by act of congress of June 25, 1842, (carried forward as section 23 of the Revised Statutes,) it was provided that, where a state was entitled to more than one representative, the election should be by districts. It has never been doubted that representatives in congress thus chosen represented the entire people of the state acting in their sovereign capacity.

By original clause 3, § 1, art. 2, and by the twelfth amendment, which superseded that clause, in case of a failure in the election of president by the people the house of representatives is to choose the president; and "the vote shall be taken by states, the representation from each state having one vote." The state acts as a unit, and its vote is given as a unit, but that vote is arrived at through the votes of its representatives in congress elected by districts.

The state also acts individually through its electoral college, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the constitution being too strong and obstinate to be shaken or controlled. Stuart v. Laird, 1 Cranch, 299, 309.

It has been said that the word "appoint" is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as

conveying the broadest power of determination. It was used in article 5 of the articles of confederation, which provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct;" and in the resolution of congress of February 21, 1787, which declared it expedient that "a convention of delegates who shall have been appointed by the several states" should be held. The appointment of delegates was, in fact, made by the legislatures directly, but that involved no denial of authority to direct some other mode. The constitutional convention, by resolution of September 17, 1787, expressed the opinion that the congress should fix a day "on which electors should be appointed by the states which shall have ratified the same," etc., and that, "after such publication, the electors should be appointed, and the senators and representatives elected."

The journal of the convention discloses that propositions that the president should be elected by "the citizens of the United States," or by the "people," or "by electors to be chosen by the people of the several states," instead of by the congress, were voted down, (Jour. Conv. 286, 288; 1 Elliot, Deb. 208, 262,) as was the proposition that the president should be "chosen by electors appointed for that purpose by the legislatures of the states," though at one time adopted, (Jour. Conv. 190; 1 Elliot, Deb. 208, 211, 217;) and a motion to postpone the consideration of the choice "by the national legislature," in order to take up a resolution providing for electors to be elected by the qualified voters in districts, was negatived in committee of the whole, (Jour. Conv. 92; 1 Elliot, Deb. 156.) Gerry proposed that the choice should be made by the state executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by congress. The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.

Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.

At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina. Pennsylvania, by act of October 4, 1788, (Acts Pa. 1787-88, p. 513,) provided for the election of electors on a general ticket. Virginia, by act of November 17, 1788, was divided into 12 separate districts, and an elector elected in each district, while for the election of congressmen the state was divided into 10 other districts. Laws Va. Oct. Sess. 1788, pp. 1, 2. In Massachusetts, the general court, by resolve of November 17, 1788, divided the state into districts for the election of representatives in congress, and provided for their election, December 18, 1788, and that at the same time the qualified inhabitants of each district should give their votes for two persons as candidates for an elector of president and vice president of the United States, and, from the two persons in each district having the greatest number of votes, the two houses of the general court by joint ballot should elect one as elector, and in the same way should elect two electors at large. Mass. Resolves 1788, p. 53. In Maryland, under act of December 22, 1788, electors were elected on general ticket, five being residents of the Western Shore, and three of the Eastern Shore. Laws Md. 1788, c. 10. In New Hampshire an act was passed November 12, 1788, (Laws N. H. 1789, p. 169,) providing for the election of five electors by majority popular vote, and in case of no choice that the legislature should appoint out of so many of the candidates as equaled double the number of electors elected. There being no choice, the appointment was made by the legislature. The senate would not agree to a joint ballot, and the house was compelled, that the vote of the state might not be lost, to concur in the electors chosen by the senate. The state of New York lost its vote through a similar contest. The assembly was willing to elect by joint ballot of the two branches or to divide the electors with the senate, but the senate would assent to nothing short of a complete negative upon the action of the assembly, and the time for election passed without an appointment. North Carolina and Rhode Island had not then ratified the constitution.

Fifteen states participated in the second

presidential election, in nine of which electors were chosen by the legislatures. Maryland, (Laws Md. 1790, c. 16; Laws 1791, c. 62,) New Hampshire, (Laws N. H. 1792, pp. 398, 401,) and Pennsylvania, (Laws Pa. 1792, p. 240,) elected their electors on a general ticket, and Virginia by districts, (Laws Va. 1792, p. 87.) In Massachusetts the general court, by resolution of June 30, 1792, divided the state into four districts, in each of two of which five electors were elected, and in each of the other two three electors. Mass. Resolves, June, 1792, p. 25. Under the apportionment of April 13, 1792, North Carolina was entitled to ten members of the house of representatives. The legislature was not in session, and did not meet until November 15th, while under the act of congress of March 1, 1792, (1 St. p. 239,) the electors were to assemble on December 5th. The legislature passed an act dividing the state into four districts, and directing the members of the legislature residing in each district to meet on the 25th of November, and choose three electors. 2 Ired. N. C. Laws, 1715–1800, c. 15 of 1792. At the same session an act was passed dividing the state into districts for the election of electors in 1796, and every four years thereafter. Id. c. 16.

Sixteen states took part in the third presidential election, Tennessee having been admitted June 1, 1796. In nine states the electors were appointed by the legislatures, and in Pennsylvania and New Hampshire by popular vote for a general ticket. Virginia, North Carolina, and Maryland elected by districts. The Maryland law of December 24, 1795, was entitled "An act to alter the mode of electing electors," and provided for dividing the state into ten districts, each of which districts should "elect and appoint one person, being a resident of the said district, as an elector." Laws Md. 1795, c. 73. Massachusetts adhered to the district system, electing one elector in each congressional district by a majority vote. It was provided that, if no one had a majority, the legislature should make the appointment on joint ballot, and the legislature also appointed two electors at large in the same manner. Mass. Resolves, June, 1796, p. 12. In Tennessee an act was passed August 8, 1796, which provided for the election of three electors, "one in the district of Washington, one in the district of Hamilton, and one in the district of Mero," and, "that the said electors may be elected with as little trouble to the citizens as possible," certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero. Laws Tenn. 1794, 1803, p. 209; Acts 2d Sess. 1st Gen. Assem. Tenn. c. 4. Electors were chosen by the persons thus designated.

In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least "until some uniform mode of choosing a president and vice president of the United States shall be prescribed by an amendment to the constitution." Laws Va. 1799–1800, p. 3. Massachusetts passed a resolution providing that the electors of that state should be appointed by joint ballot of the senate and house. Mass. Resolves, June, 1800, p. 13. Pennsylvania appointed by the legislature, and, upon a contest between the senate and house, the latter was forced to yield to the senate in agreeing to an arrangement which resulted in dividing the vote of the electors. 26 Niles' Reg. 17. Six states, however, chose electors by popular vote, Rhode Island supplying the place of Pennsylvania, which had theretofore followed that course. Tennessee, by act of October 26, 1799, designated persons by name to choose its three electors, as under the act of 1796. Laws Tenn. 1794-1803, p. 211; Acts 2d Sess. 2d Gen. Assem. Tenn. c. 46.

Without pursuing the subject further, it is sufficient to observe that, while most of the states adopted the general ticket system, the district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824, and 1828. Massachusetts used the general ticket system in 1804, (Mass. Resolves, June, 1804, p. 19;) chose electors by joint ballot of the legislature in 1808 and in 1816, (Mass. Resolves 1808, pp. 205, 207, 209; Mass. Resolves 1816, p. 233;) used the district system again in 1812 and 1820, (Mass. Resolves 1812, p. 94; Mass. Resolves 1820, p. 245;) and returned to the general ticket system in 1824, (Mass. Resolves 1824, p. 40.) In New York the electors were elected in 1828 by districts, the district electors choosing the electors at large. Rev. St. N. Y. 1827, tit. 6, p. 24. The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont, and New Jersey in 1812.

In 1824 the electors were chosen by popular vote, by districts, and by general ticket, in all the states excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislature. After 1832 electors were chosen by general ticket in all the states excepting South Carolina, where the legislature chose them up to and including 1860. Journals 1860, Senate, pp. 12, 13; House, 11, 15, 17. And this was the mode adopted by Florida in 1868, (Laws 1868, p. 166,) and by Colorado in 1876, as prescribed by section 19 of the schedule to the constitution of the state, which was admitted into the Union,

August 1, 1876, (Gen. Laws Colo. 1877, pp. 79, 990.)[1]

Mr. Justice Story, in considering the subject in his Commentaries on the Constitution, and writing nearly 50 years after the adoption of that instrument, after stating that "in some states the legislatures have directly chosen the electors by themselves; in others, they have been chosen by the people by a general ticket throughout the whole state; and in others, by the people by electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district,"—adds: "No question has ever arisen as to the constitutionality of either mode, except that by a direct choice by the legislature. But this, though often doubted by able and ingenious minds, (3 Elliot, Deb. 100, 101,) has been firmly established in practice ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it." And he remarks that "it has been thought desirable by many statesmen to have the constitution amended so as to provide for a uniform mode of choice by the people." Story, Const. (1st Ed.) § 1466.

Such an amendment was urged at the time of the adoption of the twelfth amendment, the suggestion being that all electors should be chosen by popular vote, the states to be divided for that purpose into districts. It was brought up again in congress in December, 1813, but the resolution for submitting the amendment failed to be carried. The *34 amendment was renewed in the house of representatives in December, 1816, and a provision for the division of the states into single districts for the choice of electors received a majority vote, but not two thirds. Like amendments were offered in the senate by Messrs. Sanford of New York, Dickerson of New Jersey, and Macon of North Carolina. December 11, 1823, Senator Benton introduced an amendment providing that each legislature should divide its state into electoral districts, and that the voters of each district "should vote, in their own proper persons," for president and vice president, but it was not acted upon. December 16 and December 24, 1823, amendments were introduced in the senate by Messrs. Dickerson, of New Jersey, and Van Buren, of New York, requiring the choice of electors to be by districts; but these and others failed of adoption, although there was favorable action in that direction by the senate in 1818, 1819, and 1822. December 22, 1823, an amendment was introduced in the house by Mr. McDuffie, of South Carolina, providing that electors should be chosen by districts assigned by the legislatures, but action was not taken.[2] The subject was again brought forward in 1835, 1844, and subsequently, but need not be further dwelt upon, except that it may be added that, on the 28th of May, 1874, a report was made by Senator Morton, chairman of the senate committee on privileges and elections, recommending an amendment dividing the states into electoral districts, and that the majority of the popular vote of each district should give the candidate one presidential vote, but this also failed to obtain action. In this report it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." Senate Rep. 1st Sess. 43d Cong. No. 395.

From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.

Even in the heated controversy of 1876–77 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged, and our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action.

In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States. They are, as remarked by Mr. Justice Gray in Re Green, 134 U. S. 377,

[1] See Stanwood, Presidential Elections, (3d Ed.) and Appleton, Presidential Counts, passim; 2 Lalor, Enc. Pol. Science, 68; 4 Hild. Hist. U. S. (Rev. Ed.) 39, 332, 689; 5 Hild. Hist. U. S. 389, 531; 1 Schouler, Hist. U. S. 72, 334; 2 Schouler, Hist. U S. 184; 3 Schouler, Hist. U. S. 313, 439; 2 Adams, Hist. U. S. 201; 4 Adams, Hist. U. S. 285; 6 Adams, Hist. U. S. 409, 413; 9 Adams, Hist. U. S. 139; 1 McMaster, Hist. People U. S. 525; 2 McMaster, Hist. People U. S. 85, 509; 3 McMaster, Hist. People U. S. 188, 189, 194, 317; 2 Scharf, Hist. Md. 547; 2 Bradf. Mass. 335; Life of Plumer, 104; 3 Niles' Reg. 160; 5 Niles' Reg. 372; 9 Niles' Reg. 319, 349; 10 Niles' Reg. 45, 177, 409; 11 Niles' Reg. 196.

[2] 1 Benton, Thirty Years' View, 37; 5 Benton, Cong. Deb. 110, 677; 7 Benton, Cong. Deb. 472–474, 600; 3 Niles' Reg. 240, 334; 11 Niles' Reg. 258, 274, 293, 349; Annals Cong. (1812–13,) 847.

379, 10 Sup. Ct. Rep. 586, "no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as the electors of representatives in congress." Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded.

*The question before us is not one of policy, but of power; and, while public opinion had gradually brought all the states as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long-continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.

It is argued that the district mode of choosing electors, while not obnoxious to constitutional objection, if the operation of the electoral system had conformed to its original object and purpose, had become so in view of the practical working of that system. Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated. Miller, Const. Law, 149; Rawle, Const. 55; Story, Const. § 1473; Federalist, No. 68. But we can perceive no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created. Still less can we recognize the doctrine that because the constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

Nor are we able to discover any conflict between this act and the fourteenth and fifteenth amendments to the constitution. The fourteenth amendment provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"Sec. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

The first section of the fifteenth amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

In the Slaughterhouse Cases, 16 Wall. 36, this court held that the first clause of the fourteenth amendment was primarily intended to confer citizenship on the negro race; and, secondly, to give definitions of citizenship of the United States, and citizenship of the states; and it recognized the distinction between citizenship of a state and citizenship of the United States by those definitions; that the privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security and establishment of which organized society was instituted, and which remain, with certain exceptions mentioned in the federal constitution, under the care of the state governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of congress by the second clause of the fourteenth amendment.

We decided in Minor v. Happersett, 21

Wall. 162, that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the fourteenth amendment, and that that amendment does not add to these privileges and immunities, but simply furnishes an additional guaranty for the protection of such as the citizen already has; that, at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the state, nor was it at the time of the adoption of the constitution; and that neither the constitution nor the fourteenth amendment made all citizens voters.

The fifteenth amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States, but the last has been. U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Reese, Id. 214.

If, because it happened, at the time of the adoption of the fourteenth amendment, that those who exercised the elective franchise in the state of Michigan were entitled to vote for all the presidential electors, this right was rendered permanent by that amendment, then the second clause of article 2 has been so amended that the states can no longer appoint in such manner as the legislatures thereof may direct; and yet no such result is indicated by the language used, nor are the amendments necessarily inconsistent with that clause. The first section of the fourteenth amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the state having attained majority, and being a citizen of the United States, then the basis of representation to which each state is entitled in the congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty; and so of the right to vote for representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the state. There is no color for the contention that under the amendments every male inhabitant of the state, being a citizen of the United States, has from the time of his majority a right to vote for presidential electors.

The object of the fourteenth amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. In re Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930.

The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Milling Co. v. Pennsylvania, 125 U. S. 181, 188, 8 Sup. Ct. Rep. 737.

In Hayes v. Missouri, 120 U. S. 68, 71, 7 Sup. Ct. Rep. 350, Mr. Justice Field, speaking for the court, said: "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the fourteenth amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32, 5 Sup. Ct. Rep. 357."

If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second clause of section 1 of article 2 has been divested, and the state has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect.

The third clause of section 1 of article 2 of the constitution is: "The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

Under the act of congress of March 1, 1792, (1 St. p. 239, c. 8,) it was provided that the electors should meet and give their votes on the first Wednesday in December at such place in each state as should be directed by the legislature thereof, and by act of congress of January 23, 1845, (5 St. p. 721,) that the electors should be appointed in each state on the Tuesday next after the first Monday in the month of November in the year in which they were to be appointed: provided, that each state might by law provide for the filling of any vacancies in its college of electors when such college meets to give its electoral vote: and provided that when any state shall have held an election for the purpose of choosing electors, and has failed to

make a choice on the day prescribed, then the electors may be appointed on a subsequent day, in such manner as the state may by law provide. These provisions were carried forward into sections 131, 133, 134, and 135 of the Revised Statutes, (Rev. St. tit. 3, c. 1, p. 22.)

By the act of congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of president and vice president," etc., (24 St. p. 373,) it was provided that the electors of each state should meet and give their votes on the second Monday in January next following their appointment. The state law in question here fixes the first Wednesday of December as the day for the meeting of the electors, as originally designated by congress. In this respect it is in conflict with the act of congress, and must necessarily give way. But this part of the act is not so inseparably connected, in substance, with the other parts as to work the destruction of the whole act. Striking out the day for the meeting, which had already been otherwise determined by the act of congress, the act remains complete in itself, and capable of being carried out in accordance with the legislative intent. The state law yields only to the extent of the collision. Cooley, Const. Lim. *178; Com. v. Kimball, 24 Pick. 359; Houston v. Moore, 5 Wheat. 1, 49. The construction to this effect by the state court is of persuasive force, if not of controlling weight.

We do not think this result affected by the provision in Act No. 50 in relation to a tie vote. Under the constitution of the state of Michigan, in case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention chooses one of these persons to fill the office. This rule is recognized in this act, which also makes it the duty of the governor in such case to convene the legislature in special session for the purpose of its application, immediately upon the determination by the board of state canvassers.

We entirely agree with the supreme court of Michigan that it cannot be held, as matter of law, that the legislature would not have provided for being convened in special session but for the provision relating to the time of the meeting of the electors contained in the act, and are of opinion that that date may be rejected, and the act be held to remain otherwise complete and valid.

And as the state is fully empowered to fill any vacancy which may occur in its electoral college, when it meets to give its electoral vote, we find nothing in the mode provided for anticipating such an exigency which operates to invalidate the law.

We repeat that the main question arising for consideration is one of power, and not of policy, and we are unable to arive at any other conclusion than that the act of the legislature of Michigan of May 1, 1891, is not void as in contravention of the constitution of the United States, for want of power in its enactment.

The judgment of the supreme court of Michigan must be affirmed.

(146 U. S. 56)

HUBBARD, Collector of Customs, v. SOBY.

(October 31, 1892.)

No. 1,094.

SUPREME COURT—JURISDICTION—REVENUE CASES.

In an action against a collector to recover duties paid, no writ of error will lie to the supreme court when the judgment was entered and the writ sued out after July 1, 1891. Lau Ow Bew v. U. S., 12 Sup. Ct. Rep. 517, 144 U. S. 47, and McLish v. Roff, 12 Sup. Ct. Rep. 118, 141 U. S. 661, followed.

In error to the circuit court of the United States for the district of Connecticut.

Action by Charles Soby against Charles C. Hubbard, collector of customs. Judgment for plaintiff. Defendant brings error. Writ dismissed.

Edwin B. Smith and Lewis E. Stanton, for the motion. Asst. Atty. Gen. Maury, opposed.

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

This was a suit brought October 9, 1890, in the circuit court of the United States for the district of Connecticut, to recover an alleged excess of duties upon imports exacted by plaintiff in error in his capacity of collector of customs of the port of Hartford, prior to the going into effect of the act of congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues." 26 St. p. 131. Judgment was given for defendant in error, February 27, 1892, (49 Fed. Rep. 234,) and on June 11, 1892, the pending writ of error was sued out. The motion to dismiss the writ must be sustained upon the authority of Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. Rep. 517; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118.

Writ of error dismissed.

(146 U. S. 54)

CINCINNATI SAFE & LOCK CO. et al. v. GRAND RAPIDS SAFETY DEPOSIT CO.

(October 31, 1892.)

No. 872.

SUPREME COURT—JURISDICTION—WRIT OF ERROR.

In a case where federal jurisdiction depends on the diverse citizenship of the parties, a writ of error which was filed after July 1, 1891, must be dismissed, notwithstanding that it was allowed by the court, and a supersedeas filed and approved before that date. Wauton v. De Wolf, 12 Sup. Ct. Rep. 173, 142 U. S. 138; Brooks v. Norris, 11 How. 204; and Credit Co. v. Arkansas Cent. Ry. Co., 9 Sup. Ct. Rep. 107, 128 U. S. 258,—followed.

In error to the circuit court of the United States for the southern district of Ohio.

Action by the Grand Rapids Safety Deposit Company against the Cincinnati Safe & Lock Company and others to recover damages

for alleged fraud in the sale of a safety vault. The only ground of federal jurisdiction was the diverse citizenship of the parties. The jury returned a verdict for plaintiff. A motion for a new trial was denied, and judgment entered on the verdict. 45 Fed. Rep. 371. Defendants bring error. Writ dismissed.

J. F. Follett and T. H. Kelley, for plaintiffs in error. Chas. B. Wilby, for defendant in error.

*Mr. Chief Justice FULLER delivered the opinion of the court.

Judgment was rendered in this case by the circuit court of the United States for the southern district of Ohio on April 25, 1891. An entry was made of record, June 19, 1891, that the court "allows a writ of error to the supreme court of the United States, with stay of execution, upon the filing of a supersedeas bond," as described, and such a bond was filed and approved June 20, 1891. A petition for the allowance of the writ of error and an assignment of errors were filed in the clerk's office of the circuit court, July 3, 1891, and the writ of error bears teste and was filed in that office on that day, and a citation to the adverse party signed and served.

The motion to dismiss must be sustained upon the authority of Wauton v. De Wolf, 142 U. S. 138, 12 Sup. Ct. Rep. 173; Brooks v. Norris, 11 How. 204; Credit Co. v. Railway Co., 128 U. S. 258, 9 Sup. Ct. Rep. 107, and cases cited.

Writ of error dismissed.

(146 U. S. 60)

EARNSHAW v. UNITED STATES.

(November 7, 1892.)

No. 4.

CUSTOMS DUTIES — REAPPRAISEMENT — NOTICE — DISCRETION OF APPRAISERS.

1. An importer, having demanded a reappraisement, attended on the day set, but, the government not being ready, the hearing was adjourned indefinitely, with the understanding that the importer should be notified when a new day was fixed. About nine months later notice was mailed at New York to the importer in Philadelphia that the hearing would be held the next day at noon. The importer was then in Cuba, but the letter was received at his office by his clerk, who wrote, asking a postponement. The appraiser then telegraphed the clerk that the appraisement would take place on the fifth succeeding day, but no attention was paid thereto, and the appraisement was had soon after the day fixed, the importer being unrepresented. *Held* that, in view of the fact that the importer had left the country without making any provision for a hearing during his absence, the appraisers did not act unreasonably, and their decision must stand. 30 Fed. Rep. 672, affirmed.

2. The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court.

3. The board of appraisers is entitled to the benefit of the general rule that some presumption is to be indulged in favor of the propriety and legality of the action of inferior tribunals, and that with respect to their methods of procedure they are vested with a certain discretion, which will be respected by the courts except in cases of manifest abuse thereof.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Action against Alfred Earnshaw to recover duties alleged to be due on certain imports of iron ore. A demurrer to the answer was sustained by the district court. 12 Fed. Rep. 283. Subsequently a trial was had, and the court directed a verdict for the United States. A motion for judgment in favor of the defendant non obstante veredicto was overruled, and judgment entered on the verdict. 30 Fed. Rep. 672. On March 1, 1891, a demurrer to new matter in the answer was sustained. 45 Fed. Rep. 782. The judgment was affirmed by the circuit court, and the defendant brings error. Affirmed.

Statement by Mr. Justice BROWN:

*This was an action by the United States against Earnshaw in the district court for duties upon 11 consignments of iron ore imported by him into the port of New York in 1882. At the entry of the different consignments their values were declared, and to each of these values the appraiser made an addition.

From this appraisement Earnshaw appealed, and demanded a reappraisement, and a day was fixed for the hearing in June, 1883. Earnshaw, as well as the general appraiser and the merchant appraiser, attended upon that day, and the government asked for a postponement. The proceeding was adjourned, but the day was not named, and Earnshaw was told that he would be notified.

Upon March 19, 1884, —nine months after the adjournment,—the defendant, who lived in Philadelphia, was notified by letter from the general appraiser that the appraisement would take place at his office in New York at noon on March 20th. At that time, however, defendant was in Cuba, and his brother, who was also his clerk, wrote the general appraiser in his name that he was out of the country, and would not be back before the beginning of May, and asked a postponement of the hearing until that time. The appraiser telegraphed in reply: "Your cases adjourned to Tuesday, March 25th, 12 M." On March 31st, in the absence of Earnshaw, and with no one acting for him, the reappraisement was made, and for the difference between the amount he had paid and the amount thus ascertained this action was brought.

Upon the trial the defendant, having read the statute authorizing the demand for a reappraisement, read the following regulation of the treasury department, to show that he was entitled to notice to be present at the reappraisement that he might tender evidence:

"Art. 466. On the receipt of this report the collector will select one discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question, to be associated with an appraiser at large, if the attendance of such officer be practicable, to examine and

appraise the same according to law. Rev. St. § 2930. * * * The appraiser at large will be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. The importer will be notified of the time and place, but not of the name of the merchant selected to assist in the appraisement. * * * The importer or his agent will be allowed to be present, and to offer such explanations and statements as may be pertinent to the case."

The defendant relied solely upon the want of proper notice of the reappraisement, and asked the court to instruct the jury as follows:

"(1) If the defendant attended on the day appointed for the appraisement by the merchant appraiser, and the United States not being ready to go on, the hearing was postponed indefinitely, the defendant was entitled to such reasonable notice of the time and place of holding the appraisement as would enable him to attend.

"(2) If the United States failed to move in the matter after the adjournment from June, 1883, until March, 1884, and the defendant was then temporarily absent from home, he was entitled to a reasonable time to enable him to return and attend at the appointment.

"(3) If the United States insisted on proceeding with the reappraisement in the absence of the defendant, under the circumstances, as shown by the testimony, the reappraisement is not a valid merchant's appraisement."

*The judge declined to instruct as requested, and charged the jury that such notice was given to the defendant as is contemplated by the regulations of the department and the rules of law governing reappraisements; that the reappraisement was valid; and that the plaintiff was entitled to recover a verdict for the amount of the claim, $1,611.20, with interest. This was the amount claimed over and above the amount paid, and for this amount the jury returned a verdict, upon which judgment was entered accordingly. 30 Fed. Rep. 672.

The circuit court affirmed this judgment upon a writ of error, whereupon the defendant sued out a writ of error from this court.

R. C. McMurtrie, for plaintiff in error. Asst. Atty. Gen. Maury, for the United States.

*Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

It is conceded in this case that the reappraisement was binding, provided it was properly conducted, (Rev. St. § 2930; Rankin v. Hoyt, 4 How. 327, 335; Bartlett v. Kane, 16 How. 263, 272; Sampson v. Peaslee, 20 How. 571; Hilton v. Merritt, 110 U. S. 97, 3 Sup. Ct. Rep. 548;) and the sole defense made upon the trial was that Earnshaw did not receive a reasonable notice of the time when the reappraisement was to be made.

*The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court, and was properly withdrawn from the consideration of the jury. Hill v. Hobart, 16 Me. 164; Blackwell v. Fosters, 1 Metc. (Ky.) 88; Seymour v. McCormick, 16 How. 480, 491; Luckhart v. Ogden, 30 Cal. 547, 557; Holbrook v. Burt, 22 Pick. 546; Insurance Co. v. Allen, 11 Mich. 501. By Rev. St. §§ 2899-2902, provision is made for the appraisement of imported merchandise under regulations prescribed in the succeeding sections; and by section 2930, if the importer is dissatified with such appraisement, he may give notice to the collector, upon the receipt of which the latter "shall select one discreet and experienced merchant, to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; * * * and the appraisement thus determined shall be final, and be deemed to be the true value, and the duties shall be levied thereon accordingly." No provision is expressly made by statute for notice to the importer, but by article 466 of the treasury regulations of 1884 "the importer will be notified of the time and place, but not of the name of the merchant selected to assist in the appraisement." The board of appraisers thus constituted is vested with powers of a quasi judicial character, and the appraisers are bound (section 2902) "by all reasonable ways and means in his or their power to ascertain, estimate, and appraise the true and actual market value and wholesale price * * * of the merchandise at the time of exportation," etc. No reason is perceived for excluding this board of appraisers from the benefit of the general rule applicable to such officers that some presumption is to be indulged in favor of the propriety and legality of their action, and that with respect to their methods of procedure they are vested with a certain discretion which will be respected by the courts, except where such discretion has been manifestly abused, and the board has proceeded in a wanton disregard of justice or of the rights of the importer. *The general principle is too well settled to admit of doubt that, where the action of an inferior tribunal is discretionary, its decision is final. Giles' Case, Strange, 881; King v. Proprietors, 2 W. Bl. 708; Henderson v. Moore, 5 Cranch, 11; Insurance Co. v. Young, Id. 187; Same v. Hodgson, 6 Cranch, 206.

It was decided at an early day in this court that the refusal of an inferior court to continue a case cannot be assigned as error, (Woods v. Young, 4 Cranch, 237;) and yet there are doubtless cases to be found which hold that where, under the recognized practice, a party makes a clear case for a continuance, it is an abuse of discretion to refuse it. Thus, in Rose v. Stuyvesant, 8 Johns. 426,

the judgment of a justice of the peace was reversed, because he had refused an adjournment of a case on account of a child of the defendant being dangerously sick; and in Hooker v. Rogers, 6 Cow. 577, the verdict was set aside by the appellate court upon the ground that the circuit judge refused to put off the trial of the cause upon proof that a material witness was confined to his bed by sickness, and unable to attend court. See, also, Trustees v. Patchen, 8 Wend. 47; Ogden v. Payne, 5 Cow. 15. So, in Frey v. Vanlear, 1 Serg. & R. 435, where arbitrators adjourned to a day certain, and did not meet on that day, but met on a subsequent day, examined the witnesses in the absence of the opposite party, and without notice of the meeting, and made an award, it was held that their proceedings were irregular, and the judgment was reversed. The question in all these cases is whether, in respect either to the notice of the trial, adjournments, allowance of pleas, the reception of testimony, or other incidental proceedings, the court has or has not acted in the exercise of a sound and reasonable discretion. The subject is fully discussed in People v. Superior Court, 5 Wend. 114.

The tribunal in this case was created as a part of the machinery of the government for the collection of duties upon imports, and, while its proceedings partake of a semijudicial character, it is not reasonable to expect that in notifying the importer it should proceed with the technical accuracy necessary to charge a defendant with liability in a court of law. The operations of the government in the collection of its revenue ought not to be embarrassed by requiring too strict an adherence to the forms and modes of proceeding recognized in courts of law, so long as the rights of its taxpayers are not wantonly sacrificed. In this case notice was given to the defendant by letter and telegram, but, as these notices were actually received at his office, he has no right to complain that they were not served personally. Jones v. Marsh, 4 Term R. 464; Johnston v. Robins, 3 Johns. 440; Walker v. Sharpe, 103 Mass. 154; Clark v. Keliher, 107 Mass. 406; Blish v. Harlow, 15 Gray, 316; Wade, Notice, § 640.

The first day fixed for the hearing was in June, 1883, when the defendant and the appraisers attended, but the government was not ready to proceed, and the hearing was adjourned indefinitely, with an understanding that the defendant should be notified of the day when the case would be again taken up. Nine months elapsed without any action, when on March 18, 1884, the general appraiser at New York addressed a letter to the defendant at Philadelphia, notifying him that the reappraisement would take place at his office on the 20th day of March, at noon. Defendant at that time was in Cuba, but the letter was received by his brother, a clerk in his office, who wrote the appraiser in Earnshaw's name that Mr. Earnshaw was out of the country, and was not expected back before the beginning of May, "and I must, therefore, ask you to be kind enough to postpone the said reappraisement." In reply to this a telegram was sent, to the effect that the case was adjourned to March 25th, at noon,—a postponement of five days from the time originally fixed. To this telegram no attention was paid, and it appears that the reappraisement was not held until the 31st, nearly a week after the day fixed in the telegram. On the 10th of May, when the defendant returned, he received a demand for payment of the duties according to the reappraisement.

The amount of business done by the defendant does not distinctly appear, but, considering that this suit is brought to collect the difference in duties upon 11 different importations of iron ore from a single foreign port during the latter half of 1882, it is but fair to infer that it was of considerable magnitude. Defendant knew, before leaving for Cuba, that proceedings were pending for a reappraisement of duties upon these cargoes, and were liable to be called up in his absence. Under such circumstances, the appraiser might reasonably expect that he would leave some one to represent him, or at least that his clerk would act upon his notification to appear on the 25th, and ask for a further postponement on the ground of the defendant's continued absence, if the personal presence of the latter were in fact important. Had he done so, and his application been refused, a much stronger case would have been presented by the defendant. He did not do so, however, but neglected to appear, or to request a further postponement, and practically allowed the hearing to take place by default. In view of the neglect of the defendant to make any provision for the case being taken up in his absence, and of his clerk to appear and ask for a further postponement of the hearing, we cannot say that the appraisers acted unreasonably in proceeding ex parte, and imposing the additional duties, without awaiting the return of the defendant. Indeed, if a court of justice should fix a day for the trial of a case, though the court were informed that a party could not be present on that day, and the attorney of the party refused to appear and demand a further postponement, we should be unwilling to say that it would constitute such an abuse of discretion as to vitiate the judgment.

There was no error in the ruling of the court below, and the judgment is therefore affirmed.

(146 U. S. 117)

CITY OF BELLAIRE v. BALTIMORE & O. R. CO. et al.

(November 14, 1892.)

No. 38.

REMOVAL OF CAUSES — SEPARABLE CONTROVERSY — LOCAL PREJUDICE — CONDEMNATION PROCEEDINGS.

1. In a suit by a city to condemn land occupied by a railroad corporation of another state

as lessee of a railroad corporation of the same state, when the main issue is as to the right to condemn, the controversy as to the foreign corporation is not separate, so as to give it a right to remove the cause to federal court, although the interests of the two defendants and their separate awards of damages must be determined incidentally.

2. Under the judiciary act of March 3, 1887, (24 St. at Large, p. 552,) § 2, where prejudice and local influence such as would prevent a party from obtaining justice in a state court are relied on as ground for removal to a federal circuit court, they must be proved to the satisfaction of the circuit court.

In error to the circuit court of the United States for the southern district of Ohio.

Petition by the city of Bellaire against the Baltimore & Ohio Railroad Company and the Central Ohio Railroad Company to condemn certain land for a street. The Baltimore & Ohio Railroad Company removed the cause to the federal circuit court. A motion by the plaintiff to remand the cause to the state court was denied, and verdict and judgment were given for the defendant. Plaintiff brings error. Reversed, and the cause remanded to the state court.

J. A. Gallaher, for plaintiff in error. John K. Cowen and Hugh L. Bond, Jr., for defendants in error.

Mr. Justice GRAY delivered the opinion of the court.

The original petition was filed May 5, 1887, in the court of common pleas for the county of Belmont and state of Ohio, under sections 2233–2238 of the Revised Statutes of the state, by the city of Bellaire, a municipal corporation of that state, against the Baltimore & Ohio Railroad Company, a corporation of Maryland, and the Central Ohio Railroad Company, a corporation of Ohio, to condemn and appropriate, for the purpose of opening and extending a street across the railroad tracks of the defendants, a strip of land about 60 feet wide and 160 feet long, of which, the petition alleged, "said defendants claim to be the owners, legal and equitable," "but as to the proportionate interest of each of said defendants this plaintiff is not advised." Notice of the petition was issued to and served upon both defendants within the state of Ohio.

*112 *After the return day, and before trial, the case was removed into the circuit court of the United States for the southern district of Ohio by the Baltimore & Ohio Railroad Company, which alleged that this defendant was in possession of the land in question under a lease from its codefendant, and that there was a controversy wholly between the plaintiff and this defendant, and which could be fully determined as between them; and further alleged, on the affidavit of its agent, that from prejudice and local influence it would not be able to obtain justice in the courts of the state. The city of Bellaire moved to remand the case to the state court.

On July 5, 1887, the circuit court of the United States, as appears by its decision and order entered of record, overruled the motion to remand, upon this ground: "The Baltimore & Ohio Railroad Company has in this case a separate controversy, which is wholly between it and the city of Bellaire, and which can be fully determined as between them. This is the question of the value of the leasehold interest of the Baltimore & Ohio Railroad Company in the land which the city seeks to appropriate. This interest is wholly apart from the interest of the Central Ohio Railroad Company in the fee, and entitles the Baltimore & Ohio Railroad Company to a separate verdict."

The case was afterwards tried by a jury, and a verdict returned upon which judgment was rendered for the Baltimore & Ohio Railroad Company. The city of Bellaire sued out this writ of error, assigning errors in the denial of the motion to remand, and in sundry rulings and instructions at the trial.

Under the act of congress in force at the time of the removal of this case and of the refusal to remand it, prejudice and local influence which would prevent the party removing it from obtaining justice in the state court must be proved to the satisfaction of the circuit court of the United States, if its jurisdiction is to be supported on that ground. Act March 3, 1887, c. 373, § 2, (24 St. p. 552;) Ex parte Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. Rep. 141; Id., 137 U. S. 457, 11 Sup. Ct. Rep. 143; Fisk v. Henarie, 142 U. S. 459, 468, 12 Sup. Ct. Rep. 207.

In the case at bar the question of prejudice and local influence appears not to have been insisted on or considered in the *circuit* court. But that court refused to remand the case, solely because in its opinion there was a separable controversy between the petitioning defendant and the original plaintiff.

In this the circuit court erred. The object of the suit was to condemn and appropriate to the public use a single lot of land, and not (as in Union Pac. Ry. Co. v. City of Kansas, 115 U. S. 2, 22, 5 Sup. Ct. Rep. 1113, cited by the defendant) several lots of land, each owned by a different person. The cause of action alleged, and consequently the subject-matter of the controversy, was whether the whole lot should be condemned; and that controversy was not the less a single and entire one because the two defendants owned distinct interests in the land, and might be entitled to separate awards of damages. Kohl v. U. S., 91 U. S. 367, 377, 378. The ascertaining of those interests, and the assessment of those damages, were but incidents to the principal controversy, and did not make that controversy divisible, so that the right of either defendant could be fully determined by itself, apart from the right of the other defendant, and from the main issue between both defendants on the one side and the plaintiff on the other. Safe-Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. Rep. 733; Graves v. Corbin, 132 U. S. 571, 588, 10 Sup. Ct. Rep. 196; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. Rep. 726, and other cases there cited.

The judgment of the circuit court, therefore, must be reversed for want of jurisdiction, with costs against the Baltimore & Ohio Railroad Company, and with directions to award costs against it in that court, and to remand the case to the state court.

Judgment reversed accordingly.

(146 U. S. 42)

VAN WINKLE et al. v. CROWELL et al.

(October 31, 1892.)

No. 23.

CHATTEL MORTGAGES — VENDOR'S LIEN — CONDITIONAL SALE—WAIVER.

1. The purchasers of certain machinery, after paying the first installment on delivery according to the contract, which was a mere order for goods, accepted without reservation of title, executed a mortgage thereon for an old debt, which mortgage was duly filed. Thereafter the purchaser gave the seller, as security for the rest of the price, three notes, each with an express condition that title should not pass until payment in full had been made. *Held*, that title passed on delivery, and the mortgagee's title was good as against the seller claiming under the notes, which could have no greater effect than a mortgage in revesting title.

2. Under Code Ala. 1876, § 2170, requiring conveyances of personal property to be recorded within three months, such notes, if unrecorded, would convey no title, as against the holder of a duly-recorded subsequent mortgage, without notice of the noteholder's claim.

3. Where an action in detinue is brought against a bailee and his two bailors, recovery cannot be had against the bailee as a wrongful possessor, unless the possession of both bailors was wrongful.

4. In detinue by a seller of machinery to recover the same from one in possession under chattel mortgages given by the purchaser, plaintiff cannot be permitted to testify that the written contract of sale was qualified by an oral guaranty, and that the machinery was not accepted as fulfilling the same; especially as such conditions were in favor of the purchaser, and his act in giving the mortgages constituted a waiver thereof.

5. The sellers of personal property brought an action to enforce their lien, and thereafter began an action of detinue. *Held*, that the former action asserting title in the defendants, although it was dismissed by the plaintiffs without trial, barred the action of detinue.

In error to the circuit court of the United States for the middle district of Alabama. Affirmed.

W. A. Gunter and John D. Roquemore, for plaintiffs in error. H. C. Tompkins, for defendants in error.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action of detinue, brought November 8, 1886, in the circuit court of Bullock county, Ala., by E. Van Winkle and W. W. Boyd, copartners as E. Van Winkle & Co., against Canty Crowell, to recover certain machinery belonging to and constituting a cotton-seed oil mill.

The plaintiffs being citizens of Georgia, and the defendant a citizen of Alabama, the suit was removed by the latter into the circuit court of the United States for the middle district of Alabama. After its removal, and in November, 1887, the latter court allowed Emanuel Lehman, Meyer Lehman, Joseph Goeter, and John W. Durr, composing the firm of Lehman, Durr & Co., and Ignatius Pollak, doing business under the firm name of Pollak & Co., all citizens of New York and Alabama, to make themselves parties defendant to the suit, and they filed pleas. The pleas were to the effect that Crowell did not unlawfully detain the property sued for, as alleged in the complaint: and that it was not at the time of the commencement of the suit, and had not since been, and was not at the time of putting in the pleas, the property of the plaintiffs, but of the defendants pleading. The case was tried before a jury, which rendered a verdict for the defendants; and there was a judgment for them, with costs. The plaintiffs have brought the case here by a writ of error.

The controversy was in fact one between the plaintiffs on the one part, and Lehman, Durr & Co. and Pollak & Co. on the other part. Lehman, Durr & Co. claimed the property under a mortgage executed to them, December 4, 1885, by Samuel S. Belser and Langdon C. Parker, and their wives, to secure a debt of $30,000, with interest, and covering 1¾ acres of land in Bullock county, on which was an oil mill, together with the machinery therein, other land in Montgomery county, and certain other personal property. Pollak & Co. claimed under a mortgage executed to them January 2, 1886, to secure a debt of $15,000, and covering land in Montgomery county, the oil-mill land in Bullock county, the improvements thereon and appurtenances belonging thereto, and other personal property. At the time suit was brought against Crowell, the property in question was in his possession as bailee of the mortgagees. The property had been manufactured by the plaintiffs for Belser & Parker under a written contract signed by the latter, and accepted by the former, in the terms set forth in the margin.[1] At the date of the paper, one of the plaintiffs visited Belser & Parker, and himself wrote the paper, which Belser & Parker signed and delivered to him. No other agreement was made than the one contained in that paper.

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[1] L. C. Parker. E. B. Gray. S. S. Belser.
Parker, Gray and Belser, Dealers in General Merchandise.
Mitchell's Station, Ala., March 28, 1885.
Messrs. E. Van Winkle & Co., Atlanta, Ga.—Gents: You will please ship to us, at Mitchell's Station, Ala., the following oil-mill machinery, to wit, for which we agree to pay you the sum of twelve thousand five hundred dollars, ($12,500.00:)
One set of oil-mill machinery complete, with capacity to work thirty tons of cotton seed per day, as follows:
4 hydraulic presses.
4 steam heaters.
2 hullers.
4 linters, feeders, and condensers.
All line and center shafting, all steam and oil pipes, all pulleys, hangers, etc.; one hydraulic pump of six plungers, one oil pump, one cake breaker & cake grinding mill, one sett of crushing rollers, one sett of separating machinery, all eleva-

By that contract, the plaintiffs obliged themselves (1) to ship to Belser & Parker the machinery named therein; (2) to pay the freight thereon to Mitchell's Station, the place to which it was to be shipped; and (3) to furnish the mechanics to erect the machinery there. Belser & Parker, by the terms of the contract, agreed (1) to furnish all rough labor and the board of the men engaged in the work, and (2) to pay $12,500 for the machinery, namely, $3,000 on the receipt of the bill of lading, $4,750 on November 1, 1885, and $4,750 on March 1, 1886, with interest at 8 per cent. from the date of starting the mill.

There was a great deal of delay in shipping the machinery, and much complaint on the part of Belser & Parker. The building
*45 in which the machinery was placed was erected by Belser & Parker after the contract for the machinery was made. It was constructed for the purpose of being used as a cotton-seed oil mill, and the machinery furnished was such as was essential for only such a mill. The machinery was manufactured by the plaintiffs at Atlanta, Ga., and at various times was placed by them on railroad cars at Atlanta, consigned to Belser & Parker at Mitchell's Station, Ala. During the progress of the work, Belser & Parker paid to the plaintiffs $2,500 on their drafts drawn according to the contract, and also paid out for freight and other expenses, which the plaintiffs had agreed to pay, sums amounting to $500. The machinery was in place so that the mill could be operated prior to December 1, 1885; and Belser & Parker commenced operating it in November, 1885. There was some evidence that after December 10, 1885, the plaintiffs supplied some additional machinery, but the evidence did not identify it. The land on which the building stood in which the machinery was placed belonged to Belser & Parker.

On December 4, 1885, the date of the mortgage to Lehman, Durr & Co., Belser & Parker were indebted to that firm in debts which were then due. They obtained from Lehman, Durr & Co. an extension of those debts, and also further advances, making a total indebtedness of $30,000, for which the mortgage was given. It was recorded in the proper office on the 3d of February, 1886, within three months after its execution. On the 2d of January, 1886, the date of the mortgage to Pollak & Co., Belser & Parker owed to Pollak & Co. debts which were past due; and an agreement was then made for their extension, and new advances were made, the whole amounting to $15,000. The mortgage was duly recorded on February 4, 1886.

On the 11th of December, 1885, one of the plaintiffs visited Belser & Parker, and with one of the latter inspected the mill. It was agreed between them that certain additional machinery should be provided, and other portions changed, but what portions does not appear; and that the balance due for the machinery should be settled by three notes, dated December 11, 1885, and signed by Belser & Parker, one for *$1 500, with interest *46
at 8 per cent. per annum, due February 1, 1886; a second of like tenor, for $3,500, due March 1, 1886; and a third for $4,633.52, due December 1, 1886. The first one of the three notes read as in the margin,[1] and the others corresponded mutatis mutandis.

*48 *The plaintiffs rely for a recovery of the property on title claimed under the three notes. All of the machinery, except a few pieces, which were not pointed out by the evidence, had been received and was in use by Belser & Parker prior to December 1, 1885; and no work of construction was done after the latter date on the mill or the machinery. Testimony was given by E. Van Winkle, one of the plaintiffs, that they did not turn over the machinery to Belser & Parker (otherwise than by shipping it and permitting Belser & Parker to operate it) until upon the settlement made after such inspection in December, 1885; and that Belser & Parker, prior to that time, did not accept the machinery as a compliance with the contract, and then only accepted it conditionally upon the plaintiffs supplying and changing certain parts of the machinery. That testimony was admitted against the objection of the defendants, and then on their motion was excluded; and to the latter action of the court the plaintiffs excepted.

The same witness testified that the machinery was manufactured under a guaranty, and that the plaintiffs permitted its operation

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tors and conveyers, three seventy-saw gins, with feeders and condensers; two cotton presses, all shafting for gins and presses, all pulleys complete, all belting but main belt for oil mill, belting for ginhouse not included—this to mean, in fact, all machinery and appurtenances necessary to operate an oil mill and ginhouse of above-described capacity. It is agreed that you are to lay down the mach'y at Mitchell's Sta. and pay all freight and furnish the mechanics to erect the same; we to furnish all rough labor and board of men. We agree to pay you for machinery as follows:

$3,000.00 on receipt of bill of lading.

$4,750.00 (four thousand seven hundred and fifty dollars) on the first day of November ensuing, and like amount, $4,750.00, first day of March ensuing, with interest at 8 per cent. from date of starting mill.

Yours respect'y, &c., &c.,

BELSER & PARKER.

[1] $1,500.00. Pike Road, Ala., Dec. 11th, 1885.

On or before the first day of February, 1886, we promise to pay to E. Van Winkle & Co. or order fifteen hundred & 00-100 dollars, for value received, with interest from date until paid at the rate of eight per cent. per annum, and also all costs of collection. The benefit of any and all homestead or exemption laws is waived as to this note. The above is for purchase money of one cotton-seed oil-mill machinery built at Mitchell's Station, Ala., which E. Van Winkle and Co. have this day agreed to sell to Messrs. Belser and Parker, of Pike Road, Ala.; and it is the express condition of the delivering of the said property that the title to the same does not pass from E. Van Winkle & Co. until the purchase money and interest is paid in full.

In testimony whereof —— have hereunto set —— hands and seal.

Payable at ——.

BELSER & PARKER. [Seal.]

by Belser & Parker in order that it might be fully tested. That testimony was objected to when offered, but was admitted, and was then excluded on motion of the defendants; to which action of the court the plaintiffs excepted.

It was also testified that, under the terms of the contract for the machinery, the plaintiffs were to erect it, but the testimony, on motion of the defendants, was excluded on the ground that the written contract was the *evidence of what the plaintiffs agreed to do. To that ruling of the court the plaintiffs excepted. *49

All that testimony, we think, was properly excluded. E. Van Winkle testified that he made no contract with Belser & Parker except the one contained in the written order from them which he accepted. That contract contained no guaranty, except the implied guaranty that the machinery should be reasonably fit for the uses for which it was sold. It contained an express direction to the plaintiffs to ship the machinery to Belser & Parker at Mitchell's Station, Ala., and an express provision that the plaintiffs were to furnish a specified part of the force necessary to erect the machinery. The plaintiffs were never in possession of the mill.

The condition of the title to the machinery, on and prior to December 4, 1885, was a conclusion of law, to be drawn from the undisputed facts of the case; and the witness could not testify to such legal conclusion. The contract contained no stipulation that Belser & Parker were to be allowed to test the machinery before accepting it. Moreover, any provisions in regard to erecting or testing the machinery would have been for the benefit of Belser & Parker, and could have been waived by them. They had a right to accept it without testing it, and even before its erection; and the plaintiffs had no right to insist that it should not be accepted until after those things had been done. Whenever Belser & Parker did any act which showed that they had waived those things and accepted the machinery, the title to it vested at once in them; and, as to innocent purchasers, such as the mortgagees were, the title could not be revested in the plaintiffs. Belser & Parker manifested their acceptance of the machinery by giving the mortgages, after having used and operated it.

By the terms of the contract, one of the payments was to be made by Belser & Parker on their receipt from the plaintiffs of the bill of lading; and, under that provision, the title passed to Belser & Parker as soon as they received the machinery, if not before. By the transfer of the property by Belser & *Parker, by the mortgages, after they had received it, the title vested in the mortgagees. The latter were bona fide purchasers for value. By the statute of Alabama, three months were allowed for the recording of the mortgages. Code Ala. 1876, § 2166. The title to the machinery was in Belser & Parker when the mortgages were executed. The notes given December 11, 1885, conferred no title which related back to a prior date. The most favorable construction that could be given to them would be that they constituted a mortgage executed on December 11, 1885; and prior to that date the mortgage to Lehman, Durr & Co. had been given. If the plaintiffs could recover at all in this suit, it must be against all of the defendants. They could not recover against Crowell, because he held as bailee of all the other defendants. If the title of Lehman, Durr & Co. was better than that of the plaintiffs, Crowell did not detain the property wrongfully; and the gist of the action was that he wrongfully detained it at the time the suit was brought. *50

If the notes of December 11, 1885, vested any title in the plaintiffs, those notes were never recorded, and there is no evidence that Pollak & Co. had any notice of the claim of the plaintiffs under those notes, at the time Pollak & Co. took their mortgage. Therefore that mortgage divested whatever title the plaintiffs may have had, as against Pollak & Co. Under section 2170 of the Code of Alabama of 1876, it was necessary that the plaintiffs, so far as concerned any title claimed by them under the notes of December 11, 1885, should have recorded the notes as a conveyance of personal property.

Moreover, it is shown that, prior to the commencement of the present suit, the plaintiffs, in May, 1886, filed a mechanic's lien as respected the machinery made under the contract of March 28, 1885, admitting a credit for the $2,500 and the $500, and claiming a lien under said contract and under the three notes of December 11, 1885; that in July, 1886, they commenced a suit in a court of the state of Alabama to enforce that lien; and that that suit was dismissed by the plaintiffs without a trial on the merits, before the trial of the present suit was had. The assertion of that lien treated the property as the property of Belser & Parker, and did so after *51 the notes of December 11, 1885, were taken. It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property to Belser & Parker as unconditional. In Lehman v. Van Winkle, 8 South. Rep. 870, the supreme court of Alabama held that by the suit to enforce the lien Van Winkle & Co. made an election to treat the title to the property as in Belser & Parker, and that that election could not be affected by a subsequent attempt to obtain the property by an action of detinue. The proceedings to enforce the lien were pending when the present suit was brought, in November, 1886.

On the whole case, we are of opinion that the trial court acted correctly in instructing the jury to find for the defendants, if they believed the evidence. Even if the plaintiffs were entitled to recover for any articles furnished to Belser & Parker after December 4, 1885, the burden was upon them to identify the articles which Belser & Parker

received after that date; but no evidence of such identification was introduced.

The plaintiffs asked the court to give to the jury eight several charges, which are set forth in the margin,[1] "but the court severally refused to give each of said charges, and to each such refusal the plaintiffs duly excepted. Each of said charges was separately asked and separately refused, and each refusal separately excepted to by the plaintiffs." We think the court properly refused to give those charges. The questions involved in them have been substantially considered in what has been hereinbefore said, and it is not necessary to make any further remarks upon them. Judgment affirmed.

Mr. Justice SHIRAS was not a member of the court when this case was argued, and took no part in its decision.

[1]Charges asked by the plaintiffs and refused:

"(1) That if the evidence shows that the complainants were the manufacturers of the machinery in question, that would constitute them the owners until by some complete act of sale the title passed to some other person. And there is no complete act of sale until there has been, between the buyer and the seller, a full agreement of their minds, on the part of the vendor to part with his ownership of the property, and of the vendee (or buyer) to accept and receive the property as a full compliance on the part of the seller with his agreement. When this agreement of the minds of the buyer and the seller takes place in any given instance is a question of intention, to be determined by a consideration of the situation and surroundings of the parties and the subject-matter of the contract, and the stipulations to be observed and performed by the parties with respect thereto. The burden of showing satisfactorily that the title has passed from the original owner to a buyer rests upon the buyer, if he affirms that a sale has taken place; and when the contract is for articles to be manufactured, or for articles in existence at the date of the contract, with or about which the seller, under the terms of the contract, was to do something to put them in such condition as he could insist upon an acceptance by the buyer, or, as is commonly said, in a deliverable state, the property does not pass from the vendor to the vendee unless it is shown satisfactorily that there was a specific intent of the parties that it should do so contrary to the ordinary course of business. The presumption is against such intent under such circumstances, and must be shown by the party asserting it.

"(2) In a case of doubt, the construction which the parties themselves have put upon a contract is of great assistance in arriving at its true meaning. If the contract in this instance was for the purchase of certain cotton-seed oil-mill machinery as a complete mill, which was to be transported to a given place and to be put up by the vendor, or for the putting up of which he was to do anything, such as furnishing mechanics, etc., and which machinery was to be of a given capacity, the presumption of law would be that the property would not pass from the vendor until the latter had completed the mill as a whole and the vendee had unconditionally accepted it as a fulfillment of the contract; and such acceptance must be notified to the vendor. The doing of secret or fraudulent acts by the vendee in transactions with third persons which might estop him from saying he was not the owner as against the person with whom he dealt would have no operation whatever against the vendor; and in this case the making of a mortgage by Belser & Parker to Lehman, Durr & Co. cannot be regarded as of any force as evidence to show the necessary agreement of the minds of E. Van Winkle & Co. and Belser & Parker as to the relinquishment of the right of property by one and the full acceptance of the property by the other as a compliance of the contract; and, until such mutual agreement of the minds of the vendor and vendee is shown, the property would remain with the vendor, notwithstanding the buyer should in the mean time execute mortgages or make absolute sales of the property. In such case the vendee cannot alone elect to regard the property as passing, and certainly not by any secret or perhaps fraudulent act. The vendor must also agree to the relinquishment of his right of property, which right may be of importance to the vendor to secure the performance of contemporaneous acts to be done by the buyer, such as making payments falling due before the contract has been fully completed.

"(3) In the present instance, no right of property passed to the vendees (Belser & Parker) at the time of making the contract. The contract itself contemplated certain things to be done by both the buyer and the seller before any property could pass under the contract to the buyer, and the law is (unless a specific intent is shown to the contrary by the party alleging it) that the property will not in such cases pass until each party has done all that the contract requires to be done before the property is in that condition in which it may be tendered as a full compliance with the contract, and there must be such a tender or delivery of the property to the buyer and such full acceptance by the buyer, and such acceptance and tender cannot in either case be by secret acts. The law contemplates notice to each party, and the mutual assent of their minds to the act of relinquishment of the property by the vendor and its acquirement by the buyer.

"(4) The payment of installments prior to or during the progress of the acts to be done by either or both of the parties before the property is in a deliverable state under the contract is not inconsistent with the retention of the property in the vendor.

"(5) When machinery is to be put up on the premises of the buyer, and is to be of a certain quality or capacity under the terms of the contract, the possession and use of the machinery by the buyer, with the consent of the seller, for the purpose of testing its quality or capacity prior to the full acceptance of the machinery as a compliance with the contract and the relinquishment of the vendor's right of the property, is not inconsistent with the property being with the vendor, notwithstanding such possession. Neither party would be estopped by such a possession.

"(6) That the jury are to determine under all the evidence whose property the machinery in question was, by mutual understanding of Belser & Parker and E. Van Winkle & Co., up to the 11th of December, 1885, and if they find that up to that time there was no mutual agreement or understanding between them whereby it vested in Belser & Parker, or that they (Belser & Parker) refused to accept it as a fulfillment of the contract up to that time, and only accepted it at that time, and then gave the plaintiffs the notes in evidence, the plaintiffs' right is superior to that of Lehman, Durr & Co., and to that of any of the defendants.

"(7) That the plaintiffs are entitled to recover such property as was furnished after the 11th of December, 1885.

"(8) That it is a question of intention of the parties as to when the property in the machinery passed to Belser & Parker, and the jury are the judges as to when they both intended that it should pass, and if they believe that they did not so mutually intend that it should pass until the settlement and adjustment on the 11th of December, 1885, the plaintiffs' rights are superior to those of Lehman, Durr & Co. and to those of any of the defendants."

(146 U. S. 83)

CROSS v. BURKE, Jail Warden.

(November 14, 1892.)

No. 1,105.

SUPREME COURT — JURISDICTION — APPEAL FROM SUPREME COURT OF DISTRICT OF COLUMBIA ON HABEAS CORPUS—STARE DECISIS.

1. Act March 3, 1885, (23 St. at Large, p. 437,) provides that an appeal from the circuit to the supreme court shall lie in cases where the prisoner is alleged to be restrained of his liberty in violation of the constitution or any law or treaty of the United States. 23 St. at Large, p. 443, of the same date, provides that no appeal shall lie from the supreme court of the District of Columbia, or of any territory, unless the amount in controversy exceeds $5,000. *Held*, that habeas corpus proceedings are civil cases, and under the latter act no appeal therein lies from such courts. Wales v. Whitney, 5 Sup. Ct. Rep. 1050, 114 U. S. 564, overruled.

2. Rev. St. D. C. § 846, giving the same right of appeal from the supreme court of the District as is "provided by law" for appeals from circuit courts, does not render applicable to that court the provisions of subsequent acts regulating appeals from circuit courts.

3. Where the question of jurisdiction does not appear to have been contested in a previously adjudicated case, the court is not bound by the view expressed therein.

Appeal from the supreme court of the District of Columbia. Appeal dismissed.

*83 *Statement by Mr. Chief Justice FULLER:

William D. Cross was found guilty for the second time upon an indictment for murder in the supreme court of the District of Columbia holding a criminal term, and sentenced to death, the time of his execution being fixed for January 22, 1892. He prosecuted an appeal to the court in general term, which, on January 12, 1892, finding no error in the record, affirmed the judgment rendered at the criminal term, (20 Wash. Law Rep. 98,) and on January 21, 1892, a writ of error from this court was allowed by the chief justice of the supreme court of the district, citation was signed and served, and the time for filing the record enlarged. On the same day the execution of the sentence of death was postponed until the 10th of June, 1892, by order entered by the court in general term.

That writ of error was dismissed May 16, 1892. Cross v. U. S., 145 U. S. 571, 12 Sup. Ct. Rep. 842. May 28, 1892, Cross filed his petition in the supreme court of the District of Columbia for a writ of habeas corpus, which petition was heard in the first instance by that court in general term. The application was denied June 4, 1892, and the petition dismissed. 20 Wash. Law Rep. 389. On June 8, 1892, the court in general term allowed an appeal to this court.

C. Maurice Smith and Joseph Shellington, for appellant. Sol. Gen. Aldrich, for appellee.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

It was not denied in the supreme court of the district that the time and place of execution are not parts of a sentence of death unless made so by statute. Holden v. Minnesota, 137 U. S. 483, 495, 11 Sup. Ct. Rep. 143; Schwab v. Berggren, 143 U. S. 442, 451, 12 Sup. Ct. Rep. 525. But it was insisted that in the District of Columbia the time has been made a part of the sentence by section 845 of the Revised Statutes of the District, which is in these words: "To enable any person convicted by the judgment of the court to apply for a writ of error, in all cases when the judgment shall be death, or confinement in the penitentiary, the court shall, upon application of the party accused, postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term." And it was contended that the time fixed by such a postponement is to be regarded as a time fixed by statute, and that the power of the court to set a day for execution is thereby exhausted.

The supreme court of the District of Columbia, speaking by James, J., held that "the subject-matter dealt with in this provision was not the powers of the court at all. It related simply to a right of the accused in a particular instance; that is, a right to a postponement of the time of executing his sentence in case he should apply for it in order to have a review of alleged error. With the exception of this restriction in the matter of fixing a day for execution, the power of the court was not made the subject of legislation, but was left as it had been at common law. The whole effect of the statute was to declare that, in case of an application for the purpose of obtaining a review on error, the day of execution should not be set so as to cut off the opportunity for review and possible reversal;" that the power of the court to set a day for execution was not exhausted by its first exertion; and that, if the time for execution had passed for any cause, the court could make a new order.

We have held that this court has no jurisdiction to grant a writ of error to review the judgments of the supreme court of the District in criminal cases, either under the judiciary act of March 3, 1891, (26 St. p. 826, c. 517,) or under the act of congress of February 6, 1889, (25 St. p. 655, c. 113,) or any other. In re Heath, 144 U. S. 92, 12 Sup. Ct. Rep. 615; Cross v. U. S., 145 U. S. 571, 12 Sup. Ct. Rep. 842. Have we jurisdiction over the judgments of that court on habeas corpus?

Under the fourteenth section of the judiciary act of 1789, (1 St. p. 73,) the courts *85 of the United States, and either of the justices of the supreme court, as well as the judges of the district courts, had power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment; but this extended in no case to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some court of the United States, or necessary to be brought into court to testify.

By the seventh section of the act of March 2, 1833, (4 St. p. 634,) the power was extended to all cases of prisoners in jail or confinement, when committed or confined on or by any authority or law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

By the act of August 29, 1842, (5 St. p. 539,) the power was further extended to issue the writ when the prisoner, being a subject or citizen of a foreign state, and domiciled therein, "shall be committed or confined or in custody under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption set up or claimed under the commission or order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

By the first section of the act of February 5, 1867, (14 St. p. 385,) it was declared that the courts of the United States, and the several justices and judges thereof, should have power "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States;" and it was provided that "from the final decision of any judge, justice, or court inferior to the circuit court an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the supreme court of the United States."

March 27, 1868, an act was passed (15 St. p. 44) to the effect that "so much of the act approved February five, eighteen hundred and sixty-seven, entitled 'An act to amend "An act to establish the judicial courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine' as authorizes an appeal from the judgment of the circuit court to the supreme court of the United States, or the exercise of any such jurisdiction by said supreme court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed." Ex parte McCardle, 6 Wall. 318; Id., 7 Wall. 506; Ex parte Yerger, 8 Wall. 85.

These various provisions were carried forward into sections 751–766 of the Revised Statutes.

By section 763 it was provided that an appeal to the circuit court might be taken from decisions on habeas corpus (1) in the case of any person alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States; (2) in the case of the subjects or citizens of foreign states, as hereinbefore set forth. And by section 764 an appeal to the supreme court from the circuit court was provided for, but limited to "the cases described in the last clause of the preceding section."

The Revised Statutes of the United States and the Revised Statutes of the District of Columbia were approved June 20, 1874. Section 846 of the latter, which was taken from section 11 of the act of March 3, 1863, (c. 91, 12 St. p. 764,) is as follows: "Any final judgment, order, or decree of the supreme court of the District may be re-examined and reversed or affirmed in the supreme court of the United States upon writ of error or appeal in the same cases, and in like manner, as provided by law in reference to the final judgments, orders, or decrees of the circuit courts of the United States." By act of congress of March 3, 1885, (23 St. p. 437,) section 764 of the Revised Statutes was amended in effect by striking out the words, "the last clause of," so that an appeal might be taken in all the cases described in section 763.

It was to this act that Mr. Justice Miller referred in Wales v. Whitney, 114 U. S. 564, 565, 5 Sup. Ct. Rep. 1050, as restoring "the appellate jurisdiction of this court in habeas corpus cases from decisions of the circuit courts, and that this necessarily included jurisdiction over similar judgments of the supreme court of the District of Columbia." But the question of jurisdiction does not appear to have been contested in Wales v. Whitney, and, where this is so, the court does not consider itself bound by the view expressed. U. S. v. Sanges, 144 U. S. 310, 317, 12 Sup. Ct. Rep. 609; U. S. v. More, 3 Cranch, 159, 172. We have pointed out in Re Heath, 144 U. S. 92, 12 Sup. Ct. Rep. 615, that to give to this local legislation, extending the appellate jurisdiction of this court to the District of Columbia, a construction which would make it include all subsequent legislation touching our jurisdiction over circuit courts of the United States, is quite inadmissible, (Kendall v. U. S., 12 Pet. 524;) and that no reference was made in Wales v. Whitney to the act of congress approved on the same 3d of March, 1885, entitled "An act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several territories," (23 St. p. 443.) The first section of this act provided "that no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars;" and the second section, that the first section should not apply to any case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

The act does not apply in either section to any criminal case, (Farnsworth v. Montana,

129 U. S. 104, 9 Sup. Ct. Rep. 253; U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. Rep. 609,) but is applicable to all judgments or decrees in suits at law or in equity in which there is a pecuniary matter in dispute, and it inhibits any appeal or writ of error therefrom, except as stated. Clearly, the act of March 3, 1885, amending section 764 of the Revised Statutes, in respect of circuit courts, cannot be held to give a jurisdiction in respect of the supreme court of the District denied by the act of March 3, 1885, relating to the latter court. It is well settled that a proceeding in habeas corpus is a civil, and not a criminal, proceeding. Farnsworth v. Montana, ubi supra; Ex parte Tom Tong, 108 U. S. 556, 2 Sup. Ct. Rep. 871; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. Rep. 148. The application here was brought by petitioner to assert the civil right of personal liberty against the respondent, who is holding him in custody as a criminal, and the inquiry is into his right to liberty notwithstanding his condemnation.

In order to give this court jurisdiction under the act of March 3, 1885, last referred to, the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained, (Kurtz v. Moffitt, ubi supra;) and as, in this case, the matter in dispute has no money value, the result is that no appeal lies.

It may also be noted that under the judiciary act of March 3, 1891, (26 St. p. 826,) appeals from decrees of circuit courts on habeas corpus can no longer be taken directly to this court in cases like that at bar, but only in the classes mentioned in the fifth section of that act. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. Rep. 517; Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. Rep. 522.

Appeal dismissed.

(146 U. S. 76)

UNITED STATES v. SCHOVERLING et al.

(November 7, 1892.)

No. 690.

CUSTOMS DUTIES—CLASSIFICATION — GUNSTOCKS—APPEAL—AMENDMENTS.

1. Under the tariff act of October 1, 1890, "finished gunstocks with locks and mountings" are dutiable at 45 per cent. ad valorem, under paragraph 215, as "manufactures, articles, or wares not specially enumerated," "composed wholly or in part of iron, steel," etc., and the fact that the finished gun barrels are imported separately by another firm, under an arrangement with the importer of the stocks with intent that they shall be brought together here, does not render the importation dutiable at the higher rate prescribed by paragraph 170 for all double-barreled, sporting, breech-loading shotguns, when it does not appear that the stocks had ever formed part of completed guns in Europe. 45 Fed. Rep. 349, affirmed. Robertson v Gerdan, 10 Sup. Ct. Rep. 119, 132 U. S. 454, followed. Falk v. Robertson, 11 Sup. Ct. Rep. 41, 137 U. S. 225, distinguished.

2. Act Jan. 29, 1795, (1 St. at Large, p. 411,) § 2, providing that where any article is made subject to duty, the parts thereof, when imported separately, shall be subject to duty at the same rate, was limited to duties imposed by laws then existing, and does not apply to subsequent tariff acts.

3. The prosecution of an appeal against a firm instead of against the individual partners is a defect which may be cured by amendment in the supreme court. Estis v. Trabue, 9 Sup. Ct. Rep. 58, 128 U. S. 225, followed.

Appeal from the circuit court of the United States for the southern district of New York.

This was a proceeding to review a decision of the board of general appraisers, affirming the action of the collectors in imposing certain duties on gunstocks. The circuit court reversed the judgment of the appraisers, and sustained the claim of the importers, (45 Fed. Rep. 349,) and the United States was thereupon allowed an appeal to this court. Affirmed.

Sol. Gen. Aldrich, for the United States.

Albert Comstock, for appellees.

*Mr. Justice BLATCHFORD delivered the opinion of the court.

On the 20th of October, 1890, the firm of Schoverling, Daly & Gales, composed of August Schoverling, Charles Daly, and Joseph Gales, imported into the port of New York, from Europe, articles described in the entry as "12 finished gunstocks, with locks and mountings." The collector assessed a duty upon them of $1.50 each, and, in addition thereto, 35 per cent. ad valorem, under paragraph 170 of the act of October 1, 1890, c. 1244, (26 St. p. 579,) in Schedule C of that act, entitled "Metals and Manufactures of Firearms:" "170. All double-barreled, sporting, breech-loading shotguns, valued at not more than six dollars each, one dollar and fifty cents each; valued at more than six dollars and not more than twelve dollars each, four dollars each; valued at more than twelve dollars each, six dollars each; and in addition thereto, on all the above, thirty-five per centum ad valorem. Single-barrel breech-loading shotguns, one dollar each and thirty-five per centum ad valorem. Revolving pistols valued at not more than one dollar and fifty cents each, forty cents each; valued at more than one dollar and fifty cents, one dollar each; and, in addition thereto, on all the above pistols, thirty-five per centum ad valorem." The importers, on November 15, 1890, filed with the collector, under section 14 of the act of June 10, 1890, c. 407, (26 St. p. 137,) a notice in writing, addressed to him, objecting to the decision of the collector, and stating their reasons for so doing. That notice in writing, called a "protest," claimed that the articles were only parts of guns, and were dutiable at 45 per cent. ad valorem, under paragraph 215 of Schedule C of the act of October 1, 1890, (page 582,) which reads as follows: "215. Manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or any other metal, and whether partly or wholly

manufactured, forty-five per centum ad valorem." The protest stated that the articles in question were simply parts or accompaniments intended for use in the manufacture of guns or muskets, were not guns or muskets, and could not be classed as such completed commodities.

Under section 14 of the act of June 10, 1890, the collector, on the 16th of December, 1890, transmitted to the three general appraisers on duty at the port of New York the invoice, entry, and protest. The assistant appraiser had reported to the appraiser, November 28, 1890, that the articles in question were "gunstocks, with mountings complete, ready for attachment to the barrels, which arrived by another shipment," and that "the gunstocks and barrels, when attached, make double-barreled breech-loading shotguns, complete." The collector, in his communication to the general appraisers, referred to the foregoing report of the assistant appraiser, and stated that the merchandise was returned by the appraiser upon the invoice as "breech-loading shotguns," invoiced at a value not over $6 each, and that he had assessed duty on them, under paragraph 170, at the rate of 35 per cent. ad valorem and $1.50 each.

The board of general appraisers took the testimony of Mr. Daly, one of the importing firm, on December 19, 1890, and it is set forth in the margin.[1] In its report to the collector, signed by all three of its members, it is said that, if the importation was simply one of gunstocks, without the gunbarrels required to make a complete firearm, and the case rested there, the articles could not be regarded as completed guns, so as to be dutiable under paragraph 170; that the testimony of Daly disclosed the facts that the firm of Schoverling, Daly & Gales had imported the gunstocks in question, and had made an agreement with another firm by which the latter were to order the barrels, with the mutual expectation that the stocks and barrels, after arriving at New York, were to be put together so as to make complete guns; that Schoverling was a member of both firms thus colluding together; that such a mode of evading the payment of duties could not be tolerated; and that the decision of the collector was affirmed. *79

On the 6th of January, 1891, the importers, under section 15 of the act of June 10, 1890, applied to the circuit court of the United States for the southern district of New York for a review of the questions of law and fact involved in such decision of the board of general appraisers, by filing in the office of the clerk of said court a statement of the errors of law and fact complained of, which were that the duty had been assessed on the articles at $1.50 each and 35 per cent. ad valorem, while it should have been assessed, under paragraph 215, at 45 per cent. ad valorem, only. On the filing of the application, the circuit court made an order that the board of general appraisers return to the court the record and the evidence, with a certified statement of the facts involved and their decision thereon.

*On the 22d of January, 1891, the board of general appraisers filed in the court their return, embodying the protest of November 15, 1890, the assistant appraiser's report of November 28, 1890, the collector's communication of December 16, 1890, the testimony of Daly, and the opinion and decision of the board. The case was argued before the circuit court, held by Judge Lacombe, which entered an order, on March 20, 1891, reversing and setting aside the decision of the collector and that of the board of general appraisers, and adjudging that the merchandise should have been classified and assessed with duty at the rate of 45 per cent. ad valorem, under paragraph 215 of the act, as "manufactures, articles, or wares not specially enumerated or provided for in this act, composed * * * in part of iron or steel." The opinion of the circuit court is reported in 45 Fed. Rep. 349. It stated that there was no evidence that the articles were ever assembled or brought together with the gunbarrels on the other side; that there was no finding to that effect by the appraisers; that, if there were such a finding of fact, the court would be constrained to reverse it, because there was no evidence in the record to support it; that, for all that appeared, the gunstocks might have been bought from one manufac- *80

[1] Protest in the matter of importation of certain gunstocks by Messrs. Schoverling, Daly & Gales. Statement of Mr. Daly. Examined by Gen. App. Somerville: "Question. You are a member of the firm of Schoverling, Daly & Gales? Answer. Yes, sir. Q. Where are you doing business? A. In New York. Q. This importation, as I understand you, consists of this item marked '225 here,' finished gunstocks, with locks and mountings? A. That is it. Q. Shotguns? A. They are parts of shotguns,—parts of breech-loading shotguns. Q. When did you make this order for this importation? A. I telegraphed for it a short time before this invoice. Q. How many of these are there here? A. Twelve of these finished gunstocks. Q. Did you at the same time order the other parts of these guns to be sent? A. I did not. That is all we received. We never received the barrels. Q. You made no order for the barrels? A. No, sir. (Reference made in the special report of the appraiser to protests of Schoverling, Daly & Gales against the assessment of duty at the rate of 35 per cent., etc.) Q. What we want to know is whether the barrels of these guns have arrived by another shipment, within your knowledge. A. As a member of the firm of Schoverling, Daly & Gales, I do not know it, because we have never received any invoice. Q. Never made any order? A. No, sir. Q. Have you any agreement with any other firm that they were to order the barrels of these guns? A. Yes; we have. Q. With the expectation on your part that they were to be put together here? A. Yes, sir. Q. Have those other importations been received by the other firms? A. A good many of them, I guess, are in bond. Q. What firms did you have an understanding of this nature with? A. With A. Schoverling. Q. Is he a partner in your house? A. Yes, sir; he is a partner in the firm of Schoverling, Daly & Gales, and also runs a separate business. Mr. Tichenor. Q. Do you think the trade generally adopted this plan? A. I think they all have received goods in the same way. We have imported those stocks with the intention of putting them with the other parts imported by these other parties."

turer, and the gunbarrels from another; that the tariff act laid a duty upon "sporting, breech-loading shotguns," and laid a separate and different duty upon the parts of which such shotguns were composed, as manufactures in whole or in part of metal; that it could be fairly assumed that congress, by that terminology, meant to allow importers who chose to do so to bring in fragments of a combination article by different shipments, and then to employ domestic labor in putting them together; that it might have been intended to induce importers to employ to that extent the labor of this country, instead of having the article combined abroad; that, under the language of the statute, there was nothing in the shipment in question except gunstocks mounted,—articles which were properly described in the act only by the phrase "manufactures composed wholly or in part of metal;" and that, therefore, they *151 should pay that duty, and no other.

*On March 20, 1891, the attorney general of the United States, under section 15 of the act of June 10, 1890, applied to the circuit court for the allowance of an appeal to this court from the decision and judgment of the circuit court. On the same day the application was granted, the appeal was allowed, and it has here been heard.

We are of opinion that the judgment of the circuit court must be affirmed. The contention on the part of the United States is that the transaction, as conducted, was a fraud upon the statute. But the question was solely as to the gunstocks. Sampson v. Peaslee, 20 How. 571. There is not in the statute, in paragraph 170 or elsewhere, any imposition of duty on parts of breech-loading shotguns, except the provision in paragraph 215. There is no duty otherwise imposed on materials for such guns.

In the act of October 1, 1890, in paragraph 154, a duty is imposed on "axles, or parts thereof;" in paragraph 165, on "penknives or pocketknives of all kinds, or parts thereof;" in paragraph 185, on "wheels, or parts thereof," and "tires, or parts thereof;" and in paragraph 210, on chronometers, "and parts thereof."

In the present case, the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation. Merritt v. Welsh, 104 U. S. 694.

In Robertson v. Gerdan, 132 U. S. 454, 10 Sup. Ct. Rep. 119, the statute had imposed a duty on musical instruments, and had not imposed the same duty on parts of musical instruments; and it was held that pieces of ivory for the keys of pianos or organs, to be used exclusively for such musical instruments, and made on purpose for such instruments, were not dutiable as musical instruments, but were liable to a less duty, as manufactures of ivory.

We do not think the decision in Falk v. Robertson, 137 U. S. 225, 11 Sup. Ct. Rep. 41, applies to the present case. It nowhere appears that these gunstocks had formed part of completed guns in Europe, nor was the question of the importation of the barrels *152 for the guns involved. In the present case, the dutiable classification of the gunstocks imported must be ascertained by an examination of them in the condition in which they are imported. Worthington v. Robbins, 139 U. S. 337, 11 Sup. Ct. Rep. 581.

Reference is made by the counsel for the United States to the provision of section 2 of the act of January 29, 1795, (1 St. p. 411,) which reads as follows: "Where any article is, by any law of the United States, made subject to the payment of duties, the parts thereof, when imported separately, shall be subject to the payment of the same rate of duties," as not having been repealed. In 1 St. p. 411, opposite the act is the word "[Obsolete.]" That provision is not embodied in the Revised Statutes, and we think it was limited to the case of duties then imposed by law, and did not apply to duties imposed by subsequent tariff acts. Tariff acts passed subsequently to the act of 1795 have provided that the duties theretofore imposed by law on imported merchandise should cease and determine. If the provision of the act of 1795 had been still in force when the tariff act of 1890 was enacted, it would have been wholly unnecessary in the latter act to impose a duty on parts of articles, as well as on the articles themselves, in cases where it was deemed proper to impose such duty upon parts.

This appeal was prosecuted as against the firm, but this defect may be cured by amendment, and the motion to that effect is granted. Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. Rep. 58.

Judgment affirmed.

(146 U. S. 71)

UNITED STATES v. PERRY et al.

(November 7, 1892.)

No. 794.

CUSTOMS DUTIES—CLASSIFICATION—STAINED-GLASS WINDOWS.

Under the tariff act of October 1, 1890, stained-glass windows containing representations of saints and other Biblical subjects, and imported in a fragmentary state for the use of a convent, are not exempt from duty, under paragraph 677, as "paintings," specially imported in good faith, for the use of any society or institution established for religious purposes, but are dutiable at 45 per cent. ad valorem, under paragraph 122, as "stained or painted window glass and stained or painted glass windows," "wholly or partly manufactured, and not specially provided for in this act." 47 Fed. Rep. 110, reversed.

Appeal from the circuit court of the United States for the southern district of New York. Reversed.

Statement by Mr. Justice BROWN:

This case arose out of the importation of certain stained-glass windows containing effigies of saints and other representations of

Biblical subjects. These windows were imported and entered November 24, 1890, as "paintings" upon glass for the use of the Convent of the Sacred Heart, located at Philadelphia, and consisted of pieces of variously colored glass cut into irregular shapes, and fastened together by strips of lead, and intended to be used for decorative purposes in churches, and when so used are placed upon the interior of the window frame, and are backed by an outer window of ordinary white glass. The outer window is necessary, as such paintings require for their proper exhibition a transmitted light. These paintings had been executed by artists of superior merit, especially trained for the work, and represented Biblical subjects and characters, such as St. Agnes, St. Joseph teaching our Lord, St. Mark the Evangelist, and St. Peter, and other pictorial representations of like kind, designed for religious instruction and edification. They did not come to this country in a completed state, but in fragments, to be put together in the form of windows.

Upon these articles, the collector of the port levied and collected a duty of 45 per cent. imposed by paragraph 122 of the tariff act of October 1, 1890, (26 St. 573,) upon "stained or painted window glass and stained or painted glass windows, * * * wholly or partly manufactured, and not specially provided for in this act."

Against this classification defendant duly and seasonably protested, claiming the articles were exempt from duty as "paintings * * * specially imported in good faith for the use of any society or institution * * * established for religious * * * purposes, * * * and not intended for sale," under paragraph 677. A hearing was had before the board of general appraisers, who overruled the protest and affirmed the action of the collector. Respondents thereupon filed a petition in the circuit court for the southern district of New York, praying for a review of the decision of the general appraisers, as provided in section 15 of the act of June 10, 1890, (26 St. 138.) The circuit court reversed the decision of the board of appraisers, and held the paintings to be entitled to free entry. In re Perry, 47 Fed. Rep. 110. From this decision the United States appealed to this court.

Asst. Atty. Gen. Maury, for the United States. Chas. Currie, W. Wickham Smith, and D. Ives Mackie, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

It is difficult to fix the proper classification of the importations in question under the act of October 1, 1890, without referring to the prior acts upon the same subject.

By the tariff act of March 3, 1883, (22 St. 497,) there was imposed a duty of 45 per cent. upon "porcelain and Bohemian glass, chemical glassware, painted glassware, stained glass, and all other manufactures of glass * * * not specially enumerated," while "paintings, in oil or water colors" (Id. 513) were subject to a duty of 30 per cent.; and "paintings, drawings, and etchings specially imported in good faith" for religious institutions (Id. 520) were admitted free. Under this and similar prior statutes, which did not differ materially in their language, it was uniformly held by the treasury department that the term "paintings" covered all works of art produced by the process of painting, irrespective of the material upon which the paint was laid; and that paintings on glass, which ranked as works of art, were dutiable as paintings, and when imported for religious institutions were entitled to admission free of duty. Like rulings were made with respect to paintings on ivory, silk, leather, and copper, having their chief value as works of art. The term was also held to include wall panels painted in oil and designed for household decoration. A like view was taken by this court in Arthur v. Jacoby, 103 U. S. 677, of pictures painted by hand upon porcelain, where the porcelain ground "was only used to obtain a good surface on which to paint, and was entirely obscured from view when framed or set in any manner, and formed no material part of the value of said paintings on porcelain, and did not in itself constitute an article of China ware, being manufactured simply as a ground for the painting, and not for any use independent of the paintings."

In the mean time, however, the manufacture of stained glass began to be recognized industry in this country. Strong protests were sent to congress against these rulings of the department, and demands were made for the imposition of a duty upon stained glass windows as such, to save the nascent industry from being crushed out by foreign competition. Accordingly, in the act of October 1, 1890, we find a notable change in phraseology and the introduction of a new classification. By paragraph 122 a duty of 45 per cent. is imposed upon "all stained or painted window glass and stained or painted glass windows, and hand, pocket, or table mirrors, not exceeding" a certain size; while, by paragraph 465, "paintings, in oil or water colors," are subject to a duty of only 15 per cent. The former exemption of "paintings, drawings, and etchings specially imported" for religious institutions is continued in paragraph 677, while in paragraph 757 a similar exemption is extended to "works of art, the production of American artists residing temporarily abroad, or other works of art, including pictorial paintings on glass, imported expressly for * * * any incorporated religious society, * * * except stained or painted window glass, or stained or painted glass windows."

It is insisted by the defendants that the painted glass windows in question, having been executed by artists of superior merit, specially trained for the work, should be regarded as works of art, and still exempted

from duty as "paintings," and that the provision in paragraph 122, for "stained or painted window glass and stained or painted glass windows," applies only to such articles as are the work of an artisan, the product of handicraft, and not to memorial windows, which attain to the rank of works of art. Those who are familiar with the painted windows of foreign cathedrals and churches will indeed find it difficult to deny them the character of works of art; but they would nevertheless be reluctant to put them in the same category with the works of Raphael, Rembrandt, Murillo, and other great masters of the art of painting. While they are artistic in the sense of being beautiful, and requiring a high degree of artistic merit for their production, they are ordinarily classified in foreign exhibits as among the decorative and industrial, rather than among the fine, arts. And in the catalogues of manufacturers and dealers in stained glass, including the manufacturers of these very importations, no distinction is made between these windows and other stained or painted glass windows, which, by paragraph 757, are specially excepted from the exemption of pictorial paintings on glass.

For most practical purposes, works of art may be divided into four classes:

(1) The fine arts, properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone, or bronze. These are subject to a duty of 15 per cent.

*675 *(2) Minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etchings, and the thousand and one articles which pass under the general name of bric-a-brac, and are susceptible of an indefinite reproduction from the original.

(3) Objects of art, which serve primarily an ornamental, and incidentally a useful, purpose, such as painted or stained-glass windows, tapestry, paper hangings, etc.

(4) Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas fixtures, and household and table furniture.

No special favor is extended by congress to either of these classes except the first, which is alone recognized as belonging to the domain of high art. It seems entirely clear to us that, in paragraph 757, congress intended to distinguish between "pictorial paintings on glass," which subserve a purely ornamental purpose, and stained or painted glass windows, which also subserve a useful purpose, and, moved doubtless by a desire to encourage the new manufacture, determined to impose a duty of 45 per cent. upon the latter, while the former were admitted free. As new manufactures are developed, the tendency of each tariff act is to nicer discriminations in favor of particular industries. Thus, by acts previous to that of 1890, paintings upon glass and porcelain were distinguished and taken out of the general category of manufactures of glass and porcelain, and even of stained glass, while under that act painted and stained glass windows are distinguished and taken out of the general designation of paintings upon glass. If the question in this case rested solely upon the language of paragraph 677, doubtless these importations would be exempted as paintings imported for religious purposes; but as, by paragraph 757, pictorial paintings on glass, a more specific designation, are again exempted, and stained glass windows are excepted and taken out of this exemption, we think the intent of congress must be gathered from the language of the latter paragraph rather than the former. Robertson v. Glendenning, 132 U. S. 158, 10 Sup. Ct. Rep. 44. Particularly is this so in view of the fact that, by paragraph 122, a duty is levied upon "stained or painted window glass and stained or painted glass windows" eo nomine. The use for which the importations are made in each case is much the same. The fact that these articles are advertised and known to the trade as painted or stained glass windows is an additional reason for supposing that congress intended to subject them to a duty.

The judgment of the circuit court must therefore be reversed, and the case remanded for further proceedings in conformity to this opinion.

(146 U. S. 88)

FOSTER v. MANSFIELD, C. & L. M. R. CO. et al.

(November 14, 1892.)

No. 25.

LACHES — WHAT CONSTITUTES — RAILROAD FORECLOSURE.

1. On the foreclosure of a railroad mortgage it is the duty of a stockholder who believes he has any interest to protect to acquaint himself with the proceedings, and after a delay of 10 years, during which many of those engaged in the transactions have died, he cannot maintain a bill to set aside a foreclosure decree alleged to have been procured by the fraudulent withdrawal of the company's answer, when such answer in fact remains upon the files, and sets forth certain matters which disclose the alleged fraudulent transactions, and of which complainant, in order to excuse his delay, alleges that he was ignorant until a short time before bringing the suit. 36 Fed. Rep. 627, affirmed.

2. In considering the question of laches by a stockholder in bringing a bill to set aside an alleged fraudulent decree foreclosing a railroad mortgage, it is a strong circumstance against complainant that he does not show that his interest would receive any benefit from the granting of the relief asked, for a court of equity will not do a vain thing, nor will it entertain a bill merely to vindicate an abstract principle of justice, or to compel defendants to buy their peace.

Appeal from the circuit court of the United States for the northern district of Ohio.

Suit by Charles Foster against the Mans-

field, Coldwater & Lake Michigan Railroad Company and others to open a decree foreclosing a mortgage on the company's property. Demurrers to the original and amended bills were sustained by the circuit court, and a decree entered dismissing the bill. 36 Fed. Rep. 627. Plaintiff appeals. Affirmed.

Statement by Mr. Justice BROWN:

"This was a bill in equity by a stockholder of the Mansfield, Coldwater & Lake Michigan Railroad Company to open the foreclosure of a mortgage upon its road executed to George W. Cass and Thomas A. Scott, trustees, and to vacate the order of sale and all proceedings thereunder upon the ground of fraud and collusion, and for a receiver and injunction.

The bill purported to be filed for the benefit of the plaintiff and all other stockholders of the defendant company, and, after averring a written request to the directors and chief officers of the company to commence this suit, and the neglect and refusal of such directors so to do, set forth that the plaintiff was, and had been since the transactions set forth in the bill, the owner of 258 shares of the capital stock of the defendant company; that the suit was not collusive; and that, until within a few months prior to the filing of this bill, he was ignorant of the fraud charged.

The bill further averred that in June, 1871, the Mansfield, Coldwater & Lake Michigan Railroad Company was incorporated under the laws of Michigan and Ohio for the construction of a line of road from the city of Mansfield, in Ohio, to the town of Allegan, in Michigan, with an authorized capital stock of $4,000,000. That it began the construction of its road on such line, and, in order to obtain the money necessary for its completion and equipment, on October 1, 1871, executed a mortgage to George W. Cass and Thomas A. Scott, trustees, in the sum of $4,460,000. That on July 20, 1871, the defendant, hereinafter designated as the "Coldwater Company," entered into a contract with the Pennsylvania Company, also made a defendant to this bill, by which the latter bound itself to provide the necessary iron, etc., and to equip and operate the whole line as a first-class road. In consideration of these obligations, the Coldwater Company agreed that its preferred stock should be issued to the amount of the actual expenditures made by the Pennsylvania Company in doing the work aforesaid, said stock to be entitled to dividends equal to 7 per cent. out of the net earnings of said road, with the further agreement to deliver to the Pennsylvania Company bonds to the amount of $20,000 per mile of track laid, and common stock to an amount $5,000 greater than the whole amount of stock issued for all other purposes, said bonds and stock to be delivered to Cass and Scott, trustees, for delivery to the Pennsylvania Company, as fast as material should be delivered by said company to the value thereof, and in full as each 10 miles of iron should be laid, and the track put in running condition. That afterwards, and on May 4, 1872, the Coldwater Company entered into another contract with the Pennsylvania Company, by which it delivered to the latter all of its bonds of the par value, as above stated, of $4,460,000, whereupon the Pennsylvania Company, by its president, the said Scott, agreed that, in consideration of the delivery of such bonds before the iron was laid, and the other conditions performed, the Pennsylvania Company bound itself to take care of and pay all interest coupons which might become due thereon prior to the completion of said line of railway for traffic, and that for all interest so paid and not justly chargeable thereto under the contract of July 20, 1871, the Pennsylvania Company should be reimbursed out of the earnings of said road, after the same should be completed in sections under said contract, and begin to make earnings on the respective sections. The bill further averred that all of said bonds remained in the possession and under the control of the Pennsylvania Company from the time of their delivery as agreed until the sale of the railroad under the decree of the court. That on May 1, 1872, the Pennsylvania Company wrongfully obtained $1,500,000 of the common stock of the Coldwater Company, claiming to be entitled thereto under the contract of July 20, 1871; and that, after obtaining the same, it managed and controlled the affairs of the Coldwater Company, and thereby secured a majority of the members of its board of directors, and absolutely influenced and controlled all its corporate acts. That when it was given said capital stock it had in no way complied with its undertakings hereinbefore mentioned, nor had it earned the same, nor in any way become entitled thereto, but, on the contrary, had entirely failed to perform upon its part its undertaking of July 20, 1871. That it finished no portion of said road as therein provided, and in no way earned an ownership in the bonds and capital stock aforesaid. That on January 20, 1876, the said Cass and Scott, trustees, filed a bill for the foreclosure of the mortgage, averring the insolvency of the Coldwater Company, and its failure to pay the interest on its bonds. That on April 17, 1876, the defendant company filed its answer, denying each material allegation of the bill, and setting up a full and complete defense. That on January 3, 1877, the Coldwater Company withdrew its appearance and answer, and on March 21st suffered an order pro confesso to be entered against it, in pursuance of which a decree of foreclosure and an order of sale was made, and the property was sold August 8, 1877, to Joseph Lessley, in trust for the Pennsylvania Company, for the sum of $500,000; that all of the proceeds of such sale were ap-

plied to the payment of the bonds held by the Pennsylvania Company, and no portion came to the Coldwater Company, or was applied to the payment of its debts or liabilities.

The gravamen of the bill was that at the time of the execution of the mortgage the said Thomas A. Scott, trustee thereunder, was president of the Pennsylvania Company, and its chief executive officer. That George W. Cass, cotrustee, had full knowledge of the relations of said Scott to the Pennsylvania Company, and of his aims and motives, and conspired with him in forwarding the interests of the Pennsylvania Company to the detriment of the Coldwater Company. That J. Twing Brooks, who was also made a defendant to this bill, was a director of the Coldwater Company, and was also general attorney for the Pennsylvania Company, and legal counselor and adviser of Cass and Scott, and as their solicitor brought the suit to foreclose the mortgage; and in all of their acts these parties were moved by, and acted wholly in, the interest of the Pennsylvania Company, and in violation of their obligations to the Coldwater Company. That Reuben F. Smith, George W. Layng, and Frank Janes, who were also made defendants, were directors of the Coldwater Company, and were also at the same time employes of the Pennsylvania Company, and were made directors of the Coldwater Company at the instigation of Scott, for the sole purpose of carrying out the plans and schemes of the Pennsylvania Company. That Cass and Scott, as trustees, prosecuted the foreclosure suit in the interest of the Pennsylvania Company, to destroy so much of the road of the Coldwater Company as lay west of Tiffin, in Ohio, and to sink and destroy its stock; and that the interests of said trustees and said Pennsylvania Company and of the holders of said bonds were one and identical. That, by the terms of the agreement of May 4, 1872, the Pennsylvania Company was bound to pay the interest matured upon the bonds, and the subsequently accruing interest thereon, until the completion of the road, under the agreement of July 20, 1871; and that the allegations of the foreclosure bill that the interest upon the bonds was overdue and unpaid, and that the Coldwater Company was insolvent, were untrue, and were known to be untrue by said trustees and the defendant Brooks.

It was further averred that the existence of the contract of May 4, 1872, was, at the time of the withdrawal of the appearance and answer of the Coldwater Company and the entering of the decree, purposely concealed from the court and from the stockholders of the company, as a part of the conspiracy and fraud; that the defense to the foreclosure suit was withdrawn in pursuance of the collusive action of the board of directors; that such withdrawal was solicited by Scott, in the interest of the Pennsylvania Company, and secured by Brooks through the aid and support of Smith, Layng, and Janes, employes of the Pennsylvania Company, all of whom were aided and abetted by Henry C. Lewis and Joseph Fiske, two directors of said company, also deceased, both of whom were directors of the Coldwater, Marshall & Mackinaw Railroad Company, to which company was to be given, by Scott and Cass, the trustees, a large portion of the property of the Coldwater Company, to induce them to favor the withdrawal of their answer; that the withdrawal of said defense was the fraudulent act of Scott and Brooks, aided and abetted by the directors conspiring together to cheat the Coldwater Company, and to benefit the Pennsylvania Company; that, in furtherance of such fraudulent scheme, Joseph Lessley, an employe of the Pennsylvania Railroad Company, also made defendant, bid off the property, and in so doing acted only as agent or trustee of the Pennsylvania Company, which was the only real party in interest; that the Pennsylvania Company organized the Northwestern Ohio Railway Company, which is now the nominal owner of so much of the road of the Coldwater Company as lies between Tiffin and Mansfield, and that the Pennsylvania Company is operating that part of said road as the nominal lessee of the Northwestern, which the bill averred is but a branch of the Pennsylvania Company, and in their relations to the said road the two corporations are identical; that in the operation of that part of the said road the Pennsylvania Company has accumulated large earnings, and has derived large revenue and receipts from sales, leases, and other sources from that portion of the Coldwater road between Tiffin, Ohio, and Allegan, in Michigan, and that the Pennsylvania Company is now operating, and will continue to operate, said road, and will dispose of and incumber its property, to the irreparable injury of the Coldwater Company, unless restrained, etc. The bill further averred that until recently neither the plaintiff nor any of those whom he represents had any knowledge of the contract of May 4, 1872, by which the Pennsylvania Company was bound to pay the interest as it accrued upon the bonds, and he believes that such knowledge was purposely kept from plaintiff and the other stockholders, as well as from some of the directors of the Coldwater Company, by the Pennsylvania Company and by Scott and Brooks, for the purpose of carrying out the fraudulent scheme set forth; that at the time of the sale of such property, and the application of the proceeds of such sale to the payment of interest upon the bonds, the Pennsylvania Company was under obligation to pay such interest by the terms of its contract of May 4, 1872, and there was no liability on the part of the Coldwater Company to pay the same, all of which facts were known to the Pennsylvania Company, to Scott and Cass, trustees, and to Brooks and the other directors referred to, and that they conspired to keep such knowledge from the plaintiff and from other stockholders.

The bill prayed that the decree of foreclosure and order of sale and all other proceedings be vacated; that the answer withdrawn be reinstated; that the case be held for further hearing upon the issues joined by the bill and answer in the foreclosure suit; that the defendant Cass, then surviving trustee, be required to account; that the Pennsylvania Company be held to have received the rents, issues, and profits from all of said railroad property in trust for the benefit and use of the Coldwater Company, and that a receiver be appointed, and an injunction issued against the further selling, leasing, or otherwise incumbering the property of the Coldwater Company during the pendency of the suit. There were annexed as exhibits to the bill the construction contract of July 20, 1871, the agreement of the Pennsylvania Company of May 4, 1872, and a complete transcript of the proceedings in the foreclosure suit.

*The answer of the defendant the Coldwater Company to the bill of foreclosure in that suit averred that the company was not legally incorporated until January 6, 1873, and that prior to that date it possessed no power or authority to execute either the bonds or mortgages, and denied that they were the act of the corporation, or constituted any valid lien upon its property; that, while the company was created by the consolidation of a Michigan and an Ohio corporation by an agreement of April 13, 1871, no election of directors of said consolidated company was held until January 6, 1873, and that, until such election, the consolidated company did not succeed to the rights and franchises of the original corporation, nor was its organization perfect and complete until such election, nor did it have power to make contracts and incur liabilities; that the agreement of July 20, 1871, was entered into with one Willard S. Hickox, on behalf of the defendant, and that he subsequently entered into a traffic contract with the Pennsylvania Company, assuming to act for the Coldwater Company, and as president thereof. The answer further set up the contract of May 4, 1872, and alleged that at the date of the delivery of the bonds to the Pennsylvania Company such company was not entitled to any portion thereof; that "none of said bonds are held by bona fide owners, but the pretended holders and owners thereof have, and are chargeable with, notice of all the matters herein set forth, and all of the equities of the defendant arising therefrom;" that the Pennsylvania Company had never earned the stock fraudulently delivered to it, nor had it entitled itself to any interest on the bonds delivered as aforesaid. The other allegations of the answer were much the same as those of the bill in the present case.

The bill was subsequently amended, and general demurrers were filed both to the original and amended bills, and upon the hearing of said demurrers the circuit court made a decree dismissing the bill. 36 Fed. Rep. 627.

From this decree the plaintiff appealed to this court.

John H. Doyle, for appellant. J. T. Brooks, for appellees.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The bill in this case was dismissed in the court below upon the ground of laches, and also for the want of equity. The propriety of this action is now before us for review.

As the alleged fraudulent sale of this road, which constitutes the gravamen of the bill, took place August 28, 1877, and the bill was not filed until August 30, 1887, 10 years thereafter, there is certainly a presumption of laches, which it is incumbent upon the plaintiff to rebut. His reply is that he did not discover the fraud until a few months before the filing of the bill. The allegation of the original bill in that particular is very general, namely, that "until within a few months prior to the filing of this bill he and those whom he represents were entirely ignorant of each and all of the fraudulent proceedings hereinafter set forth, and that this bill of complaint was filed in this court as soon after the acts of fraud, hereinafter set forth, came to his knowledge, as he could satisfy himself of the truth thereof. * * * And your orator had no knowledge of any of the fraudulent acts hereinbefore complained of until very recently accidentally discovered." The amended bill is much more specific in its details, and avers that a certain supplemental mortgage, which appears to have been executed by the Coldwater Company, October 1, 1872, to the same parties as trustees, for the purpose of effecting the sale and negotiation of its bonds, at the time of its execution by the officers of the company contained a full reference to the contract of May 4, 1872, the same having been inserted for the purpose of giving to all the purchasers of bonds due notice regarding the obligations of the Pennsylvania Company, but that after the execution of said supplemental mortgage, and the same had come into the possession of the officers of the Pennsylvania Company, it was altered by striking out all reference to the interest contract of May 4, 1872, or by taking out of the mortgage the page on which said reference was made, and substituting therefor another page, in which said reference was omitted, and the mortgage was recorded as so altered; that the plaintiff and the other stockholders were thereby kept from all knowledge of this contract, and of the obligations of the Pennsylvania Company, and were also ignorant of the alteration of the supplemental mortgage until after the filing of the original bill. The amended bill further avers that during all this time the records of the railroad company were kept out of the reach of the stockholders; that no meeting of stockholders was ever called after that of January, 1874; no notice was given for the election of directors; and

that the knowledge of the contract of May 4, 1872, was purposely kept from the stockholders, plaintiff believing that the decree of foreclosure was final, and the company hopelessly insolvent, and that there was no advantage in keeping up the organization of the company, and hence no annual meetings were called or held, all of which was brought about by the Pennsylvania Company as a part of the scheme and conspiracy to obtain the property, and defraud the stockholders of the Coldwater Company out of the same. Plaintiff further alleged that some time during the month of May, 1886, he was shown a copy of the contract of May 4, 1872; that until that time he neither knew nor had any means of knowing or suspecting the unlawful proceedings alleged in the bill, or that there was or could be any lawful or valid defense to the foreclosure; that he began at once a careful examination of all the facts, but was greatly retarded by his inability to discover the records or papers of the company, or to find the original of this contract, and did not find them until within six months of the time of filing the bill; that the majority of the board of directors was made up of the officers and employes of the Pennsylvania Company, and, acting in this interest, kept from stockholders all means of obtaining information, and neglected to make reports or call stockholders' meetings for the purpose of enabling them to obtain information; and that, if the plaintiff had known of the existence of such contract, or any of the matters in defense of the bill of foreclosure, during the pendency of those proceedings, he would have called the same to the attention of the court.

Do these allegations exhibit such a state of facts as acquits the plaintiff of the charge of laches? Taken literally, they show that plaintiff had no knowledge of the contract of May 4, 1872, until May, 1886; but it also appears that in the original answer to the foreclosure bill, which was filed March 1, 1876, the substance of this contract was set out, and the same allegations of fraud with respect to the conduct of the Pennsylvania Company up to that time were made in the answer as are made in the plaintiff's bill in this case. This answer, though nominally withdrawn by consent of the parties, does not appear to have been actually taken from the files; and, being a part of the records of the court, the presumption is that it would not be so taken away without leave of the court. It is also certified here by the clerk as a part of the record of the foreclosure suit. Not only was the contract set forth in this answer, but in the answer and cross petition of Swan, Rose & Co., judgment creditors of the road to the amount of $600,000, which was filed December 18, 1876, the same contract was set forth, and the authority of Hickox, the president of the defendant company, to make such contract, was denied; and it was averred that the Pennsylvania Company had wrongfully obtained certificates for a million and a half of stock, and had assumed to manage and control the affairs of the company.

The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law, which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place, and the subject of such fraud is a railroad with whose ownership and management the public, and certainly the stockholders, may be presumed to have some familiarity. The foreclosure of this road could not have taken place without actual as well as legal knowledge of the fact by its stockholders, and if they believed they had any valuable interest to protect it was their duty to have informed themselves by an inspection of the records of the court in which the foreclosure was carried on of what was being done, and to have taken steps to protect themselves, if they had reason to believe their rights were being sacrificed by the directors. If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment. An examination of the records in this case would have apprised the plaintiff, not only of the existence of the contract of May 4, 1872, but of the alleged fraudulent conduct of the Pennsylvania Company thereunder, and of the withdrawal of their answer by the directors, which is now claimed to be decisive proof of fraud. An inquiry of the directors, two of whom had protested against the resolution to withdraw the answer, and were within easy reach of the plaintiff, would have disclosed all the material facts set forth in plaintiff's bill, even to the reasons assigned for withdrawing the answer. The slightest effort on his part would have apprised him of the proceedings subsequent to the sale; of the purchase of the road by Lessley, the alleged employe of the Pennsylvania Company; of the subsequent organization of the Northwestern Ohio Railway Company; and of the lease of the new railway company to the Pennsylvania Company. Had he asked the leave of the court to intervene for the protection of his interest, it would have undoubtedly acceded to his request. Instead of this, he permits the sale to take place, and the road to pass into the hands of a new corporation, which has operated it for 10 years without objection

from the bondholders or creditors of the Coldwater Company, and without question as to its title. In the mean time many of the witnesses, including both Cass and Scott, trustees, whose alleged fraudulent betrayal of their trust constitutes the gravamen of this bill, are dead, as well as Lewis, the president, and Fish and F. V. Smith, directors, of the defendant company, one of whom participated with Lewis in the meeting at which the attorneys were instructed to withdraw their defense, and all opportunity of explanation from them is lost. It is evident that the plaintiff in this suit has fallen far short of that degree of diligence which, under the most recent decisions of this court, the law exacts in condonation of this long delay. Bailey v. Glover, 21 Wall. 342; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. Rep. 418; Hoyt v. Latham, 143 U. S. 553, 12 Sup. Ct. Rep. 568; Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. Rep. 862.

We are the more readily reconciled to this conclusion from the fact that it does not appear that, if this sale were set aside and held for naught, the decree would redound to the advantage of the plaintiff. The only allegation as to his interest is that he is the owner and holder of 258 shares of the capital stock of the company of the par value of $12,900. It does not appear how much of its authorized capital stock of $4,000,000 was actually issued, though there is an allegation in the bill that the Pennsylvania Company wrongfully obtained $1,500,000 of the stock of the Coldwater Company in addition to the preferred stock, which the plaintiff averred was to be issued for actual expenditures at cash values made by this company. Whatever amount was issued, it is safe to infer that plaintiff's interest was comparatively very small. If the decree were set aside, and the case reinstated, as he demands, his rights, as well as those of the other stockholders, would be subordinate to those of the bondholders, and probably, also, to those of the judgment creditors of the road. It is a difficult matter to say what amount of bonds was earned by the Pennsylvania Company, although it is admitted that iron was laid on 75 miles of the road, and the road completed for at least 47 miles, for which the Pennsylvania would be entitled to bonds at $20,000 per mile, and also that the company raised nothing towards the sinking fund which was provided for by the original mortgage. Under these circumstances, the trustees could hardly fail to obtain another decree of foreclosure for a large amount; and, as the road was hopelessly insolvent, it is hardly within the bounds of possibility that it should sell for more than enough to pay the amount adjudged to be due, to say nothing of the judgment creditors' claims of Swan, Rose & Co. In a case of this kind, where the plaintiff seeks to annul a long-standing decree, it is a circumstance against him that he does not show a probability, at least, of a personal advantage to himself by its being done. A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice, or to compel the defendants to buy their peace, and, if it appear that the parties really in interest are content that the decree shall stand, it should not be set aside at the suit of one who could not possibly obtain a benefit from such action.

In the view we have taken of this case upon the question of laches it is unnecessary to consider whether the plaintiff has made such a case of fraud in the original decree as justifies the interposition of a court of equity.

The decree of the court dismissing the bill is therefore affirmed.

(146 U. S. 102)

WARE et al. v. GALVESTON CITY CO.

(November 14, 1892.)

No. 28.

LACHES—CANCELLATION OF STOCK TRANSFERS.

The heirs at law of a deceased owner of stock in a Texas corporation were guilty of laches, and a bill in equity, filed by them against the corporation in 1881, to cancel transfers of shares by the attorney in fact of deceased for fraud, and to revive such shares in their names, was properly dismissed, where it appeared that complainants lived in Alabama; that their ancestor died there in 1841; that his attorney in fact made the transfers in question in 1842, and died in 1858; that agents of the estate went to Texas in the years 1843, 1854, and 1858, and obtained full reports from the corporation concerning the transfers; that the executor went to Texas in 1844 and in 1854, but neither saw deceased's attorney nor made inquiries of the corporation; that he went again in 1858, when he learned of the liability of the corporation; that in administering the Texas estate in 1844 no rights were asserted against the corporation; that all the heirs at law became of age before 1854; that the executor died, and that an agent of the executor's estate went to Texas in 1869, and raised the question of the corporation's liability, but, being advised, in 1873, by his attorneys, that no recovery could be had against the company, the matter was dropped until 1881.

Appeal from the circuit court of the United States for the eastern district of Texas. Affirmed.

Walter Gresham, for appellants. A. H. Willie, for appellee.

*Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the circuit court of the United States for the eastern district of Texas on March 18, 1881, by Asenath A. Ware, the widow of Robert J. Ware, and the daughter of David White; David P. Lumpkin, the son of Lucy S. Lumpkin, a deceased daughter of said David White; Mary A. Holtzclaw, daughter of Mary A. Cowles, a deceased daughter of said David White, and James T. Holtzclaw, husband of the said Mary A. Holtzclaw; Thomas W. Cowles, son of said Mary A. Cowles; and Daniel O. White and Clement B. White, sons

of J. Osborne White, a deceased son of the said David White,—the plaintiffs being citizens of Alabama and Florida,—against the Galveston City Company, a Texas corporation. The plaintiffs filed the bill as heirs at law of the said David White.

The bill set forth that on June 15, 1837, one Michael B. Menard, of the first part, Robert Triplett, Sterling Neblett, and William F. Gray, of the second part, and Thomas Green, Levi Jones, and William R. Johnson, of the third part, entered into a written agreement, which recited that Menard claimed title to a league and labor of land, consisting of 4,605 acres, situated on the east end of Galveston island, in the territory of the republic of Texas; that, Triplett claiming on behalf of himself and Neblett and Gray 640 acres of land, part of said league and labor, articles of agreement were entered into by Menard and Triplett, bearing date April 11, 1837, by which Menard agreed to relinquish to Triplett 640 acres out of said league and labor; that Menard, by deed or act bearing date April 18, 1837, conveyed the residue of said league and labor, after deducting the said 640 acres, to Jones, to be sold and disposed of by him in the manner and for the purposes prescribed in the said act or deed; that Jones, intending to execute the trust created by said deed, had proposed to divide the premises into 1,000 shares, for which certificates were to be issued to the purchasers, and in pursuance thereof had actually issued certificates for 400 shares, of which it was believed many shares had been sold; that Triplett, together with Menard, by deed duly executed by them, had conveyed the 640 acres to Green, Jones, and Johnson, to be sold and disposed of in the manner therein prescribed; that, after further reciting that, it being the intention of all the parties to lay off the league and labor of land into lots for the purpose of building a town thereon, it had been found most beneficial to the parties concerned that the whole of said league and labor should be held on joint account in the proportions thereinafter specified, and should be under the control and at the disposition of the same set of trustees, acting upon one common plan in regard to the whole, instead of being held partly by Jones and partly by Green, Jones, and Johnson, under different titles and plans, it was witnessed that the parties thereto covenanted and agreed with each other, among other things, that the said league and labor of land should be conveyed to Green, Jones, and Johnson, as trustees and commissioners, to carry into effect the purposes of the agreement; that the said league and labor of land should be divided by the trustees into 1,000 shares, of which the 400 shares for which certificates had been issued by Jones should be regarded as 400 shares, and the lawful holders of the said certificates should be on the same footing and entitled to the same rights with the holders of certificates issued under said agreement of June 15, 1837, and upon surrendering their said certificates new certificates in lieu thereof should be issued by said trustees; that the remaining 600 shares should be sold by said trustees in such manner as they should think expedient, no share to be sold for a less sum than $1,500, unless a majority of said trustees should be of opinion that it would be expedient to reduce the price; that a certificate, signed by at least two of the trustees, should be issued to every purchaser, who should have a right to demand a separate certificate for each share; that the certificates should be transferable by assignment in writing thereon, signed and sealed by the holder, and acknowledged in the presence of two witnesses before any justice of the peace or notary public; that the trustees, as soon as, in their opinion, a sufficient number of shares had been sold, should call a meeting of the shareholders at such time and place as should be designated by them, of which they should give sufficient and convenient notice to shareholders; that the trustees should hold the title to the said league and labor of land, subject to the orders of the shareholders, as adopted at their general meetings, and the rules and regulations prescribed by them, and make all conveyances which the shareholders might require them to make, any two of them being authorized to make conveyances and perform all other acts; and that it was thereby further witnessed that the parties thereto of the first and second parts, in consideration of the premises thereto, and the further consideration of $10 to them in hand paid by the parties of the third part, did thereby sell and convey unto Green, Jones, and Johnson, their heirs and assigns, the said league and labor, in trust to execute the agreements thereinbefore set forth.

The bill further showed that Green, Jones, and Johnson accepted the trust created by said written instrument, and took upon themselves its discharge, and in June, 1837, having supplied themselves with 1,000 printed certificates, as the representatives of a like number of shares, which certificates were bound into five books of 200 certificates each, designated as books "A," "B," "C," "D," and "E," solicited subscriptions for shares; that many persons became purchasers for value and owners of shares therein, to whom said trustees issued a certificate of ownership for each share so purchased; that on April 13, 1838, on due notice given by said trustees, the shareholders held a meeting in Galveston, Tex., and formally organized themselves into a joint-stock company, under the name of the Galveston City Company, by the election of a president and four directors, who were to constitute the board of directors of the company, and to whom was confided the care and control of its property, with power to pass ordinances and by-laws for its government, appoint an agent, apply for a charter of incorporation, require from said trustees a deed for said league and labor of land, so as to vest the legal title in the said board of directors and their successors, lay

off the land into blocks and lots, make sales thereof and convey title to the purchasers, declare dividends of the proceeds of sales among the stockholders, and otherwise manage and control the property as they might deem best for the interest of the company; but the bill alleged that said trustees, with the approval and consent of the company, continued to make sales of shares in its stock, and as many as 1,000—the number designated in said written articles—eventually were disposed of, and certificates of ownership thereof issued by said trustees to persons entitled thereto.

*The bill further showed that David White, late of Mobile, Ala., in his lifetime, on November 7, 1838, subscribed for and became the owner and proprietor of 67 shares in the capital stock of said company, in evidence of which the said trustees appointed under the instrument of June 15, 1837, issued and delivered to him 67 certificates of ownership, duly signed by two of them, to wit, 17 out of Book A, numbered from 108 to 124, inclusive, and 50 out of Book C, numbered from 1 to 50, inclusive, each certificate being in the form set forth in the margin.[1]

The bill further showed that on December 31, 1838, at a regular meeting of the board of directors of the company, an ordinance was passed by it requiring its agent, as soon as a charter could be procured, to open a book for the registration and transfer of stock, and to give due notice of such opening, and conferring the right on stockholders, after such notice, to file and register the certificates issued to them by the said trustees, and receive in lieu thereof certificates under the seal of the company, stating the number of shares to which the party was entitled, which last certificate should not be transferred, except on the regular books of transfer of the company, and should be necessary in every case to entitle the shareholder to receive the dividends due him; that another ordinance was passed requiring the trustees to convey said league and labor to the five persons who were then the directors of the company, and their successors in office; that on April 12, 1839, the said trustees, by deed duly executed and recorded, conveyed the said league and labor in fee to the said directors, by virtue whereof the latter became seised and possessed of it in trust for the stockholders of the company; that afterwards the said Galveston City Company was incorporated under the same name by an act of the congress of the republic of Texas, approved February 5, 1841, and that said David White was one of the original corporators thereof.

*The bill further showed that the directors of the company laid off the said land into blocks and lots, and offered the same for sale, and from time to time made sales and conveyances of numerous parcels of it to different persons, receiving in part consideration therefor $1,000,000 and upwards; that there remains a large portion yet unsold, of the value of $500,000 and upwards; that the company adopted the policy of accepting from its stockholders shares of stock in exchange for its lands, and the directors, in a large majority of the sales of lots by them, accepted and received from the purchasers in payment therefor, instead of a money consideration, a surrender of shares in the capital stock of said company, owned by said purchasers, in all such instances canceling upon the books of the company the shares thus surrendered; that very many shares had been in that manner retired, until now there were not more than 50 shares outstanding; that no dividend of the cash proceeds arising from sales of land had been declared among the stockholders, although the same had always greatly exceeded the expenses of the company, but the profits had been permitted to accumulate; and that the market value of a share in the capital stock of the company far exceeded now the face value of such share, to wit, $10,000 and upwards.

The bill further showed that on April 8, 1839, by an instrument in writing, White appointed one Abner S. Lipscomb his attorney in fact, for him, among other things, to transfer any or all of his Galveston stock, or any interest he might have in the city of Galveston; that White thereupon delivered to Lipscomb, for that purpose, the said 67 certificates of stock; that on December 3, 1841, Lipscomb surrendered to the company 3 of

[1] "City of Galveston in one thousand shares.

"The proprietors, M. B. Menard, Robert Triplett, Sterling Neblett, and Wm. Fairfax Gray, conveyed to the undersigned, as trustees, by their deed of the 15th of June, 1837, a league and labor of land, containing 4,605 acres, on the east end of Galveston island, to be sold as joint stock in 1,000 shares.

"By the terms of said deed, certificates of shares, when issued, are to be assigned by indorsement under hand and seal, in the presence of two witnesses, before any justice of the peace or notary public.

"The trustees, any two of whom may act, are to call a meeting of the shareholders when deemed advisable.

"In the proceedings of the stockholders in general meeting each share to be entitled to one vote, and to be represented in person or by proxy, and a majority in interest to determine all questions which may arise. The company may prescribe such rules and regulations for its government and management, and give such orders and directions to the trustees for the sale of lots or any other purpose, as it may think promotive of the general interest.

"Certificate of Stock. Book —, No. —.

"This is to certify that we, Levi Jones, William R. Johnson, and Thomas Green, trustees of the city of Galveston, in consideration of ——, do grant, bargain, and sell to David White, his heirs and assigns, forever, one share, No. —, in the city of Galveston, to be holden and enjoyed by him and his assigns upon the terms prescribed in the deed bearing date the 15th of June, 1837, of M. B. Menard, Robert Triplett, Sterling Neblett, and William Fairfax Gray, constituting us the trustees, and in the agreement entered into between us and the stockholders in said city, as set forth in the proposal for subscription.

"Witness our hands this 7th day of November, 1838.

"LEVI JONES,
"THOMAS GREEN,
"Trustees."

the certificates issued to White, namely, certificates numbered 33, 36, and 39, out of Book C, and with the consent of the company, and by an entry on its books, but without authority, and in fraud of the rights of White, transferred the 3 shares of stock represented by the 3 certificates into his own name, receiving from the company, in lieu thereof, a certificate of ownership of said 3 shares, issued under its seal in his name; that White died on December 10, 1841, leaving Mary S. White, his wife, the plaintiff *109 Asenath A. Ware, his *daughter, and the five plaintiffs who are his grandchildren, his only heirs at law; that he was entitled at the time of his death to a considerable personal estate, and possessed of 24 shares in the stock of the Galveston City Company, including the 3 shares so alleged to have been fraudulently transferred by Lipscomb into his own name; that 21 of said shares were, at the time of said White's death, standing in his name on the books of the company, and the certificates of ownership thereof so issued to him, to wit, those numbered 108, 116, 118, 119, 120, 121, 122, and 124, out of Book A, and those numbered 10, 12, 27, 28, 34, 42, 43, 44, 45, 46, 47, 48, and 49, out of Book C, were at that time in the possession or power of said Lipscomb; that the personal estate of which White died possessed was more than sufficient, exclusive of the 24 shares of stock, to pay his debts, and they had long since been paid; and that there was no administration of his estate in Texas, nor any necessity therefor.

The bill further showed that Mary S. White died in 1853, without having disposed of the right or interest she was entitled to as the widow of David White in the said 24 shares of stock, leaving her daughter, the said Asenath, and her said five grandchildren, her only heirs at law her surviving; and that they, as such, and as the only heirs at law of David White, thereupon became entitled to said shares of stock.

The bill further showed that Lipscomb, after the death of said White, and with the connivance of the company, and by an entry on its books, but without authority, and in fraud of the rights of the plaintiffs, transferred the said 24 shares of stock to some persons unknown; the company at the time taking up and canceling the said certificates of ownership thereof, and delivering to the transferees new certificates under its seal in their names, representing the shares to be $1,000 each. That the company subsequently procured the said 24 shares, and the certificates corresponding thereto, to be surrendered to it by those to whom Lipscomb had so transferred them, or by their assigns, at the same time canceling said shares upon its *110 books, thus retiring them; and was now claiming the benefit thereof. That the transfer of said shares *by Lipscomb, after the death of White, was without warrant, and void, and the company, in contemplation of law, was a party to his said illegal acts, and liable to the plaintiffs for all the consequences thereof; and that the company held the stock in trust for the plaintiffs.

The bill further charged that the truth of the said matters would appear by the books, certificates, writings, papers, and memoranda relating to said shares of stock, in the possession or power of the company, if it would discover and produce the same, which it refused to do, though frequently applied to for that purpose.

The bill further charged that the company and its agents and servants had always studiously concealed from the plaintiffs the said matters relating to the stock of the said White, and particularly the said illegal acts of Lipscomb, and the company's participation therein, by withholding from the plaintiffs all information in reference to said stock, and refusing them access to its books and papers; that the plaintiffs were in total ignorance of said illegal acts of Lipscomb, and their rights in the premises, until about 12 or 14 months next before the filing of the bill; that the plaintiffs, except the said Asenath, were, at the time of the death of said White, minors of tender age, and resided in Alabama and Florida, at a distance of 800 miles and upwards from Galveston, where Lipscomb resided, and where the said illegal acts were committed; that the plaintiffs were not apprised even of the fact that said White had owned shares in the capital stock of the company, until some years after his death; that after they were so apprised, to wit, in 1869, and again on March 19, 1879, at Galveston, by one Thomas J. Molton, their agent in that behalf, and at divers other times and by other persons, they made application to the company, its agents and servants, for information as to what disposition, if any, had been made of the shares owned by said White, and also for permission to examine its books and papers, to ascertain their rights, but the company, on every such application, declined to disclose to the plaintiffs any facts relating to said stock, and refused them access to its books and papers. *111

*The bill further showed that Lipscomb died in December, 1856, notoriously insolvent, and without having accounted to the plaintiffs, or any of them, for the 24 shares of stock, or any interest therein; that the plaintiffs had applied to the company to cancel the alleged transfers of said 24 shares, and the entries of such transfers in its books, and to revive said shares in the names of the plaintiffs as the heirs at law of said White and his widow, and to enter the names of the plaintiffs in its books as the owners of said stock, and to issue and deliver to them certificates therefor, in the proper form, but that it refused to comply with such requests.

The bill called for an answer, but not upon oath, the benefit whereof was expressly waived. It prayed that the alleged transfer of the 3 shares of stock by Lipscomb into his own name from that of White, and the entry thereof in the books of the company, and

the delivery by it to Lipscomb of a certificate of ownership of the 3 shares, might be declared to be a fraud upon White; that it might be declared that the alleged transfers by Lipscomb of the 24 shares, after the death of White, and the subsequent retirement or cancellation of said shares by the company, were without lawful warrant, and void; that the said 24 shares might be declared to be the property of the estate of White, and the plaintiffs might be declared entitled to have the same to their own use, and to share ratably with the other stockholders of the company in all accumulations of property by the company since the date of said illegal transfers; that the company might be decreed to cancel said transfers and the entries thereof in its books, and to revive the said 24 shares, to enter the names of the plaintiffs in its books as the owners of the stock, and to issue and deliver to the plaintiffs a certificate of ownership for each of said 24 shares at the face value of $1,000 each; that, if the revival of said stock, and the transfer thereof on the books of the company into the names of the plaintiffs, were impracticable, then the company might be decreed to pay to the plaintiffs the market value thereof; and for general relief.

The answer of the defendant sets forth, by way of demurrer for want of equity, that the cause of action of the plaintiffs, and of those under whom they claim, accrued more than 35 years before the filing of the bill; that no reasonable or sufficient cause or excuse is alleged why the suit was not earlier brought, or why all the facts therein pretended to be known were not earlier discovered; that it was not shown in the bill when or how any discovery of facts alleged not to have been before known, or to have been concealed, was made by the plaintiffs, nor any diligence to ascertain the same, nor any excuse for the want of such diligence, nor any statement as to the course of proceedings, nor any facts connected with the administration of the estates of David White or his widow in Alabama, or as to the knowledge or acts of the legal representatives thereof in regard to the alleged rights and claims which are the subject of this suit, nor to remove the presumptions that all matters relating to the said stock, and on which the rights thereto were dependent, were fully known to said representatives; that the plaintiffs' cause of action is barred by the law of limitations of Texas, and the lapse of more than 35 years since the same accrued before this suit was brought; that the suit had been delayed such great lapse of time, and parties holding the certificates of stock alleged to have been issued in renewal of those which belonged to White had many years ago obtained full value therefor in the property of the company, and the rights of third and innocent parties, as the only holders of the present alleged stock in the company, had intervened, and been permitted to grow up and become of great value: and that, therefore, the plaintiffs' cause of action was barred by such lapse of time and laches, was stale and inequitable, and ought not to be heard in a court of equity.

The answer sets forth various denials of material allegations in the bill, and various alleged defenses thereto. It further sets forth that no person survives who was connected with the business or administration of the company, or who had any connection with the stock, or could be reasonably presumed to have any knowledge respecting the same.

The answer further says that the defendant pleads that suit on the matters alleged in the bill had been forborne until all persons connected with the transactions to which it related, knowing particular facts and details in regard to said stock, and the receipt and appropriation of proceeds therefor, were dead; and it pleads the laches, neglect, and delay of the plaintiffs in bar of the suit, and alleges that the same is stale and inequitable, and ought not to be further heard or considered.

The answer further sets forth that by the statute of limitation of suits in Texas, passed in 1841, and ever since in force, all actions for personal property must be commenced and sued within 2 years after the cause of action accrued, all actions of debt grounded upon any contract in writing must be commenced and sued within 4 years next after the cause of such action or suit, and the longest period of limitation for suits or actions of any kind was 10 years; that the plaintiffs' cause of action, if any they ever had, accrued more than 10 years and more than 35 years before the filing of the bill; that said statute had not failed to be operative against the plaintiffs on account of any exception therefrom, contained therein, within the principles of equity and good conscience restraining the same. It denies all concealment, fraud, or wrong charged in the bill on the part of the defendant, to prevent the running of said statute, and denies that any diligence had been shown or existed on the part of the plaintiffs, or any excuse for the lack thereof, to prevent the running of said statute; and it pleads the same as a bar to the plaintiffs' suit. It further answers that the great lapse of time, rendering impossible correct knowledge of facts at the present day, resulting from the death of all parties to the transactions, the laches of the plaintiffs, and the bona fide accrual of the large and valuable rights of the other stockholders in the company, render the bill a stale, inequitable, and unconscientious demand, which ought not to be heard in a court of equity; and the defendant pleads the same in bar and estoppel.

A replication was filed to the answer, proofs were taken, and the cause was heard. The circuit court, in November, 1886, dismissed the bill, with costs, and allowed an appeal to this court by the plaintiffs. No written opinion was delivered, but it is stated in the brief of the appellants that the circuit court held that the claim could not be prosecuted, by reason of the laches of the plaintiffs. We

think there was good cause on that ground for the dismissal of the bill, and the decree of the circuit court must be affirmed.

David White died in December, 1841. Whatever cause of action, if any, the plaintiffs had, arose either then or in March, 1842, when Lipscomb assigned to one James Love shares of the stock. It is contended for the plaintiffs that the discovery on which their suit was based was made only a short time before 1881; but an agent was sent to Texas in 1843, expressly to obtain information. He saw Lipscomb, and obtained from the office of the Galveston City Company, in June, 1843, a full report as to the persons who surrendered the original certificates and got renewals. The report showed that the three certificates embraced in this suit, numbered 33, 36, and 39, were renewed to Lipscomb. It showed the fact of the renewal of 16 shares to Love. There was information enough to make it the duty of the agent to make further inquiry. In July, 1844, Robert J. Ware, executor of David White, visited Texas for the purpose of seeing Lipscomb, but did not meet him. Then ensued the period from 1844 to 1854, when no diligence was shown by the representative of White's estate. In July, 1844, administration on the estate of White was opened in Texas by W. B. Lipscomb, the son of A. S. Lipscomb. He brought a suit against Menard, claiming that the latter owed White's estate over $14,000 and interest, and that the claim was a lien on all the property of the Galveston City Company. Jones, the trustee, was made a party to the suit, and an injunction was prayed against all the operations of the company. This suit was brought with the knowledge and privity of Ware, the executor; but the administration in Texas did not assert any rights against the company, such as are asserted in the present suit. Ware visited Texas again, and saw Lipscomb, prior to 1854, and had an opportunity to make inquiries of the company.

In 1854, one A. F. James, as agent of David White's estate, made inquiry at the office of the company as to the rights and interest which White had in the company at the time of his death. The books, records, and papers were all opened to his inspection, and the agent of the company made out for him an historical record of White's stock. At that time, no suspicion existed of a claim against the company in the matter, and it was supposed that the search was made as the foundation of a liability on the part of Lipscomb. Therefore there could have been no purpose on the part of the company of any concealment. The information contained in the report of the company's agent was sufficient to put James upon inquiry.

Ware went to Texas again in 1858, when James, as his agent, made a further examination. This was after A. S. Lipscomb had died. It appears that then, in 1858, the question arose between Ware and James as to the liability of the company to account to the heirs of White for the stock which, it was alleged, was transferred by Lipscomb after the death of White. Thus, in 1858,—23 years before this suit was brought,—the attention of Ware was directed to the point of the liability of the company for any transfers of White's stock made by Lipscomb after White's death. Then the whole matter appears to have been dropped for 11 years, until 1869. At that time Ware had died, and his executor, with Mr. Molton, went to Galveston in the interest of Ware's estate and of his widow, and the question arose as to a claim for the stock against the company.

On June 17, 1873, the firm of Ballinger, Jack & Mott, of Galveston, lawyers at that time employed by the company, wrote to Molton that very careful and thorough examination had satisfied them without doubt that the heirs of David White could not recover against the company for stock improperly transferred to others in the company's books. The matter was then dropped until 1881, when a bargain was made with a land agent of Galveston, to employ counsel and bring a suit, for a contingent interest of one half.

On all these facts the defense of laches is sustained, on the principles established by this court in the cases of Stearns v. Page, 7 How. 819, 829; Moore v. Greene, 19 How. 69, 72; Beaubien v. Beaubien, 23 How. 190; Badger v. Badger, 2 Wall. 87, 94; New Albany v. Burke, 11 Wall. 96, 107; Broderick's Will, 21 Wall. 503, 519; Upton v. Tribilcock, 91 U. S. 45; Sullivan v. Railroad Co., 94 U. S. 806, 811, 812; Godden v. Kimmell, 99 U. S. 201; Wood v. Carpenter, 101 U. S. 135; Hoyt v. Sprague, 103 U. S. 613; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. Rep. 350; Philippi v. Philippe, 115 U. S. 151, 157, 5 Sup. Ct. Rep. 1181; Speidel v. Henrici, 120 U. S. 377, 386, 387, 7 Sup. Ct. Rep. 610; Richards v. Mackall, 124 U. S. 183, 187, 188, 8 Sup. Ct. Rep. 437; Hanner v. Moulton, 138 U. S. 486, 495, 11 Sup. Ct. Rep. 408; Underwood v. Dugan, 139 U. S. 380, 383, 11 Sup. Ct. Rep. 618; Hammond v. Hopkins, 143 U. S. 224, 274, 12 Sup. Ct. Rep. 418.

Within the rules laid down in the cases above cited, there are not in the bill sufficiently distinct averments as to the time when the alleged fraud was discovered, and what the discovery was; nor does the bill or the proof show that the delay was consistent with the requisite diligence. On the evidence in the record, the case stood in March, 1881, when the bill was filed, on no different ground from that on which it stood in 1858, or that on which it stood from 1843, or, in fact, from the date of White's death. Molton married a daughter of the plaintiff Asenath A. Ware, and granddaughter of David White. He testified that in the spring of 1869 he went to Texas as agent of the heirs of David White, especially to examine carefully into the facts of the transfers of the shares of stock which had belonged to White.

Nor is there anything which takes any of the plaintiffs out of the operation of the statutes of limitations of Texas, so as to affect

the question of laches. David White's widow was a feme sole from 1841 to 1853. The plaintiff Lumpkin became of age in 1843, the plaintiff Daniel O. White in 1847, the plaintiff Clement B. White in 1850, the plaintiff Cowles in 1852, and the plaintiff Mary A. Holtzclaw in 1854. Robert J. Ware died in 1867, and his widow, since that time, has been a feme sole. The longest period of limitation for any cause of action in Texas is 10 years.

Decree affirmed.

(146 U. S. 179)

HARDEE et al. v. WILSON.

(November 21, 1892.)

No. 34.

APPEAL—JOINT DECREE—PARTIES—DISMISSAL.

An appeal by one of two codefendants from a joint decree against them will be dismissed, where the record does not show either that the other defendant was notified in writing and failed to appear, or that he appeared and refused to join in the appeal.

Appeal from the circuit court of the United States for the southern district of Georgia. Dismissed.

Wm. D. Harden and C. N. West, for appellants. T. P. Ravenel and Rufus E. Leiter, for appellee.

Mr. Justice SHIRAS delivered the opinion of the court.

It appears by this record that Benjamin J. Wilson filed in the superior court of Washington county, in the state of Georgia, his bill of complaint against James M. Minor, Annie E. Minor, and John L. Hardee, and that the cause was subsequently removed into the circuit court of the United States for the southern district of Georgia. In his bill the complainant charged that a certain conveyance of land, made on the 18th day of March, 1876, by said James M. Minor to himself as trustee for his wife, Annie E. Minor, and a certain other deed of conveyance of the same lands, made on the 6th day of February, 1877, to John L. Hardee, were without consideration, and with the intention of putting said lands beyond the reach of his creditors, and particularly with the intention to delay, hinder, and defraud him, the said complainant, in the collection of a certain judgment in his favor against Minor, and prayed that said deeds might be declared null and void as to his said demand.

Answers were filed to this bill by Hardee, and by Minor and his wife, and the case was so proceeded with that, on the 12th day of December, 1887, a final decree was entered declaring, in effect, that the trust deed in favor of Minor's wife was void, and that the deed to Hardee could only operate as a security for the payment of a certain sum of money found to be due Hardee on an account stated by a master.

From this decree Hardee has appealed, and the question presents itself whether his appeal can be heard in the absence of Minor and his wife, who were codefendants with him in the court below, and who have taken no appeal.

Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. Owings v. Kincannon, 7 Pet. 399; Mussina v. Cavazos, 6 Wall. 355.

In the present case, Hardee, the appellant, complains that the decree below was wrong, as respects him, in two particulars: First, in declaring that the deed, absolute in form, from Minor and wife to him, was merely a security; and, second, if the deed were a security only, in fixing the amount of his debt at too small a sum. And as it was the interest of Minor and wife to have their deed to Hardee held to be a security merely, and also to have the debt thereby secured found as small as possible, particularly as the decree gave them a beneficial interest in the proceeds of the sale of the land ordered by the decree, it was contended that it would be for the interest of Minor and wife to have the decree stand, and that hence Hardee might prosecute his appeal alone.

At the same time it was said that, if this were not so, the Minors had disclaimed any interest. But the disclaimer was nothing more than that the Minors agreed with the position taken by Hardee, which, however, the circuit court held to be untenable. And it further appears that one matter in controversy in the court below was the validity of the deed of trust declared by Minor in favor of his wife, and which deed was declared by the decree in the court below to have been given without consideration, and in fraud of Wilson and other creditors of Minor, and as respects this feature of the decree it was the right of Minor and wife to have taken an appeal. In the case of Masterson v. Herndon, 10 Wall. 416, it was held that "it is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and, in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; (2) that the appellate tribunal shall not be required to decide a second or third time the same question on the same record. In the case of Williams v. Bank, 11 Wheat. 414, the court says that, where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of Todd v. Daniel, 16 Pet. 521, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books,

allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons by which the one who refused to proceed was brought before the court, and, if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment *182 was to bar the party who refused to proceed from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the circuit court for an appeal that Maverick [the codefendant] refused to prosecute the appeal with him. We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice, and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made in permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final, in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested."

In the case of Downing v. McCartney, reported in the appendix to 131 U. S., at page xcviii., where the decree below was joint against three complainants, and one only appealed, and there was nothing in the record *183 showing that the other* complainants had notice of this appeal, or that they refused to join in it, the appeal was therefore dismissed. Mason v. U. S., 136 U. S. 581, 10 Sup. Ct. Rep. 1062, was a case where, a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties appeared and defended. The suit was abated as to two of the sureties, who had died, and the other sureties made default, and judgment of default was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed. In Feibelman v. Packard, 108 U. S. 14, 1 Sup. Ct. Rep. 138, a writ of error was sued out by one of two or more joint defendants, without a summons and severance or equivalent proceeding, and was therefore dismissed.

The state of facts shown by the record brings the present case within the scope of the cases above cited, and it follows that the appeal must be dismissed.

(146 U. S. 183)

COOK v. HART, Sheriff.

(November 21, 1892.)

No. 1,067.

HABEAS CORPUS — DISCRETION OF CIRCUIT COURT — INTERSTATE EXTRADITION — COMITY BETWEEN STATE AND FEDERAL COURTS.

Where a person who had been extradited from Illinois for a violation of a Wisconsin banking law sued out a writ of habeas corpus pending trial in a court of Wisconsin, on the ground that his extradition was in violation of the constitution and laws of United States, it was discretionary with the circuit court to refuse to discharge him, since it was not an urgent case, involving either the authority and operations of the general government, or the obligations of this country to or its relations with foreign nations, and since state courts are, equally with federal courts, charged with the duty of protecting the accused in the enjoyment of his rights under the constitution of the United States. 49 Fed. Rep. 833, affirmed. Ex parte Royall, 6 Sup. Ct. Rep. 734, 117 U. S. 241, followed.

Appeal from the circuit court of the United States for the eastern district of Wisconsin. Affirmed.

Statement by Mr. Justice BROWN: *184

This was an appeal from an order of the circuit court for the eastern district of Wisconsin discharging a writ of habeas corpus, and remanding the petitioner, Charles E. Cook, to the custody of the sheriff of Dodge county, Wis. The facts of the case were substantially as follows:

On March 9, 1891, the governor of Wisconsin made a requisition upon the governor of Illinois for the apprehension and delivery of Cook, who was charged with a violation of section 4541 of the Laws of Wisconsin, which provides that "any officer, director,

* * * manager, * * * or agent of any bank, * * * or of any person, company, or corporation, engaged in whole or in part in banking, brokerage, * * * or any person engaged in such business in whole or in part, who shall accept or receive on deposit, or for safe-keeping, or to loan, from any person, any money * * * for safe-keeping or for collection, when he knows, or has good reason to know, that such bank, company, or corporation, or that such person, is unsafe or insolvent, shall be punished," etc. The affidavits annexed to the requisition tended to show that the petitioner, Cook, and one Frank Leake, in May, 1889, opened a banking office at Juneau, in the county of Dodge, styled the "Bank of Juneau," and entered upon and engaged in a general banking business, with a pretended capital of $10,000, and continued in such business, soliciting and receiving deposits up to and including June 20, 1890, when the bank closed its doors; that during all this time Cook had the general supervision of the business, and was the principal owner of the bank, and all business was transacted by him personally, or by his direction by one Richardson, acting as his agent; that Cook frequently visited the bank, and well knew its condition; that from January 6 to June 20, 1890, Cook, by the inducements and pretenses held out by the bank, received deposits from the citizens of that county to the amount of $25,000; that this was done by the express order and direction of Cook, and such amount appeared upon the books of the bank at the time it failed as due to its depositors; that Cook, while receiving these deposits, drew out of the bank all of its pretended capital stock, if any were ever put in, and also all the deposits, except the sum of $5,048 in money and securities, which was in the bank at the time it closed; that on June 23, 1890, Cook and Leake assigned their property for the benefit of their creditors; that on the 6th of January, 1890, and from that time onward, Cook knew, and had good reason to know, that both he and Leake and the bank were each and all of them unsafe and insolvent; that on June 20, 1890, at about 4 o'clock in the afternoon, the said Cook and Leake accepted and received a deposit in said bank from one Herman Becker to the amount of $175 in money; and that said deposit was received by direction and order of the said Cook, he knowing that said bank was unsafe and insolvent. There was also annexed a complaint setting forth substantially the same facts, and a warrant issued by a justice of the peace for Dodge county for the apprehension of Cook. Upon the production of this requisition, with the documents so attached, the governor of Illinois issued his warrant for the arrest and delivery of Cook to the defendant, as agent of the executive authority of the state of Wisconsin. Cook was arrested by the sheriff of Cook county, Ill., and on the same day, and while still in the custody of the sheriff, procured a writ of habeas corpus from the circuit court of Cook county to test the legality of his arrest. That court, on June 6, 1891, decided that the arrest was legal, remanded Cook to the custody of the sheriff, and he was thereupon delivered to the defendant as executive agent, and conveyed to Wisconsin, where he was examined before the magistrate issuing the warrant, and held to answer the charge. During the September term of the circuit court of that county an information was filed against him, charging him with the offense set out in the original complaint. Upon his application the trial was continued to the term of said court beginning in February, 1892. He appeared, and was arraigned at that term, pleaded not guilty, and the trial was begun, when, and during the pendency of such trial, Cook sued out a writ of habeas corpus from the circuit court of the United States, claiming that his extradition from Illinois to Wisconsin was in violation of the constitution and laws of the United States. It was established upon the hearing, to the satisfaction of the court below, that Cook for some years prior to the 20th day of June, 1890, and for some years prior to his arrest upon the warrant of the executive of Illinois, had been, and still was, a resident of the city of Chicago; that he made occasional visits to Wisconsin in connection with his banking business at Juneau and elsewhere; that he left Chicago on June 17, 1890, and went to Hartford, in the county of Washington, state of Wisconsin, where he spent the whole of the 18th day of June, proceeding thence to Beaver Dam, in the county of Dodge, where he was engaged during the whole of the 19th day of June with business not connected with the Bank of Juneau; that early in the morning of June 20th he left Beaver Dam, and made a continuous journey to Chicago, arriving there at 2 o'clock in the afternoon; and that he did not, on the occasion of that visit to Wisconsin, visit or pass through the village of Juneau, and had not been there for some three weeks prior to the closing of the bank on June 20th. It was also conceded at the hearing that the particular deposit by Herman Becker, charged in the complaint upon which the requisition proceedings were had, was actually made at 4 o'clock in the afternoon of June 20th, and after the petitioner's arrival in Chicago.

Upon the hearing of the writ of habeas corpus, the petitioner was remanded to the custody of the defendant, (49 Fed. Rep. 833,) and thereupon he appealed to this court.

Chas. H. Aldrich, for appellant. W. C. Williams, for appellee.

*Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

Petitioner claims his discharge upon the ground that he is accused of having illegally received a deposit in his bank at Juneau, when in fact he had not been in Juneau within three weeks before the deposit was

received, and that, at the time it was received, which was about 4 o'clock in the afternoon of June 20, 1890, he was in Illinois, and had been in that state for more than two hours before the deposit was received. He had in fact left Beaver Dam, Wis., at an early hour that day, and traveled continuously to Chicago, not stopping at Juneau, and having no actual knowledge of the illegal deposit charged. Upon this state of facts petitioner insists that his journey from Wisconsin to Illinois was not a "fleeing from justice," within the meaning of article 4, § 2, of the constitution; that it is essential to the jurisdiction of the trial court that he should have been a fugitive from justice; and hence that the circuit court of Dodge county was without authority to try him for the offense charged, and he should therefore be relieved from its custody upon this writ of habeas corpus.

We regard this case as controlled in all its essential features by those of Kerr v. Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225, and Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. Rep. 1204. The former case arose upon a writ of error to the supreme court of Illinois. The petitioner had pleaded, in abatement to an indictment for larceny in the criminal court of Cook county, that he had been kidnapped from the city of Lima, in Peru, forcibly placed on board a vessel of the United States in the harbor of Callao, carried to San Francisco, and sent from there to Illinois upon a requisition made upon the governor of California. After disposing of the point that he had not been deprived of his liberty without "due process of law," the court intimated, in reply to an objection that the petitioner was not a fugitive from justice in the state of California, that "when the governor of one state voluntarily surrenders a fugitive from the justice of another state to answer for his alleged offenses, it is hardly a proper subject of inquiry on the trial of the case to examine into the details of the proceedings by which the demand was made by the one state, and the manner in which it was responded to by the other." The court further held that the petitioner had not acquired by his residence in Peru a right of asylum there, a right to be free from molestation for the crime committed in Illinois, or a right that he should only be removed thereto in accordance with the provisions of the treaty of extradition; and winds up the opinion by observing that "the question of how far his forcible seizure in another country, and transfer by violence, force, or fraud to this country, could be made available to resist trial in the state court for the offense now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the constitution or laws or treaties of the United States guaranty him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense. * * * However this may be, the decision of that question is as much within the province of the state court as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States."

The case of Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. Rep. 1204, arose upon an application of the governor of West Virginia to the district court of the United States for the district of Kentucky for the release of Mahon upon a writ of habeas corpus, upon the ground that he had been, while residing in West Virginia, and in violation of her laws, without warrant or other legal process, arrested by a body of armed men from Kentucky, and, by force and against his will, carried out of the state to answer to a charge of murder in the state of Kentucky. As stated in the opinion of the court, the governor "proceeded upon the theory that it was the duty of the United States to secure the inviolability of the territory of the state from a lawless invasion of persons from other states, and, when parties had been forcibly taken from her territory and jurisdiction, to afford the means of compelling their return." This court held that, while the accused had the right, while in West Virginia, of insisting that he should not be surrendered to the governor of Kentucky, except in pursuance of the acts of congress, and was entitled to release from any arrest in that state not made in accordance with them, yet that, as he had been subsequently arrested in Kentucky under the writs issued under the indictments against him, the question was not as to the validity of the arrest in West Virginia, but as to the legality of his detention in Kentucky. "The only question, therefore," said the court, "presented for our determination is whether a person indicted for a felony in one state, forcibly abducted from another state and brought to the state where he was indicted by parties acting without warrant or authority of law, is entitled, under the constitution or laws of the United States, to release from detention under the indictment by reason of such forcible and unlawful abduction." After a full review of all the prior authorities upon the point, the court came to the conclusion that the jurisdiction of the court of the state in which the indictment was found was not impaired by the manner in which the accused was brought before it. "There is, indeed," said the court, "an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another state, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offense charged. They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or be-

cause of indignities committed against another state."

There was a vacancy in the office of chief justice at the time, and two members of the court (Mr. Justice Bradley and Mr. Justice Harlan) dissented upon the ground that the constitution had provided a peaceful remedy for the surrender of persons charged with crime; that this clearly implied that there should be no resort to force for this purpose; that the cases upon which the court relied had arisen where a criminal had been seized in one country and forcibly taken to another for trial, in the absence of any international treaty of extradition; and that, as the application in that case was made by the governor of the state whose territory had been lawlessly invaded, he was entitled to a redelivery of the person charged.

These cases may be considered as establishing two propositions: (1) That this court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one state to that of another, where they are held under process legally issued from the courts of the latter state; (2) that the question of the applicability of this doctrine to a particular case is as much within the province of a state court, as a question of common law or of the law of nations, as it is of the courts of the United States.

An attempt is made to distinguish the case under consideration from the two above cited, in the fact that those were cases of kidnapping by third parties, by means of which the accused were brought within the jurisdiction of the trial state, and the state had not acted, as here, under legal process, or been in any way a party to the proceedings; that they were cases of tort, for which the injured parties could sue the tort feasors, while in the case under consideration the action is under and by virtue of an act of congress, and hence the party can ask this court to inquire whether the power thus invoked was properly exercised. The distinction between cases of kidnapping by the violence of unauthorized persons without the semblance of legal action, and those wherein the extradition is conducted under the forms of law, but the governor of the surrendering state has mistaken his duty, and delivered up one who was not in fact a fugitive from justice, is one which we do not deem it necessary to consider at this time. We have no doubt that the governor upon whom the demand is made must determine for himself, in the first instance, at least, whether the party charged is in fact a fugitive from justice, (Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. Rep. 1148; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. Rep. 291;) but whether his decision thereon be final is a question proper to be determined by the courts of that state. A proceeding of that kind was undertaken in this case when Cook applied to the state circuit court of Chicago to obtain a writ of habeas corpus to test the legality of his arrest. Upon the hearing of this writ the court decided the arrest to be legal, and remanded Cook to the custody of the sheriff, by whom he was delivered to the defendant as executive agent of the state of Wisconsin. Cook acquiesced in this disposition of the case, and made no attempt to obtain a review of the judgment in a superior court. Long after his arrival in Wisconsin, however, and after the trial of his case had begun, he made this application to the circuit court of the United States for that district upon the ground he had originally urged, namely, that he was not a fugitive from justice, within the meaning of the constitution and laws of the United States. That court decided against him, holding that he had been properly surrendered.

It is proper to observe in this connection that, assuming the question of flight to be jurisdictional, if that question be raised before the executive or the courts of the surrendering state, it is presented in a somewhat different aspect after the accused has been delivered over to the agent of the demanding state, and has actually entered the territory of that state, and is held under the process of its courts. The authorities above cited, if applicable to cases of interstate extradition, where the forms of law have been observed, doubtless tend to support the theory that the executive warrant has spent its force when the accused has been delivered to the demanding state; that it is too late for him to object even to jurisdictional defects in his surrender; and that he is rightfully held under the process of the demanding state. In fact it is said by Mr. Justice Miller in Kerr v. Illinois, 119 U. S. 441, 7 Sup. Ct. Rep. 225, that "the case does not stand where the party is in court, and required to plead to an indictment, as it would have stood upon a writ of habeas corpus in California." Some reasons are, however, suggested for holding that, if he were not in fact a fugitive from justice, and entitled to be relieved upon that ground by the courts of the surrendering state, he ought not to be deprived of that right by a forced deportation from its territory before he could have an opportunity of suing out a writ of habeas corpus. That question, however, does not not necessarily arise in this case, since the record before us shows that he did sue out such writ before the criminal court of Cook county, and acquiesced in its decision remanding him to the custody of the officer.

As the defense in this case is claimed to be jurisdictional, and, in any aspect, is equally available in the state as in the federal courts, we do not feel called upon at this time to consider it, or to review the propriety of the decision of the court below. We adhere to the views expressed in Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734, and Ex parte Fonda, 117 U. S. 516, 6 Sup. Ct. Rep. 848, that, where a person is in custody under process from a state court of original jurisdiction for an alleged offense against the laws of that state, and it is claimed that he is restrained of his liberty in violation of the con-

stitution of the United States, the circuit court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted, although this discretion will be subordinated to any special circumstances requiring immediate action. While the federal courts *195 have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the federal constitution or laws, they are not bound to exercise such power even after a state court has finally acted upon the case, but may, in their discretion, require the accused to sue out his writ of error from the highest court of the state, or even from the supreme court of the United States. As was said in Robb v. Connolly, 111 U. S. 624, 637, 4 Sup. Ct. Rep. 544: "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." We are unable to see in this case any such special circumstances as were suggested in the case of Ex parte Royall as rendering it proper for a federal court to interpose before the trial of the case in the state court. While the power to issue writs of habeas corpus to state courts which are proceeding in disregard of rights secured by the constitution and laws of the United States may exist, the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are, equally with the federal courts, charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired. So far from there being special circumstances in this case to show that the federal court ought to interfere, the fact that, with ample opportunity to do so, he did not apply for this writ until after the jury had been sworn and his trial begun in the state court, is of itself a special circumstance to indicate that the federal court should not interpose at this time.

The judgment of the court below refusing the discharge is therefore affirmed.

(146 U. S. 202)

SOUTHERN PAC. CO. v. DENTON.

(November 21, 1892.)

No. 403.

JURISDICTION OF FEDERAL COURTS — DISTRICT OF RESIDENCE — FOREIGN CORPORATIONS — STATE PRACTICE.

1. Under the judiciary act of March 3, 1887, as corrected by the act of August 13, 1888, when federal jurisdiction depends on diverse citizenship, a corporation cannot be sued in a state or district merely because it is doing business there, but suit can only be maintained in the state of its incorporation or in the district of plaintiff's residence. Shaw v. Mining Co., 12 Sup. Ct. Rep. 935, 145 U. S. 444, followed.

2. Gen. Laws Tex. 1887, p. 116, requires a foreign corporation, as a condition precedent to doing business in the state, to file in the secretary of state's office a resolution of its directors authorizing service of process on its agents in the state, and requesting the issuance of a permit to do business therein, with a stipulation that such permit shall be subject to "each of the provisions of this act." One of these provisions is that the permit shall be void if the corporation removes any case from a state to a federal court on the ground of nonresidence or local prejudice. *Held*, that the act is void as requiring a surrender of rights secured by the constitution and laws of the United States, and the filing of such a request by a foreign corporation does not change its residence so as to give jurisdiction to a federal court in a district of the state where plaintiff does not reside.

3. Where the want of jurisdiction in a federal court is apparent on the face of the petition, it may be taken advantage of by demurrer.

4. Rev. St. Tex. 1879, arts. 1241–1244, providing that any appearance in behalf of defendant, though in terms limited to the purpose of objecting to the jurisdiction, shall constitute a waiver of objection to the jurisdiction on the ground of nonresidence, are not rendered applicable to the federal courts by Rev. St. U. S. § 914, which requires the forms of procedure to conform "as nearly as may be" to the state practice; and such an appearance in a federal court constitutes no waiver of the jurisdictional question.

In error to the circuit court of the United States for the western district of Texas. Reversed.

J. Hubley Ashton, for plaintiff in error.
D. A. McKnight, for defendant in error.

*203 *Mr. Justice GRAY delivered the opinion of the court.

This was an action brought January 29, 1889, in the circuit court of the United States for the western district of Texas, against the Southern Pacific Company, by Elizabeth Jane Denton, to recover damages to the amount of $4,970, for the death of her son, by the defendant's negligence, near Paisano, in the county of Presidio, on January 31, 1888. The petition alleged that "the plaintiff is a citizen of the state of Texas, and resides in the county of Red River, in said state; that the defendant is a corporation duly incorporated under the laws of the state of Kentucky, is a citizen of the state of Kentucky, and is and at the institution of this suit was a resident of El Paso county, in the state of Texas;" that at the day aforesaid, and ever since, "the defendant was and is engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Tex., into and through the counties of El Paso and Presidio and the city of San Antonio, all of the state of Texas; that the defendant is now doing business as aforesaid, and has an agent for the transaction of its business in the city and county of El Paso, Tex., to wit, W. E. Jessup." The

county of Red River is in the eastern district, and the counties of El Paso and Presidio, as well as the county of Bexar, in which is the city of San Antonio, are in the western district, of Texas. Act Feb. 24, 1879, c. 97, §§ 2, 3, (20 St. p. 318.)

The defendant, by leave of court, filed "an answer or demurrer," "for the special purpose, and no other, until the question herein raised is decided, of objecting to the jurisdiction of this court," demurring and excepting to the petition because, upon the allegations above quoted, "it appears that this suit ought, if maintained at all in the state of Texas, to be brought in the district of the residence of the plaintiff, that is to say, in the eastern district of Texas; and the defendant prays judgment whether this court has jurisdiction, and it asks to be dismissed, with its costs; but, should the court overrule this demurrer and exception, the defendant then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer."

The court overruled the demurrer, and allowed a bill of exceptions tendered by the defendant, which stated that the defendant by the demurrer raised the question of the jurisdiction of the court; "and that the court having inspected the same, as well as the pleadings of the plaintiff, and it appearing therefrom that the plaintiff is alleged to be a citizen of Texas, residing in Red River county, in the eastern judicial district of said state, and that the defendant is a corporation created and existing under and by virtue of the laws of Kentucky, and is a citizen of that state, but operating a line of railway, doing business in, and having an agent on whom process may be served in, the county and judicial district in which this suit is pending, and the court, being of opinion that the facts alleged show this cause to be in the district of the residence of the defendant, and that it ought to take cognizance of the same, overruled said demurrer."

The defendant, after its demurrer had been overruled, answered to the merits, and a trial by jury was had, resulting in a verdict and judgment for the plaintiff in the sum of $4,515. The defendant, on May 10, 1890, sued out this writ of error on the question of jurisdiction only, under the act of February 25, 1889, c. 236, (25 St. p. 693.) The plaintiff has now moved to dismiss the writ of error or to affirm the judgment, and the motion has been submitted on briefs under rules 6 (3 Sup. Ct. Rep. vi.) and 32 (Id. xvi.) of this court.

By the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, "no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 St. p. 552; 25 St. p. 434.

*205 *This is a case "where the jurisdiction is founded only on the fact that the action is between citizens of different states." The question whether under that act the circuit court of the United States for the western district of Texas had jurisdiction of the case is a question involving the jurisdiction of that court, which this court is empowered, by the act of February 25, 1889, c. 236, to review by writ of error, although the judgment below was for less than $5,000.

The allegations made in the petition, and admitted by the demurrer, bearing upon this question, are that the plaintiff was a citizen of Texas, and resided in the eastern district thereof, and that the defendant was a corporation incorporated by the law of Kentucky and a citizen of that state, and was a resident of the western district of Texas, doing business and having an agent in this district. The necessary legal effect of these allegations is that the defendant was a corporation and a citizen of Kentucky only, doing business in the western district of Texas; and consequently could not be compelled to answer to an action at law in a circuit court of the United States, except either in the state of Kentucky, in which it was incorporated, or in the eastern district of Texas, in which the plaintiff, a citizen of Texas, resided. It has long been settled that an allegation that a party is a "resident" does not show that he is a "citizen," within the meaning of the judiciary acts; and to hold otherwise in this case would be to construe the petition as alleging that the defendant was a citizen of the same state with the plaintiff, and thus utterly defeat the jurisdiction. The case is governed by the decision of this court at the last term, by which it was adjudged that the act of 1887, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires an action at law, the jurisdiction of which is founded only upon its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident; and that a corporation cannot, for this purpose, be considered a citizen or a resident of a state in which it has not been incorporated. Shaw v. Mining Co., 145 U. S. 444, 449, 453, 12 Sup. Ct. Rep. 935.

*206 *It may be assumed that the exemption from being sued in any other district might be waived by the corporation, by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction. Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. Rep. 982; Railway Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

But in the present case there was no such waiver. The want of jurisdiction, being ap-

parent on the face of the petition, might be taken advantage of by demurrer, and no plea in abatement was necessary. Coal Co. v. Blatchford, 11 Wall. 172. The defendant did file a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed. Neither the special appearance for the purpose of objecting to the jurisdiction, nor the answer to the merits after that objection had been overruled, was a waiver of the objection. The case is within the principle of Harkness v. Hyde, in which Mr. Justice Field, speaking for this court, said: "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived." 98 U. S. 476, 479.

The case at bar is not affected by either of the statutes of Texas on which the counsel for the defendant in error relies.

He contends that the plaintiff in error had consented to be sued in the western district of Texas by doing business and appointing an agent there under the statute of Texas of 1887, c. 128, requiring a foreign corporation, desiring to transact business in the state, "to file with the secretary of state a certified copy of its articles of incorporation, duly attested, *207 accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state, said application to contain a stipulation that said permit shall be subject to each of the provisions of this act," one of which was that any foreign corporation sued in a court of the state, which should remove the case into a court of the United States held within the state, "for the cause that such corporation is a nonresident of this state or a resident of another state from that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or granted to such corporation to transact business in this state." Gen. Laws Tex. 1887, pp. 116, 117.

But that statute requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. Rep. 931; Land Co. v. Worsham, 76 Tex. 556, 13 S. W. Rep. 384. Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the state. It did not undertake to declare the corporation to be a citizen of the state, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the state. Insurance Co. v. French, 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the state, so long as the judiciary acts of the United States allowed it to be sued in the district in which it was found. Ex parte Schollenberger, 96 U. S. 369; Insurance Co. *208 v. Woodworth, 111 U. S. 138, 4 Sup. Ct. Rep. 364; In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. Rep. 587. But such an agreement could not, since congress (as held in Shaw v. Mining Co., above cited) has made citizenship of the state, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up noncompliance with that test, when sued in a circuit court of the United States.

It is further contended, on behalf of the defendant in error, that the case is controlled by those provisions of the statutes of Texas which make an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of nonresidence; and which have been held by this court not to violate the fourteenth amendment of the constitution of the United States, forbidding any state to deprive any person of life, liberty, or property without due process of law. Rev. St. Tex. 1879, arts. 1241–1244; York v. State, 73 Tex. 651, 11 S. W. Rep. 869; nom. York v. Texas, 137 U. S. 15, 11 Sup. Ct. Rep. 9; Kauffman v. Wootters, 138 U. S. 285, 11 Sup. Ct. Rep. 298; Railway Co. v. Whitley, 77 Tex. 126, 13 S. W. Rep. 853; Insurance Co. v. Hanna, 81 Tex. 487, 17 S. W. Rep. 35.

But the question in this case is not of the validity of those provisions as applied to actions in the courts of the state, but whether they can be held applicable to actions in the courts of the United States. This depends on the true construction of the act of congress, by which "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing

at the time in like causes in the courts of record of the state within which such circuit or district courts are held." Rev. St. § 914; Act June 1, 1872, c. 255, § 5; 17 St. p. 197.

In one of the earliest cases that arose under this act, this court said: "The conformity is required to be 'as near as may be,'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose: It devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." Railroad Co. v. Horst, 93 U. S. 291, 300, 301.

Under this act, the circuit courts of the United States follow the practice of the courts of the state in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defenses on the merits shall be pleaded successively or together. Delaware County Com'rs v. Diebold Safe Co., 133 U. S. 473, 488, 10 Sup. Ct. Rep. 399; Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. Rep. 781. But the jurisdiction of the circuit courts of the United States has been defined and limited by the acts of congress, and can be neither restricted nor enlarged by the statutes of a state. Toland v. Sprague, 12 Pet. 300, 328; Cowles v. Mercer Co., 7 Wall. 118; Railway Co. v. Whitton, 13 Wall. 270, 286; Phelps v. Oaks, 117 U. S. 236, 239, 6 Sup. Ct. Rep. 714. And whenever congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter. Ex parte Fisk, 113 U. S. 713, 721, 5 Sup. Ct. Rep. 724; Whitford v. Clark Co., 119 U. S. 522, 7 Sup. Ct. Rep. 306.

The acts of congress, prescribing in what districts suits between citizens or corporations of different states shall be brought, manifest the intention of congress that such suits shall be brought and tried in such a district only, and that no person or corporation shall be compelled to answer to such a suit in any other district. Congress cannot have intended that it should be within the power of a state by its statutes to prevent a defendant, sued in a circuit court of the United States in a district in which congress has said that he shall not be compelled to answer, from obtaining a determination of that matter by that court in the first instance, and by this court on writ of error. To conform to such statutes of a state would "unwisely incumber the administration of the law," as well as "tend to defeat the ends of justice," in the national tribunals. The necessary conclusion is that the provisions referred to, in the practice act of the state of Texas, have no application to actions in the courts of the United States.

Judgment reversed, and case remanded, with directions to render judgment for the defendant upon the demurrer to the petition.

(146 U. S. 153)

ROBY v. COLEHOUR et al.

(November 7, 1892.)

Nos. 987–990.

SUPREME COURT—JURISDICTION—ERROR TO STATE COURT—FEDERAL QUESTION—JUDGE'S CERTIFICATE—BANKRUPTCY—ASSIGNEE'S SALE.

1. In a suit in a state court to set aside a deed from plaintiff to defendant, and to have plaintiff declared the owner of the equity of redemption in the lands, it appeared that defendant, while holding the legal title, was declared a bankrupt, and conveyed the lands to his assignee, and that he again purchased the same at the assignee's sale. In his pleadings and proofs defendant claimed that by this purchase he acquired the lands free from any rights plaintiff might have had therein before such sale. The court held that defendant was a trustee for plaintiff, and entered a decree accordingly, which was affirmed by the state supreme court. *Held* that, although it did not appear from the opinions rendered that either court formally passed on any federal question, yet that the necessary effect of the decree was to deny a right claimed under the authority of the United States, and the question as to the effect of the bankruptcy sale was therefore reviewable by the United States supreme court.

2. The certificate of the chief justice of a state court, showing that a right claimed under the federal constitution, laws, or authority was denied by the decision of that court, cannot of itself give jurisdiction to the supreme court of the United States on a writ of error, but it may be considered for the purpose of rendering more certain and specific a federal question which was raised on the record in general and indefinite terms.

3. A person holding the legal title to lands, but bound under a deed of trust to account to third persons for specific interests therein, conveyed the same to his assignee in bankruptcy. No issues were framed or determined in the bankruptcy court as between the assignee and such third persons, and at the assignee's sale the bankrupt repurchased the lands. *Held*, that the sale did not divest the interests of the third persons, but the bankrupt took the lands still burdened with the trust.

In error to the supreme court of the state of Illinois. Motion to dismiss overruled, and judgment affirmed.

Statement by Mr. Justice HARLAN:

The principal facts appearing upon the present motion to dismiss these writs of error for want of jurisdiction in this court, or to affirm the decrees, are as follows:

By deed of date July 18, 1871, Henry F. Clarke and others conveyed to William H. Colehour certain lands in Cook county, Ill., embracing those here in dispute, subject to a mortgage for $4,000, held by Mary P. M. Palmer. The sum of $10,000 was paid in cash, and the grantee executed his notes, aggregating $86,000, for the balance of the purchase money; and, for the purpose of securing them, executed a deed conveying the lands to V. C. Turner in trust. William Hansbrough, Charles W. Colehour, Wesley Morrill, and Francis M. Corby were inter-

ested in the profits to be derived from their sale. Hansbrough sold and assigned his interest to Charles W. Colehour and Edward Roby, and Charles W. Colehour acquired the interests of Corby and Morrill. Roby executed to Hansbrough his notes for $4,400, and subsequently paid them. The Colehours and Roby made an arrangement for subdividing and selling the property. That arrangement was evidenced by a written declaration of trust made by William H. Colehour in October, 1873, which Charles W. Colehour and Edward Roby accepted, and by which it was provided, among other things, that, after the payment of all sums due on the notes secured
*155 on the land, and all moneys advanced for its development, Roby should be entitled to one fourth, Charles W. Colehour to one half, and William H. Colehour to one fourth, of the net profits. Subsequently, a part of the land was subdivided and improved by grading streets, making ditches, etc., and a part sold, freed from the lien created by the deed of trust given to Turner.

It may be here stated that another writing was produced, bearing date August 16, 1873, and purporting to be a declaration of trust with respect to this property.

Charles W. Colehour, September 22, 1876, released and conveyed to William H. Colehour all his right, title, and interest in certain lands, including those here in controversy; and subsequently, August 30, 1878, filed his petition in bankruptcy, showing debts to the amount of over $800,000. Having been adjudged a bankrupt, he conveyed his property and interests of every kind, according to the course and practice of the court, to an assignee in bankruptcy; and thereafter—the answer of Roby in the principal case alleges—"said Charles W. Colehour had no right or interest therein." The same answer, referring to this petition in bankruptcy, further states: "Said Charles W. Colehour having in 1876, for a sufficient and valuable consideration, conveyed all his interest in and to said land and all claims thereon to said William H. Colehour, and having no interest in said land, or the proceeds thereof, or in the title in said William H. Colehour, did not mention the same, or any part thereof, in his inventory filed in said district court of the United States in such proceeding in bankruptcy; and said Charles W. Colehour had not, at said date, to wit, on the 30th day of August, 1878, any right, title, or interest in or to, or claim on, said lands, or any of the proceeds thereof."

Roby, August 31, 1878, filed his petition in bankruptcy. Having been adjudged a bankrupt, he conveyed, September 7, 1878, all his assets to his assignee, and afterwards, November 23, 1880, was discharged from all debts and claims provable against his estate existing on the day his petition in bankruptcy was filed.

On the 1st day of May, 1879, William H.
*156 Colehour executed to Charles W. Colehour a deed covering the lands in dispute, subject to the terms of certain declarations of trust which the grantor had previously made.

On the 30th of January, 1890, Charles W. Colehour brought a suit in equity (the principal one of the above cases) in the circuit court of Cook county, Ill., against Edward Roby and William H. Colehour. For the purposes of the present hearing it is only necessary to state that the theory of the bill was that Roby, by fraud, and in violation of his obligations as attorney for the plaintiff, and the defendant William H. Colehour, had acquired, at execution sales and otherwise, the legal title to the lands in dispute, embraced by the deed of trust of October, 1873; and that, if not barred in equity by his acts and conduct from claiming any interest in them, he was entitled to only one quarter of the net profits after all debts and liens against them were paid. The relief prayed was a decree declaring a certain deed from W. H. Colehour to Roby to be void, and that it be set aside as a cloud upon the title of the plaintiff and W. H. Colehour; that a receiver be appointed, to whom should be conveyed the titles claimed by the respective parties; that the lands be sold, and the proceeds held subject to the final decree in the cause; that the plaintiff and W. H. Colehour be decreed to be the owners of the equity of redemption; and that such other relief be given as was agreeable to equity.

The defendants answered the bill, and W. H. Colehour filed a cross bill for a decree establishing the interests of the parties to be one fourth in Roby and W. H. Colehour, each, and one half in Charles W. Colehour.

In his answer to the original bill, which stood as his answer to the cross bill, Roby denied that he had acted in bad faith, or that the relation of attorney and client existed between him and the Colehours, or either of them, at the time he purchased the lands in dispute. Referring to the proceedings in bankruptcy against him, his answer alleged that after the 31st day of August, 1878,—the date of the filing of his petition in bankruptcy,—"to wit, on the 4th day of February, A. D. 1882, the assignee in bankruptcy of this defendant sold the assets of this defendant, including all his interest derived
*157 *under the said declarations of trust, unto* this defendant, and duly assigned and conveyed the same, including all interest in the said lands embraced in said declarations of trust from said William H. Colehour to this defendant, and said sale was duly approved and made absolute by the said district court; and from thenceforward this defendant has been the owner of said declaration of trust from said William H. Colehour to this defendant, and also of an undivided half of the said declaration of trust from said William H. Colehour to William Hansbrough, and of all interests and claims arising under the same, or either of them."

The court, while acquitting Roby of any actual or intentional fraud, held that, consistently with the relations existing between

him and the Colehours, he could not, at the time of acquiring the titles under which he claims, buy the lands, and hold them adversely to those jointly interested with him. Judge Tuley, delivering the opinion of the circuit court of Cook county, said: "The law will hold Mr. Roby to be a trustee for the Colehours—for C. W. Colehour to the extent of one half, and W. H. Colehour one quarter—of all the property so purchased by him under or through such judgment proceedings; he, however, to be refunded the moneys which he has paid therefor. He cannot hold the property, because he must be treated as acquiring it while the relation of attorney and client existed."

A decree in accordance with these views was entered, appointing a receiver of the property, requiring Roby, William H. Colehour, and Charles W. Colehour to convey to him all the titles to the lands respectively acquired or held by them, etc.

At the same time the court dismissed for want of equity certain suits—three of the suits mentioned in the title to this opinion—which Roby had instituted for the recovery of part of the lands under the titles which, as stated, he had acquired by purchase at execution sales and otherwise. These suits had been previously consolidated with the suit just above mentioned, brought by Charles W. Colehour.

*153 Upon appeal to the supreme court of Illinois, the decrees of the circuit court of Cook county were affirmed. 25 N. E. Rep. 777. The several cases have been brought here for review upon writs of error. In the record is a certificate of the chief justice of the supreme court of Illinois, in which it was stated that the court decided:

(1) That, in opposition to the contention of Roby, the proceedings whereby he was adjudged a bankrupt and discharged from his obligations, etc., "did not operate in law or equity to discharge said Roby from all his obligations, liabilities, duties, and trusts with respect to and growing out of his interest in said lands and of his relations to said parties."

(2) That Roby claimed and insisted that under and by virtue of the provisions of the laws of the United States he, as purchaser from his assignee in bankruptcy, took such interest as a stranger, free and clear from any duties or obligations or connections existing, prior to his petition in bankruptcy, between him and the Colehours, or either of them; and that the above deed of May 1, 1879, was void, both as to his assignee in bankruptcy and to him as purchaser from such assignee, and passed no right to Charles W. Colehour; "but this court [the supreme court of Illinois] decided against all the said claims so made by said Roby, and also decided that such deed was and is valid against said assignee in bankruptcy, and against said Roby as purchaser from such assignee."

(3) That Roby insisted that by the proceedings in bankruptcy against Charles W. Colehour the latter was divested of all interest in and claims upon the lands in his present bill mentioned, or the profits thereof, and of all interest in common with W. H. Colehour, or either of them; and that he, Roby, was by operation thereof exempted from all claims of Charles W. Colehour, and from his suit on account of said land, and that the necessary effect of such record and proceedings in bankruptcy was that he was not chargeable to Charles W. Colehour; "but this court," the certificate of the chief justice proceeds, "in considering the law and facts of the cases, decided against the claims of said Roby so pleaded, claimed, and insisted on, and decided that such was not the legal operation and effect of such proceedings, and that Charles W. Colehour had a right to sue upon said instrument dated May 29, 1873, [being a power of attorney from William H. to Charles W. Colehour;] that said deed dated May 1, 1879, was and is valid as against said assignee in bankruptcy and against said Roby as purchaser from said assignee, and gives said Charles W. Colehour the right to defend the first three above-entitled cases against said Roby, and to prosecute the fourth against said Roby, and to claim and enforce all rights of partner, trustee, and cotenant against said assignee in bankruptcy of said Roby and against said Roby as purchaser from such assignee."

*154

John M. Palmer, for plaintiff in error. H. S. Monroe and W. C. Goudy, for defendants in error.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

Has this court jurisdiction to review the decree in these consolidated causes under the statute (Rev. St. § 709) providing that "a final judgment or decree in any suit in the highest court of a state, where any title, right, privilege, or immunity is claimed under the constitution or any * * * authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution * * * or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error?"

This question is a close one. But, although it does not appear from the opinion of the court of original jurisdiction or the opinion of the supreme court of Illinois that either court formally passed upon any question of a federal nature, the necessary effect of the decree was to determine, adversely to Roby, the rights and immunities claimed by him in the pleadings and proof under the proceedings in bankruptcy, to which reference has been made. We must not be understood as holding that the certificate from the chief justice of the latter court is, in itself, and without reference to the record, sufficient to confer jurisdiction upon this court to re-

examine the judgment below. Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the
160 right, so set up and claimed, was expressly
* denied, or that such was the necessary effect in law of the judgment. Parmelee v. Lawrence, 11 Wall. 36, 38; Brown v. Atwell, 92 U. S. 327, 329; Gross v. Mortgage Co., 108 U. S. 477, 485, 2 Sup. Ct. Rep. 940; Felix v. Scharnweber, 125 U. S. 54, 59, 8 Sup. Ct. Rep. 759. The present case may be held to come within this rule. In view of the certificate by the chief justice of the state court, the office of which, as said in Parmelee v. Lawrence, was, as respects the federal question, "to make more certain and specific what is too general and indefinite in the record," we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the federal rights which that certificate states were claimed by Roby, but were withheld, and were intended to be withheld, from him by the court.

While the motion to dismiss must, therefore, be overruled, yet, as there was color for it, we must inquire whether the questions on which jurisdiction depends are such as, in the language of our rule, (6,) not to need further argument. We are of opinion that they are of that class. When Charles W. Colehour was adjudged a bankrupt he does not appear to have held any interest in the lands now in controversy. The answer of Roby distinctly states that he, Charles W. Colehour, in 1876, for a sufficient and valuable consideration, conveyed all his interest to W. H. Colehour, and had no interest in said lands at the date of his petition in bankruptcy, filed in 1878. The decree is evidently based, so far as Charles W. Colehour is concerned, upon the deed to him by William H. Colehour, executed in 1879, although the respective interests of the parties were established with reference to the declaration of trust made in October, 1873. There is consequently no ground upon which to rest the contention that Charles W. Colehour had any interest or right in the lands that passed to his assignee in bankruptcy.

Equally without force is the contention that the adjudication of Roby to be a bankrupt, followed by his conveyance to his assignee in bankruptcy, and his purchase from
161 such assignee, had any effect upon the rights
* of William H. Colehour or Charles W. Colehour. The respective interests of Roby and the Colehours in the lands at the date of Roby's bankruptcy could have been determined in a suit or proceeding to which they and Roby's assignee in bankruptcy were parties, so that the purchaser at the assignee's sale would have acquired a title discharged from any claim upon them by either of the Colehours. But it does not appear that any such was brought, or that the conflicting interests of the parties were determined as between them, or either of them, and Roby's assignee in bankruptcy. Roby's claim is that his purchase of the lands from his assignee in bankruptcy, the legal title to which was in him, of record, discharged him from all obligation to recognize any claim, upon the part of either of the Colehours, arising out of the relations existing between them and him prior to his bankruptcy. If, at the time of filing his petition in bankruptcy, he was bound by his relations to the Colehours, although holding the legal title, to account to them for their portions of the lands, as defined in any previous declaration of trust to which he was a party, or to which he assented, or by which he was bound, he was not discharged from that obligation by merely purchasing the lands from his assignee in bankruptcy. It does not appear that any issue was framed and determined in the bankruptcy court as between him or his assignee and the Colehours. The conveyance to his assignee passed to the latter only such interest as he in fact had, and when he bought from the assignee he purchased only such as he could rightfully have conveyed originally to his assignee. If, before he went into bankruptcy, the Colehours had any interest in the lands which they could assert as between themselves and him, he could not, by simply purchasing it from his assignee, acquire an absolute title, freed from their claim. We are of opinion that the proceedings in bankruptcy against Roby, and the purchase from his assignee, did not defeat the claims now asserted by the Colehours in these lands, and which were recognized by the decree below.

Whether such relations in fact existed between the Colehours and Roby as prevented him, consistently with those relations, from
162 purchasing the lands for himself,—in other
* words, whether he was the attorney of the Colehours when he acquired the legal title,—or whether, upon principles of equity, Roby should be deemed to have acquired the title for them and himself, subject to the declaration of trust referred to in the pleadings and decree, are not questions of a federal nature. The decree below, in respect to those matters, is not subject to re-examination by this court. The federal questions having been decided correctly, and those questions being such as not to need any further argument beyond that presented in the briefs of counsel, the decree in each of the cases must be affirmed.

It is so ordered.

(146 U. S. 140)

MATTOX v. UNITED STATES.

(November 14, 1892.)

No. 1,008.

MURDER — DYING DECLARATIONS — NEW TRIAL — AFFIDAVITS OF JURORS — APPEAL.

1. On a motion for a new trial in a murder case, it was error to exclude the affidavits of

jurors that a bailiff remarked, in the presence of the jury, that this was the third person defendant had killed; and that a newspaper printed after the jury retired was introduced into the jury room, and an article read therefrom to the jury stating that defendant had been tried for his life once before, that the evidence against him was claimed to be very strong, that the argument of the prosecution was such that defendant's friends gave up all hope, and that the jury's deliberations would probably not last over an hour.

2. On a motion for a new trial, jurors may testify as to any fact showing the existence of an extraneous influence, but they cannot give evidence as to the effect which such influence had on their minds, or as to the motives and influences generally which affected their deliberations.

3. While the granting or refusing of a new trial is in the sound discretion of the federal courts, and not subject to review, yet, on a motion for a new trial, the action of the court in rejecting the affidavits of jurors as to the existence of an extraneous influence is not within that discretion, and is reviewable on writ of error.

4. On a trial for murder, when there is admitted without objection, as a dying declaration, a statement by deceased that he did not know who shot him, it is error to exclude evidence of a further statement, made immediately afterwards, that he saw the parties who shot him, and that defendant was not among them.

In error to the district court of the United States for the district of Kansas. Reversed.

Statement by Mr. Chief Justice FULLER:

*141 *This was an indictment charging Clyde Mattox with the murder of one John Mullen, about December 12, 1889, in that part of the Indian Territory made part of the United States judicial district of Kansas by section 2 of the act of congress of January 6, 1883, (22 St. p. 400, c. 13,) entitled "An act to provide for holding a term of the district court of the United States at Wichita, Kansas, and for other purposes."

Defendant pleaded not guilty, was put upon his trial, October 5, 1891, and on the 8th of that month was found guilty as charged, the jury having retired on the 7th to consider of their verdict. Motions for a new trial and in arrest of judgment were severally made and overruled, and Mattox sentenced to death. This writ of error was thereupon sued out.

The evidence tended to show that Mullen was shot in the evening between 8 and 9 o'clock, and that he died about 1 or 2 o'clock in the afternoon of the next day; that three shots were fired and three wounds inflicted; that neither of the wounds was necessarily fatal, but that the deceased died of pneumonia produced by one of them described as "in the upper lobe of the right lung, entering about two or three inches above the right nipple, passing through the upper lobe of the right lung, fracturing one end of the fourth rib, passing through and lodging beneath the skin on the right side beneath the shoulder blade." The attending physician, who was called a little after 9 o'clock and remained with the wounded man until about 9 o'clock in the morning, and visited him again between 8 and 9 o'clock, testified that Mrs. Hatch, the mother of Clyde Mattox, was present at that visit; that he regarded Mullen's recovery as hopeless; that Mullen, being "perfectly conscious" and "in a normal condition as regards his mind," asked his opinion, and the doctor said to him: "The chances are all against you; I do not think there is any show for you at all." The physician further testified, without objection, that, after he had informed Mullen as to his physical condition, he asked him as to who shot him, and he replied "he didn't have any knowledge of who shot him. I interrogated him about three times in regard to that,—who did the shooting,—and he didn't know." Counsel for defendant, after a colloquy with the court, propounded the following question: "Did or did not John Mullen, in your presence and at that time, say, in reply to a question of Mrs. Hatch, 'I know your son, Clyde Mattox, and he did not shoot me; I saw the parties who shot me, and Clyde was not one of them?'" This question was objected to as incompetent, the objection sustained, and defendant excepted. Counsel also propounded to Mrs. Hatch this question: "Did or did not John Mullen say to you, on the morning you visited him, and after Dr. Graham had told him that all the chances for life were against him, 'I know Clyde Mattox, your son, and he was not one of the parties who shot me?'" This was objected to on the ground of incompetency, the objection sustained, and defendant excepted.

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In support of his motion for new trial, the defendant offered the affidavits of two of the jurors that the bailiff who had charge of the jury in the case after the cause had been heard and submitted, "and while they were deliberating of their verdict," "in the presence and hearing of the jurors or a part of them, speaking of the case, said: 'After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him.' And at another time, in the presence and hearing of said jury or a part of them, referring to the defendant, Clyde Mattox, said: 'This is the third fellow he has killed.'" The affidavit of another juror to the same effect, in respect of the remark of the bailiff as to Thompson, was also offered, and, in addition, the affidavits of eight of the jurors, including the three just mentioned, "that after said cause had been submitted to the jury, and while the jury were deliberating of their verdict, and before they had agreed upon a verdict in the case, a certain newspaper printed and published in the city of Wichita, Kan., known as 'The Wichita Daily Eagle,' of the date of Thursday morning, October 8, 1891, was introduced into the jury room; that said paper contained a comment upon the case under consideration by said jury, and that said comment upon said case so under consideration by said jury was read to the jury in their presence and hearing; that the comment so read to said jury is found upon the fifth page of said paper, and in the third column of said page, and is as follows:

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"'The Mattox Case—The Jury Retired at Noon Yesterday and is Still Out. The destiny of Clyde Mattox is now in the hands of the twelve citizens of Kansas composing the jury in this case. If he is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or, at least, appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict. The hour passed, and nine more of them with it, and still a verdict was not reached by 10:30 last night, when the jury adjourned and went to their rooms at the Carey. Col. Johnson, of Oklahoma city, defended him, and made an excellent speech in his behalf to the jury. Mr. Ady also made a fine speech, and one that was full of argument and replete with the details of the crime committed, as gathered from the statements of witnesses. The lawyers who were present and the court officers also agree that it was one of the best and most logical speeches Mr. Ady ever made in this court. It was so strong that the friends of Mattox gave up all hope of any result but conviction. Judge Riner's instructions to the jury were very clear and impartial, and required nearly half an hour for him to read them. When the jury filed out, Mattox seemed to be the most unconcerned man in the room. His mother was very pale, and her face indicated that she had but very little hope. She is certainly deserving of a good deal of credit, for she has stuck by her son, as only a mother can, through all his trials and difficulties, and this is not the first one by any means, for Clyde has been tried for his life once before. He is a youthful looking man of light build, a beardless face, and a nervous disposition. The crime for which he has just been tried is the killing of a colored man in Oklahoma city over two years ago. Nobody saw him do the killing, and the evidence against him is purely circumstantial, but very strong, it is claimed by those who heard all the testimony.'"

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The bill of exceptions states that these affidavits and a copy of the newspaper referred to "were offered in open court by the defendant in support of his motion for a new trial, and by the said district court excluded; to which ruling the defendant, by his counsel, then and there excepts and still excepts." And the defendant excepted to the overruling of his motions for new trial and in arrest of judgment.

J. W. Johnson, for plaintiff in error. Asst. Atty. Gen. Maury, for the United States.

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Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error, (Henderson v. Moore, 5 Cranch, 11; Newcomb v. Wood, 97 U. S. 581;) but in the case at bar the district court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken, and the question of admissibility thereby preserved.

It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one and read from the other.

In U. S. v. Reid, 12 How. 361, 366, affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence on their verdict. Mr. Chief Justice Taney, delivering the opinion of the court, said: "The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution, but cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument; because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict." The opinion thus indicates that public policy, which forbids the reception of the affidavits, depositions, or sworn statements of jurors to impeach their verdicts, may, in the interest of justice, create an exception to its own rule, while at the same time the necessity of great caution in the use of such evidence is enforced.

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There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

This distinction is thus put by Mr. Justice Brewer, speaking for the supreme court of Kansas in Perry v. Bailey, 12 Kan. 539, 545: "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to produce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowl-

edge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict,—an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one."

The subject was much considered by Mr. Justice Gray, then a member of the supreme judicial court of Massachusetts, in Woodward v. Leavitt, 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced "that, on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors, as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." See, also, Ritchie v. Holbrooke, 7 Serg. & R. 458; Chews v. Driver, 1 N. J. Law, 166; Nelms v. State, 13 Smedes & M. 500; Hawkins v. New Orleans, etc., Co., 29 La. Ann. 134, 140; Whitney v. Whitman, 5 Mass. 405; Hix v. Drury, 5 Pick. 296.

We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority. These affidavits were within the rule, and, being material, their exclusion constitutes reversible error. A brief examination will demonstrate their materiality.

It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering may be reason for a new trial, variously held as absolute; or prima facie, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. Whart. Crim. Pl. §§ 821, 823, 824, and cases cited.

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Indeed, it was held in People v. Knapp, 42 Mich. 267, 3 N. W. Rep. 927, that the presence of an officer during the deliberations of the jury is such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases, without regard to whether any improper influences were actually exerted over the jury or not. And in State v. Snyder, 20 Kan. 306, where the bailiff who had charge of the jury had been introduced and examined as a witness on behalf of the state, and had testified to material facts against the accused, his presence in the jury room during the deliberations of the jury was held fatal to the verdict.

In Gainey v. People, 97 Ill. 270, the supreme court of Illinois was of opinion that the presence of a bailiff, in charge of a jury in a capital case, in the jury room during a part of their deliberations, was a grave irregularity and a breach of duty on the part of the officer, which would or would not vitiate the verdict, depending upon the circumstances in each particular case; and the application of the rule in State v. Snyder was approved, but the conclusion reached in People v. Knapp was not fully sanctioned. The text-books refer to many cases in which the action of the officer having a jury in charge, when prejudice might have resulted; or unauthorized communications having a tendency to adverse influence; or the reading of newspapers containing imperfect reports of the trial, or objectionable matter in the form of editorial comments or otherwise, — have been held fatal to verdicts.

The jury in the case before us retired to consider of their verdict on the 7th of October, and had not agreed on the morning of the 8th, when the newspaper article was read to them. It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, —could have no other tendency. Nor can it be legitimately contended that the misconduct of the bailiff could have been otherwise than prejudicial. Information that this was the third person Clyde Mattox had killed, coming from the officer in charge, precludes any other conclusion. We should therefore be compelled to reverse the judgment because the affidavits were not received and considered by the court, but another ground exists upon which we must not only do this, but direct a new trial to be granted.

Dying declarations are admissible on a trial for murder, as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him. 1 East, P. C. 353; Rex. v. Scaife, 1 Moody & R. 551; U. S. v. Taylor, 4 Cranch, C. C. 338; Moore v. State, 12 Ala. 764; Com. v. Matthews, 89 Ky. 287, 12 S. W. Rep. 333. But it must be shown by the

party offering them in evidence that they were made under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. The length of time elapsing between the making of the declaration and the death is one of the elements to be considered, although, as stated by Mr. Greenleaf, "it is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." 1 Greenl. Ev. (15th Ed.) §§ 156, 157, 158; State v. Wensell, 98 Mo. 137, 11 S. W. Rep. 614; Com. v. Haney, 127 Mass. 455; Kehoe v. Com., 85 Pa. St. 127; Swisher v. Com., 26 Grat. 963; State v. Schmidt, 73 Iowa, 469, 35 N. W. Rep. 590. In Reg. v. Perkins, 9 Car. & P. 395, the deceased received a severe wound from a gun loaded with shot, of which wound he died at 5 o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover, made no reply, but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis. There the declaration was against the accused, and obviously no more rigorous rule should be applied when it is in his favor. The point is to ascertain the state of the mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and, if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected. In this case the lapse of time was but a few hours. The wounds were three in number, and one of them of great severity. The patient was perfectly conscious, and asked the attending physician his opinion, and was told that the chances were all against him, and that the physician thought there was no "show for you [him] at all." He was then interrogated as to who did the shooting, and he replied that he did not know. All this was admitted without objection. Defendant's counsel then endeavored to elicit from the witness whether, in addition to saying that he did not know the parties who shot him, Mullen stated that he knew Clyde Mattox, and that it was not Clyde who did so. The question propounded was objected to on the sole ground of incompetency, and the objection sustained. In this, as the case stood, there was error. So long as the evidence was in the case as to what Mullen said, defendant was entitled to refresh the memory of the witness in a proper manner, and bring out, if he could, what more, if anything, he said in that connection. It was not inconsistent with Mullen's statement that he did not know the parties, for him also to have said that he knew Mattox was not one of them. His ignorance of who shot him was not incompatible with knowledge of who did not shoot him. We regard the error thus committed as justifying the awarding of a new trial.

The judgment is reversed, and the cause remanded to the district court of the United States for the district of Kansas, with a direction to grant a new trial.

(146 U. S. 162)

MORLEY v. LAKE SHORE & M. S. RY. CO.

(November 14, 1892.)

No. 1.

FEDERAL COURTS—FOLLOWING STATE DECISIONS—OBLIGATION OF CONTRACTS — DUE PROCESS OF LAW.

1. Code Civil Proc. § 1211, provides that a judgment shall bear interest from the date of its entry. Laws N. Y. 1879, c. 538, p. 598, § 1, changing the rate of interest from 7 to 6 per cent., contains a proviso that nothing therein shall affect any prior contract. The New York court of appeals decided that a judgment for breach of contract, obtained prior to the date when the latter act went into effect, bore 7 per cent. interest until that date, and only 6 per cent. thereafter. *Held*, that this decision was conclusive in the federal supreme court as to the meaning of the New York statute. O'Brien v. Young, 95 N. Y. 428, and Prouty v. Railway Co., 95 N. Y. 667, followed.

2. Where a judgment is obtained on a contract which contains no provision for interest, the allowance of interest on the judgment is a matter within the legislative discretion of a state. The judgment is not a contract, and a law reducing the rate of interest thereon does not impair the obligation of contracts, within the meaning of the federal constitution. Mr. Justice Harlan, Mr. Justice Field, and Mr. Justice Brewer, dissenting.

3. A judgment of the highest court of a state is not reviewable in the supreme court of the United States because it refuses to give effect to a valid contract, or, in effect, impairs the obligation of a contract.

4. Where a state statute changes the rate of interest thereafter to accrue on judgments previously rendered, a citizen whose claims under the statute have been adjudicated by the highest court of the state is not deprived of property without due process of law, within the meaning of the constitution. Mr. Justice Harlan, Mr. Justice Field, and Mr. Justice Brewer, dissenting.

In error to the court of appeals of the state of New York. Affirmed.

W. F. Upson, Geo. Hoadly, and Lucien Birdseye, for plaintiff in error. E. S. Rapallo, for defendant in error.

Mr. Justice SHIRAS delivered the opinion of the court.

John S. Prouty, of the city and state of

New York, was a holder and owner of certain preferred and guarantied stock of the Michigan Southern & Northern Indiana Railroad Company. This stock was issued in the city of New York, in the year 1857, and the guarantied dividends and interest were to be there paid. Subsequently, it being alleged that the said company was in arrears of dividends and interest due Mr. Prouty as holder and owner of its stock, an action was commenced by him in the supreme court of the state of New York in and for the city and county of New York, special term, upon the equity side, to compel the said company specifically to perform its contract and agreement with him. During the pendency of the action, evidence was produced tending to show that, after the commencement of the same, the said company was, with various other companies, merged or consolidated into the Lake Shore & Michigan Southern Railway Company, the present defendant in error. Upon this evidence the consolidated company was permitted to be brought in as defendant by supplemental complaint. In pursuance of this complaint, after a trial at special term, the supreme court, on motion, decreed that the railroad company should
164 specifically perform all and every act and
* acts necessary and proper for the specific performance of the contract and agreement in the findings and decisions of the special term set forth, and made as therein stated, with the plaintiff as holder and owner of the stock in question, and to pay the plaintiff the amount of the arrears as dividends, being $27,426.67, with interest, the whole aggregating $53,184.88; and also decreed that immediately after service of a copy of the judgment the company should declare and make payable, and pay out of any of the net earnings of the company, the said sum of $53,184.88, together with interest thereon from the entry of said judgment; and that, in case of failure within 30 days after service of the judgment to pay the said sum of $53,184.88 and said interest, the plaintiff should have execution therefor against the defendant. On appeal by the defendant from this decree to the general term of the supreme court, (1 Hun, 655,) and afterwards to the court of appeals, (52 N. Y. 363,) the decree was affirmed, and was entered in the office of the clerk of the county of New York on the 26th day of January, 1878. The proceedings in the action prior to this decree do not appear in the record before this court, but such facts as are not shown by the record, and which deserve to be stated here, are gathered from the briefs and data therein cited, and seem to be undisputed.

The directions of the said decree not being complied with, on the 21st day of May, 1881, an execution was duly issued for the amount of the decree, with interest, and thereupon the defendant company paid to the sheriff the said amount, with interest at the rate of 7 per cent. per annum up to January 1, 1880, and interest at the rate of 6 per cent. per annum from January 1, 1880, to May 21, 1881, the time of such payment, and demanded that the execution be returned satisfied. It would seem that the reason for the refusal to pay 7 per cent. interest after January 1, 1880, was the passage of the act of June 20, 1879, of the legislature of the state of New York, changing the rate of interest upon the loan or forbearance of any money, goods, or things in action from 7 per cent. to 6 per cent. per annum, which act, upon January 1, 1880, began to take effect. The sheriff and plaintiff received the said sum on ac-
165 count, and demanded an additional amount,
* which would be the balance due upon com-
* puting the interest at the rate of 7 per cent. per annum for the whole time. Thereupon the railroad company, by its attorney, obtained a rule to show cause why the said execution should not be returned fully satisfied, or why the said judgment should not be discharged, and marked satisfied of record, or why the sheriff should not be forever enjoined from making any levy or sale under said execution. This application was, at a special term of the supreme court of New York, denied. The general term of the same court afterwards affirmed the denial of this motion by the special term. 26 Hun, 546. An appeal was then taken from the said general term of the said supreme court to the court of appeals, where the decision of the supreme court was reversed, and that court was ordered to grant the motion. 95 N. Y. 428, 667.

The complainant thereupon, by a writ of error, brought the matter from the court of appeals, which is the highest court having jurisdiction thereof in the state of New York, to this court.

In considering this case, we shall find it convenient to have before us certain sections of the statutes of New York, namely:

Rev. St. pt. 2, c. 4, tit. 3, enacted December 4, 1827, and taking effect January 1, 1830, (1 Rev. St. 771:)

"Section 1. The rate of interest upon the loan or forbearance of any money, goods, or things in action shall continue to be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time."

Laws 1879, c. 538, p. 598, (an act to amend the title containing the section above quoted, passed June 20 1879, and taking effect January 1, 1880:)

"Section 1. The rate of interest upon the loan or forbearance of any money, goods, or things in action shall be six dollars upon one hundred dollars for one year, and after that
166 rate for a greater or less sum, or for a longer
* or shorter time; but nothing herein contained
* shall be so construed as to in any way affect any contract or obligation made before the passage of this act.

"Sec. 2. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

"Sec. 8. This act shall take effect on the first day of January, 1880."

Laws 1877, c. 417, pp. 468, 477. (An enactment of June 2, 1876, taking effect September 1, 1877.)

"Sec. 1211. A judgment for a sum of money, rendered in a court of record or not of record, or a judgment rendered in a court of record directing the payment of money, bears interest from the time when it is entered."

The first question we have to consider is the effect to be given to the saving clause contained in the first section of the act of June 20, 1879, which provides that nothing therein contained shall be so construed as to in any way affect any contract or obligation made before the passage of that act. This question is answered for us by the decision of the court of appeals of New York in this very case, holding that this saving clause is not applicable in the case of a judgment like the plaintiff's. In Louisiana v. Pilsbury, 105 U. S., at page 294, this court, speaking by Mr. Justice Field, says: "Whether such a construction [by judicial decisions, upon a clause of the state constitution] was a sound one, is not an open question. * * * The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. * * * The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it." "The rule of construction adopted by the highest court of the state in construing their own constitution and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court." Provident Inst. v. Massachusetts, 6 Wall. 611, 630. "The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." Leffingwell v. Warren, 2 Black, 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. Randall v. Brigham, 7 Wall. 523, 541. If, then, the law as enacted by the legislature, and construed by the state judiciary, will be the law of the state, it follows that, as to the proper construction of the statute, and as to what should be regarded as among its terms, no federal question could arise. The most that could be claimed would be that, although the statute of the state was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the constitution and judiciary act, subject to investigation here. Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself, as construed by the state court. Did, then, the law that changed the rate of interest thereafter to accrue on a subsisting judgment infringe a contract, within the meaning of the constitution of the United States?

Before we state the conclusions reached by this court, the contention on behalf of the plaintiff in error may be briefly stated, as follows:

The judgment was based on a contract, which, as soon as it became a cause of action by the failure of the defendant to comply with its terms, began, under the then existing law of the state, to draw interest at the rate of 7 per cent. per annum, and, when merged into judgment, was entitled to draw interest at that rate until paid; that such judgment was itself a contract in the constitutional sense; and that the interest accruing and to accrue was as much a part of the contract as the principal itself, and equally within the protection of the constitution.

Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the constitution. But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the state as declared by its statutes. If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment.

After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the nonpayment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for nonpayment of a

judgment be determined by a state, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe.

It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute; but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented or promised to pay. "A judgment is in no sense a contract or agreement between the parties." Wyman v. Mitchell, 1 Cow. 316, 321. In McCoun v. Railroad Co., 50 N. Y. 176, it was said that "a statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon a contract is no contract." In Bidleson v. Whytel, 3 Burrows, 1545, it was held by Lord Mansfield, after great deliberation, and after consultation with all the judges, that "a judgment is on contract, nor can be considered in the light of a contract; for judicium redditur in invitum." To a scire facias on a judgment entered in 13 Car. II., the defendant for plea alleged that the contract upon which recovery was had was usurious, to which plea the plaintiff demurred, saying that judgments cannot be void upon such a ground, since by the judgment the original contract which is supposed to be usurious is determined, and cited the case of Middleton v. Hall, Gouldsb. 128, and Cro. Eliz. 588; and according to this the plea was ruled bad, and judgment given for the plaintiff. Rowe v. Bellaseys, 1 Sid. 182. "To a scire facias on a judgment by confession the defendant pleaded that the warrant of attorney was given on an usurious contract; and upon demurrer it was held that this was not within the statute 12 Anne, [of usury,] or to be got at this way, for this is no contract or assurance, a judgment being redditum in invitum." Bush v. Gower, 2 Strange, 1043. In Louisiana v. Mayor, etc., 109 U. S. 285, 288, 3 Sup. Ct. Rep. 211, in which it was contended on behalf of an owner of a judgment that it was a contract, and within the protection of the federal constitution as such, it was said that "the term 'contract' is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence." Where the transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition. Garrison v City of New York, 21 Wall. 196, 203. It is true that in Louisiana v. Mayor, etc., and in Garrison v City of New York, the causes of action merged in the judgments were not contract obligations, but in both those cases, as in this, the court was dealing with the contention that the judgments themselves were contracts proprio vigore.

A large portion of the able argument in behalf of the plaintiff in error was directed to a discussion of the question how far the legislature may change remedies on existing contracts without impairing their obligation in the constitutional sense, and our special attention was asked to the case of Gunn v. Barry, 15 Wall. 610. That was a case wherein this court held that, as respects a creditor who had obtained by his judgment a lien on the land which a former exemption secured to him, while the new one destroyed it, the law creating the new exemption impaired the obligation of a contract, and was unconstitutional and void. The doctrine of that and similar cases does not seem to be applicable to the present case. Much discussion has been had in many cases in this and other courts in the attempt to fix definitely the line between the alterations of the remedy which are deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights; but, if we are right in our view of the nature of the present case, we are not called upon to review or consider those cases. If it be true, as we have endeavored to show, that interest allowed for nonpayment of judgments is in the nature of statutory damages, and if the plaintiff in the present case has received all such damages which accrued while his judgment remained unpaid, there is no change or withdrawal of remedy. His right was to collect such damages as the state, in its discretion, provided should be paid by defendants who should fail to promptly pay judgments which should be entered against them, and such right has not been destroyed or interfered with by legislation. The discretion exercised by the legislature in prescribing what, if any, damages shall be paid by way of compensation for delay in the payment of judgments, is based on reasons of public policy, and is altogether outside the sphere of private contracts.

The well-settled rule, that in a suit on this New York judgment in another state the interest recoverable is that allowed by the latter, points to the conclusion that such interest is in the nature of damages, and does not

arise out of any contract between the parties; for, as is said by Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. 213, 343, "if the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it."

The further contention of the plaintiff in error, that he has been deprived of his property without due process of law, can be more readily disposed of. If, as we have seen, the plaintiff has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property; and whether or not a statutory change in the rate of interest thereafter to accrue on the judgment can be regarded as a deprivation of property, the adjudication of the plaintiff's claims by the courts of his own state must be admitted to be due process of law. Nor are we authorized by the judiciary act to review this judgment of the state court because this judgment refuses to give effect to a valid contract, or because such judgment, in its effect, impairs the obligation of a contract. If we did, every case decided in the state courts could be brought here, when the party setting up a contract alleged that the court took a different view of its obligation from that which he held. Knox v. Bank, 12 Wall. 379, 383.

The result of these views is that we find no error in the record, and that the judgment of the New York court of appeals is accordingly affirmed.

Mr. Justice HARLAN, dissenting.

In an action brought in the supreme court of New York by John S. Prouty against the Lake Shore & Michigan Southern Railway Company and others to compel the specific performance of a certain contract, it was adjudged, January 26, 1878, that the company pay the plaintiff out of its net earnings $53,184.88, "together with interest thereon from the entry of said judgment." It was also adjudged that if the company, within a time specified, failed to pay to the plaintiff the above principal sum "and such interest," the plaintiff might have execution therefor against the defendant. Judgment was also entered in plaintiff's favor for $1,437.73 for his costs and allowance in the action.

By the statutes of New York in force when this judgment was rendered 7 per cent. was the legal rate of interest. It was provided that "every judgment shall bear interest from the time of perfecting the same;" that is, "from the time when it is entered." Laws 1844, c. 324; 1 Rev. St. N. Y. p. 771, pt. 2, c. 4, tit. 3; Laws 1877, c. 417, pp. 468, 477. It was also provided that, "whenever a judgment shall be rendered, and execution shall be issued thereon, it shall be lawful to direct, upon such execution, the collection of interest upon the amount recovered, from the time of recovering the same until such amount be paid."

Execution was issued on the above judgment, and, by written indorsement upon it, the sheriff was directed to collect thereon $54,622.61, (which was the aggregate amount, principal and costs, adjudged in favor of the plaintiff,) with interest at 7 per cent. from the date of the judgment. Was it competent for the legislature, by the act of 1879, which took effect January 1, 1880, to reduce to 6 per cent. the interest collectible, after its passage, on the above judgment? I think it was not, and therefore dissent from the opinion and judgment of the court.

It may be conceded, for the purposes of this case, that a judgment, into which is merged a contract that does not itself provide for interest, will bear interest as may be prescribed by the statute in force when the judgment is entered, whatever may have been the rate of interest upon judgments at the time such contract was made. But it does not follow, when interest is given by a judgment in conformity with the statutes in force when it is rendered, that the right thus acquired can be affected or taken away by subsequent legislation. The difficulty is not met by saying that the allowance of interest upon a judgment is wholly within legislative discretion, and not a matter of agreement between the parties. Rights may be acquired by legislation that cannot be taken away by subsequent enactments. When the judgment in question was rendered, the plaintiff was entitled by statute to require the collection of interest upon the amount recovered from the time of the recovery "until such amount be paid;" and that right was asserted in the mode prescribed when the plaintiff, by his indorsement on the execution, required the sheriff to collect the amount adjudged, with 7 per cent. interest till paid. Although the contract upon which the judgment was based did not, in terms, provide for interest upon any judgment rendered for its specific performance, it was necessarily implied, in such contract, that the party suing for a breach of it, or suing to compel its specific performance, should receive from the other party the amount judicially ascertained to be due, with such interest, if any, as the law allowed, and as the court legally awarded, at the time judgment might be entered. Indeed, it is an implied condition of every agreement that the party failing to comply with its terms shall be liable to the party injured in such sum as the law will give him at the time the default is adjudged.

Mr. Justice Story says: "Express contracts are where the terms of the agreement are openly avowed and uttered at the time of the making of it. Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform. The constitution makes no distinction between the one class

of contracts and the other. It, then, equally embraces and applies to both. Indeed, as by far the largest class of contracts in civil society, in the ordinary transactions of life, are implied, there would be very little object in securing the inviolability of express contracts if those which are implied might be impaired by state legislation. The constitution is not chargeable with such folly or inconsistency." 2 Const. § 1377. The principle was applied in Fisk v. Police Jury, 116 U. S. 131, 134, 6 Sup. Ct. Rep. 329, where this court, speaking by Justice Miller, said: "The vice of the argument of the supreme court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which, one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note."

This principle was illustrated in another case in this court. I allude to McCracken v. Hayward, 2 How. 608, 613. The question there was as to the validity of a statute of Illinois, prohibiting property from being sold on execution for less than two thirds of the valuation made by appraisers, pursuant to the directions contained in the law. That statute was held to impair the obligation of contracts made before its passage, and to be inoperative upon executions issuing on judgments founded on such contracts. This court said: "The obligation of the contract between the parties in this case was to perform the promises and understandings contained therein. The right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair, public sale, on reasonable notice, it would have conferred a right on the plaintiff which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract."

A case in point is Cox v. Marlatt, 36 N. J. Law, 389. The principal question there, as stated by the court, was "whether, after a judgment has been obtained, which carries a certain rate of interest under the then existing law, a change of that law by a subsequent statute, increasing or diminishing the former rate of interest, will affect the amount that can be collected under execution upon such judgment." The court said: "The effect of a judgment is to fix the rights of the parties thereto by the solemn adjudication of a court having jurisdiction. How those rights can be affected by any subsequent legislation is not apparent. This contract of the highest authority cannot be disturbed so long as it remains unexercised and unsatisfied. Changing the rate of interest does not affect existing contracts or debts due prior to such enactment, whether they be evidenced by statute, by judgment, or by agreement of the parties." After referring to several cases, the court proceeds: "It will be seen that these cases are decided on the principles above stated; that the parties' rights are fixed by the judgment of the court, and the judgment carries with it its incidents, equally determined, and all relating to the date of its entry." It is of no consequence, in the present case, that the judgment, although calling for interest on the amount adjudged, did not specify the rate of interest. The statute then in force fixed the rate, and, as said in Amis v. Smith, 16 Pet. 303, 311, interest upon a judgment, secured by positive law, is "as much a part of the judgment as if expressed in it."

It seems to me that the law made it a part of the contract upon which Prouty's judgment was founded that for any breach of it, or for any failure to perform it by the other party, he should be entitled to sue, and to have judgment for such sum, whether principal or interest, as the law, at the time of judgment, entitled him to demand. The statute in question took away his right to receive a part of the amount which a court, having full jurisdiction of the subject-matter and of the parties, adjudged to be due him, and therefore impaired the obligation of the contract.

If the statute in question is constitutional, then it was competent for the legislature, not simply to reduce the interest upon unsatisfied judgments previously rendered, but to take away the right to all interest after its passage. Indeed, I do not see why, under the reasoning of the court, the legislature might not, after the judgment was rendered, have forbidden the collection of any interest whatever upon it. If it be said that the right to interest at 7 per cent. had become established up to the passage of the last act, and could not be affected by its provisions, with equal force it could be said that the right to interest from the entry of the judgment until the payment of the principal was established by the judgment. Nor do I see why, under the principles of the opinion, it was not competent for the legislature to have increased the rate of interest, and thus compelled the defendant to pay more than it was bound to pay when the judgment was rendered.

Look at the question in another aspect.

Suppose, by the law in force when a judgment is rendered, the plaintiff is entitled to execution upon it. If the legislature subsequently, for the purpose of favoring debtors, requires the return of all outstanding executions, and forbids any execution upon judgments or decrees for money to be issued for 12 months, when the law, at the date of the judgment, authorized an execution to be issued in 10 days after judgment, could not *177 such legislation, under the principles of the decision in this case, be sustained as not impairing the obligations of contracts? Those who would seek to sustain legislation of that character need only say that, as the right to execution upon a judgment for money was not given by the agreement of the parties, but by the statute regulating executions, it was within legislative discretion to modify the law in force when the judgment was rendered, in respect to the mode of enforcing the judgment. I do not think that such an argument would be heeded. Yet I take leave to say, with all respect for the opinions of others, that it ought to prevail in the case supposed, if it be true, as is now held, that it is competent for the legislature, consistently with the contract clause of the constitution, to declare that a party, adjudged by a court of competent jurisdiction, in a case ex contractu, to pay a given sum, with interest, until paid, at the rate then established, shall not be required to perform that judgment in all of its parts, but may go acquitted by paying less interest than that so fixed both by the existing law and by the judgment.

There is still another view of the case which, in my opinion, is conclusive against that taken by the court. If the rights of the parties as established by the judgment were not protected by the clause of the constitution forbidding the passage of state laws impairing the obligations of contracts, was not the right of Prouty to collect the sum, principal and interest, awarded him by the judgment, a right of property, of which he could not be deprived by legislative enactment? Could the legislature have taken from him the right to collect the principal sum found to be due from the railroad company? Clearly not, if any effect whatever is to be given to that clause of the fourteenth amendment declaring that no state shall deprive any person of property without due process of law. But if the judgment, as respects the principal sum, was property of which Prouty could not be arbitrarily deprived, why is not the interest which the judgment, in conformity with law, awarded to him, equally property, and entitled to like protection? In Louisiana v. Mayor, etc., 109 U. S. 285, 289, 291, 3 Sup. Ct. Rep. 211, it was held that a judg- *178 ment against a municipal corporation for damages caused by a mob was not within the protection of the contract clause of the constitution. But the court conceded that such judgments, "though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property, in the sense that they are capable of ownership, and may have a pecuniary value." It, however, held that the fourteenth amendment did not apply to that case, for the reason that, as the judgments continued an existing liability against the city, the relators could not be said to have been deprived of them. In that case, Mr. Justice Bradley concurred in the judgment on a special ground, namely, "that remedies against municipal bodies for damages caused by mobs or other violators of law unconnected with the municipal government are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease." But he also said: "An ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, stands upon a very different footing. Such a judgment is founded upon an absolute right, and is as much an article of property as anything else that a party owns; and the legislature can no more violate it without due process of law than it can any other property. To abrogate the remedy for enforcing it, and to give no other adequate remedy in its stead, is to deprive the owner of his property, within the meaning of the fourteenth amendment. The remedy for enforcing a judgment is the life of a judgment, just as much as the remedy for enforcing a contract is the life of the contract. While the original constitution protected only contracts from being impaired by state law, the fourteenth amendment protects every species of property alike, except such as in its nature and origin is subject to legislative control.

In my opinion, the right which a party has by a judgment for money—at least where the cause of action is ex contractu—to collect the sum awarded thereby, with interest, until paid, at the rate then established by law, is *179 a right of property, of which he cannot be deprived by mere legislative enactment, even to the extent of reducing the interest collectible under such judgment.

I am authorized by Mr. Justice FIELD and Mr. Justice BREWER to say that they concur in this opinion.

(146 U. S. 325)

BENSON et al. v. UNITED STATES.

(December 5, 1892.)

No. 1007.

MILITARY RESERVATION—JURISDICTION—MURDER—EVIDENCE—WITNESSES.

1. Laws Kan. 1875, p. 95, ceding to the United States exclusive jurisdiction over the Ft. Leavenworth military reservation, with certain exceptions as to service of process and taxation by state authorities, constituted a valid cession of jurisdiction, and, though made without any request by the general government, yet, as it conferred a benefit, its acceptance is to be presumed. Railroad Co. v. Lowe, 5 Sup. Ct. Rep. 995, 114 U. S. 525, and Railway Co. v. Mc-

Glinn, 5 Sup. Ct. Rep. 1005, 114 U. S. 542, followed.

2. The action of the political departments of the government in reserving the whole tract for military purposes is conclusive upon the courts as to the character of the occupation, and they cannot inquire, for the purpose of determining jurisdiction in a criminal case, whether the place of the crime was then in actual use for military purposes.

3. On a trial for murder, defendant's wife testified for the government that certain slips and two letters were in defendant's handwriting, and that the letters were received by her through the mail. Befor. this testimony was given, defendant's counsel requested the court to advise the witness that, as defendant's wife, she need not testify unless she so desired, which request was complied with. No other objection was made. Afterwards, defendant, as a witness in his own behalf, testified that he wrote the letters. Several other witnesses were then examined, after which defendant moved to strike out the wife's testimony as incompetent. *Held* that, even if the right to object had not been finally waived before the motion, it was not error to refuse the same, under the circumstances.

4. Under a joint indictment in a federal court, when a severance and separate trials have been ordered, one defendant, even though his case has not been disposed of, may testify on behalf of the government on the trial of his codefendant. U. S. v. Reid, 12 How. 361, distinguished.

In error to the circuit court of the United States for the district of Kansas.

Joint indictment of C. A. Benson and Mary Rautzahn for murder. A severance and separate trials were ordered. Defendant Benson was first tried, and, being convicted and sentenced to death, brings this writ of error. Affirmed.

A. L. Williams, Leland J Webb, and Wm. Dill, for plaintiff in error. Asst. Atty. Gen. Parker, for the United States.

*320 *Mr. Justice BREWER delivered the opinion of the court.

In June, 1891, plaintiff in error was convicted in the circuit court of the United States for the district of Kansas of the crime of murder, and sentenced to be hanged. The crime was charged to have been committed on the Ft. Leavenworth military reservation, in the district of Kansas, and the first question presented for our consideration is one of jurisdiction.

The Ft. Leavenworth military reservation is within the territorial boundaries of the state of Kansas, as established by the act of admission, (12 St. p. 126;) and though then the property of the government, and for a long time theretofore withdrawn from the public lands, as a military reservation, was not excepted from the jurisdiction of the newly-admitted state. But in 1875 the legislature of the state of Kansas passed an act entitled "An act to cede jurisdiction to the United States over the territory of the Ft. Leavenworth military reservation," the first section of which is as follows: "That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the 'Ft. Leavenworth Reservation,' in said state, as declared from time to time by the *321 president of the United States, saving, however, to the said state the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of said cession and reservation; and saving, further, to said state the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation." Laws Kan. 1875, p. 95. This act was before this court for consideration in two cases: Railroad Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 995; Railway Co. v. McGlinn, 114 U. S. 542, 5 Sup. Ct. Rep. 1005 It was held in those cases that the act was a valid cession of jurisdiction to the general government; and that, although it did not appear that any application had been made therefor by the United States, yet, as it conferred a benefit, acceptance of the cession was to be presumed. It was conceded that article 1, § 8, of the constitution was not applicable, as there was not within the terms of that section a purchase of the tract by the consent of the legislature of the state; but it was decided that, while a state has no power to cede away its territory to a foreign country, yet it can transfer jurisdiction to the general government. In the opinion in the first case, on page 541, 114 U. S., and page 1004, 5 Sup. Ct. Rep., the court observed: "In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution. It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes, and if, to their more effective use, a *322 cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state." And in the opinion in the second case, on page 546, 114 U. S., and page 1006, 5 Sup. Ct. Rep., the prior decision was interpreted in these words: "We also held that it is competent for the legislature of a state to cede exclusive jurisdiction over places needed by the general government in the execution of

its powers, the use of the places being, in fact, as much for the people of the state as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes."

It is contended by appellant's counsel that, within the scope of those decisions, jurisdiction passed to the general government only over such portions of the reserve as are actually used for military purposes, and that the particular part of the reserve on which the crime charged was committed was used solely for farming purposes. But in matters of that kind the courts follow the action of the political department of the government. The entire tract had been legally reserved for military purposes. U. S. v. Stone, 2 Wall. 525, 537. The character and purposes of its occupation having been officially and legally established by that branch of the government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put. There was therefore jurisdiction in the circuit court, and the first contention of plaintiff in error must be overruled.

The second important question arises upon the admission of the testimony of the wife of the defendant. She was called by the government, and testified, as to six slips, and two letters, that they were in the handwriting of the defendant, and that the letters were received by her through the mail. This was all of her testimony. It was received without objection. Not only was there no objection, but the court followed the suggestions of the defendant's counsel in respect to its admission. The record
*333 shows that, when she was called as a wit-
333 ness, the defendant's counsel stated: "The woman upon the stand is the wife of the defendant. I desire that the court shall be satisfied of that by proper inquiries in order that the fact may be established, and then I wish her to be advised that she cannot, except with her own free will and voluntary consent, be used as a witness against him. She is his lawful wife." Thereupon some colloquy took place between the court and counsel, in which the latter, not in terms consenting that she be sworn and examined as a witness, yet making no objection thereto, insisted again and again that she be advised that she need not testify unless she desired to testify. Thereupon the court ruled that she should be so advised, and did in fact so advise her.

Again, the letters and slips, having been identified by Mrs. Benson, were received in evidence; and, being written in German, an interpreter was called to translate them to the jury. The defendant declared, while he was translating, that he was doing so incorrectly; and afterwards went upon the stand as a witness in his own behalf, and gave what he called a correct translation; and he did not confine himself to this, but went further, and testified that he wrote the letters.

If this were all that appeared in the record, there would be no shadow of a question; for, if a party does not object to testimony, he cannot afterwards be heard to say that there was error in receiving it. But after Mrs. Benson had left the stand, and several other witnesses had been examined, the defendant interposed a motion to strike out her testimony on the ground that it was incompetent; which motion was overruled, and exception taken.

At common law, an objection to the competency of a witness on the ground of interest was required to be made before his examination in chief, or, if his interest was then not known, as soon as it was discovered. 1 Greenl. Ev. § 421. And the rule was the same in criminal as in civil cases. Rosc. Crim. Ev. 124; Com. v. Green, 17 Mass. 538. Tested by that rule, the attempt to get rid of the testimony of Mrs. Benson by a motion, long after its admission, to strike it from the record, was too late. The
*333 defendant, by not objecting to her testimony
*333 at the time it was offered, waived the objection. But if that rigorous rule does not now prevail, and a party has a right at any time, by motion to strike out, to secure the removal from a case of objectionable and incompetent testimony, still we think no substantial error can be adjudged in overruling this motion; for here not only did the defendant not object to this testimony, but, on the contrary, it was admitted in the way suggested and insisted upon by his counsel. The court accepted the suggestions of such counsel, and gave the witness the advice and directions urged. The testimony was in reference to a subordinate matter, — mere identification of certain papers. No objection was raised until after the witness had left the stand, and the trial had proceeded at some length, and when, perhaps, witnesses by whom the same fact could have been established were discharged, or when too late to obtain other witnesses by whom it could have been proved, and the defendant himself, as a witness in his own behalf, testified as to having written the letters. Under these circumstances, we do not think there was error in overruling this motion to strike out.

The third principal point upon which defendant relies is this: Mary Rautzahn, the daughter of the murdered woman, was jointly indicted with the defendant. A severance was ordered by the court, and on this trial of defendant his codefendant, Mary Rautzahn, was called and examined as a witness for the government, and this examination was before any disposition of the case as against her. Authorities on this question are conflicting. The following sustain the ruling of the circuit court: State v. Brien, 32 N. J. Law, 414; Noyes v. State, 41 N. J. Law, 418; Noland v. State, 19 Ohio, 131;

Allen v. State, 10 Ohio St. 287; Jones v. State, 1 Ga. 610; State v. Barrows, 76 Me. 401. In this last case is quite a discussion of the question by Peters, C. J., and review of the authorities. We quote from the opinion: "As a question simply at common law, although there is a contradiction in the cases, the preponderance of authority seems to favor the admission of a codefendant, not on trial, as a witness, if called by the prosecution. There is very much less authority allowing him to be sworn as a witness for the defense. Whether the distinction be a sensible one or not, it has prevailed extensively. * * *

"Most of the authors on evidence evidently adopt the view that the testimony is admissible when offered by the state. Although but little authority is adduced to support their statements, and the doctrine is not very clearly or positively stated in some instances, still such a general concurrence of favorable expression has much weight upon the question. It goes far to show the common opinion and practice. Hawk. P. C. bk. 2, c. 46, § 90; 1 Hale, P. C. 305; 2 Starkie, Ev. 11; Rosc. Crim. Ev. (9th Ed.) 130, 140; 2 Russ. Crimes, 957. Mr. Wharton says: 'An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a codefendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered.' Whart. Crim. Ev. (8th Ed.) § 439. Mr. Greenleaf states the same rule. He says: 'The usual course is to leave out of the indictment those who are to be called as witnesses, but it makes no difference, as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in guilt.' 1 Greenl. Ev. § 379."

Referring to the English authorities, it has there been held that at common law, and independently of any statute, when two persons jointly indicted are tried together, neither is a competent witness; but that, if one is tried separately, the other is a competent witness against him, because, as observed by Mr. Justice Blackburn, "the witness was a party to the record, but had not been given in charge to the same jury." Reg. v. Payne, L. R. 1 Cr. Cas. 349, 354; Winsor v. Reg., L. R. 1 Q. B. 390.

But it is said that this court has already practically decided this question in the case of U. S. v. Reid, 12 How. 361. The precise question in that case was as to the right of the defendant to call his codefendant, and not that of the government to call the codefendant, and a distinction has been recognized between the two cases. It is true that the reasons given for the exclusion of the witness in one are largely the same as those given for his exclusion in the other, to wit, interest, and being party to the record; but public policy is also urged in favor of the exclusion of one defendant as a witness for his codefendant, for each would try to swear the other out of the charge. And as the distinction prevailed, whether founded on satisfactory reasons or not, it is sufficient to justify us in holding that that case is not decisive of this. Further, the stress in that case was not on this question. The defendant was indicted and tried in the circuit court of the United States for the district of Virginia. A statute had been passed in that state in terms permitting a codefendant, when not jointly tried, to testify in favor of the one on trial, and that statute was invoked as securing the competency of the witness, and the question which was discussed was whether the existing statute law of Virginia controlled, and it was held that it did not, and that the question was to be determined by the common law as it stood in Virginia at the date of the judiciary act of 1789. It was assumed both in this court and in the circuit court (3 Hughes, 509, 539, 540) that by that law the codefendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other states of the Union. We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason.

In this examination it is well to consider upon what reasons the codefendant was excluded. They were substantially two: First, that he was interested; and, second, that he was a party to the record. It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule. The exceptions which were ingrafted upon it were only those which sprang from the supposed necessities of the case, and were carried no further than such necessities demanded. So late as 1842 it was a question doubtful enough to be sent on certificate of division to this court whether the owner of goods stolen on the high seas was a competent witness on the trial of the party accused of the larceny, the statute providing the punishment of the offense enacting that the party convicted should be fined not exceeding fourfold the value of the property stolen,—the one moiety to be paid to the owner and the other to the informer. And after a full discussion, in an opinion by Mr. Justice Story, it was resolved in favor of the competency of the witness. U. S. v. Murphy, 16 Pet. 203.

Nor were those named the only grounds of exclusion from the witness stand. Conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last 50 years have wrought a great change in these re-

spects, and today the tendency is to enlarge the domain of competency, and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction. By congress, in July, 1864, (Rev. St. § 858,) it was enacted that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried," with a proviso as to actions by and against executors, etc. And on March 16, 1878, it also passed an act permitting the defendant in criminal cases to testify at his own request. 20 St. p. 30. Under that statute, if there had been no severance and the two defendants had been tried jointly, either would have been a competent witness for the defendants, and though the testimony of the one bore against the other, it would none the less be competent. Com. v. Brown, 130 Mass. 279. The statute in terms places no limitation on the scope of the testimony, for its language is "the person so charged shall at his own request, but not otherwise, be a competent witness." His competency being thus established, the limits of examination are those which apply to all other witnesses. Legislation of similar import prevails in most of the states. The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

In the light of these authorities and this legislation of congress, there is less difficulty in disposing of this question. If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant, not on trial, be adjudged incompetent? The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. Indeed, so far as actual legal interest is concerned, it is a matter of no moment to the latter. While the codefendant not on trial is a party to the record, yet he is only technically so. Confessedly, if separately indicted, he would be a competent witness for the government; but a separate trial under a joint indictment makes in fact as independent a proceeding as a trial on a separate indictment. In view of this, very pertinent is the observation of Chief Justice Beasley in State v. Brien, supra: "The only reason for the rejection of such a witness is that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis." We think the testimony of Mrs. Rautzahn was competent, and there was no error in its admission.

These are the only important questions presented by defendant. Two or three other matters are suggested, and, indeed, only suggested. In respect to them it is sufficient to say that either the rulings of the court were not erroneous, or else no sufficient exceptions were taken to them.

The judgment of the circuit court is affirmed.

(146 U. S. 227)

WASHINGTON & G. R. CO. v. DISTRICT OF COLUMBIA et al.

(November 21, 1892.)

No. 27.

SUPREME COURT—APPEAL FROM DISTRICT OF COLUMBIA—JURISDICTIONAL AMOUNT.

1. Under Act March 3, 1885, (23 St. at Large, p. 443,) no appeal lies from a decree of the supreme court of the District of Columbia dismissing a bill to enjoin the municipal authorities of the district from attempting to enforce the collection of certain license taxes on street cars on the ground that the act imposing the tax has been repealed, when the amount in controversy is less than $5,000.

2. The jurisdictional amount is to be determined solely by the direct effect of the judgment, and its collateral effect in other suits between the same parties cannot be considered; and hence a general allegation that complainant has refused to pay such license tax since 1876, and that the "amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly, if not quite, the sum of $5,200," was insufficient, when the amount of the tax between 1876 and 1883 was not shown in any way, and the number of cars in use was given only for the years 1883 and 1884, during which the tax thereon, with the maximum penalties, would not approximate the jurisdictional sum.

Appeal from the supreme court of the District of Columbia.

In equity. Bill by the Washington & Georgetown Railroad Company to restrain the District of Columbia and the commissioners thereof from attempting to enforce the collection of certain license taxes on street cars. A demurrer to the bill was sustained by the supreme court of the District in special term. This decree was affirmed in general term. 6 Mackey, 570. Complainant appeals. Appeal dismissed.

Statement by Mr. Chief Justice FULLER:

The Washington & Georgetown Railroad Company filed its bill in the supreme court of the District of Columbia, on October 23, 1884, against the District of Columbia and the commissioners of the District, alleging that it was a corporation duly organized under the act of congress in that behalf; that under the act of congress of February 21.

1871, entitled "An act to provide a government for the District of Columbia," (16 St. p. 419,) the legislative assembly of the District passed an act, August 23, 1871, entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia," the twenty-sixth paragraph of the twenty-first section of which was in the words and figures following, to wit:

"The proprietors of hacks, cabs, and omnibuses, and street cars, and other vehicles for transporting passengers for hire, shall pay annually as follows: Hacks and carriages, ten dollars; one-horse cabs, six dollars; omnibuses, ten dollars; street cars, six dollars; or other vehicles, capable of carrying ten passengers or more at one time, ten dollars."

And the fourth section (omitting a proviso) was as follows:

"That every person liable for license tax, who, failing to pay the same within thirty days after the same has become due and payable, for such neglect shall, in addition to the license tax imposed, pay a fine or penalty of not less than five nor more than fifty dollars, and a like fine or penalty for every subsequent offense." Laws Dist. Col. 1871-73, pp. 87, 88, 97.

*228 The bill further averred that, in pursuance and execution of the provisions of said act, "the municipal authorities of the District of Columbia have at various times harassed and annoyed, and still continue to harass and annoy, the officers and agents of the complainant in the discharge of their duties to the complainant and in their efforts to comply with the peremptory requirements of the charter of the company; and unless the said defendants shall be restrained by the injunction of this court, they will probably continue to annoy and harass the said officers and agents."

It was then alleged that at some time prior to August 28, 1877, the commissioners of the District presented to the police court an information alleging violation of the act or ordinance, and seeking to have fines imposed upon the company for failure to pay the license tax, and the court adjudged the complainant guilty, and imposed a fine, from which judgment an appeal was taken to the criminal court of the District, where the information was dismissed; that the judgment of the criminal court was final, and that no appeal could be taken therefrom; that afterwards, and some time prior to April, 1882, another information, with like charges and allegations, was presented to the police court, upon which a like judgment was rendered and a like fine imposed; that from this judgment also an appeal was taken to the criminal court, and on April 4, 1882, the information was dismissed by the District authorities.

The bill also stated that on September 20, 1884, the municipal authorities caused two informations to be presented to the police court, each containing like charges and allegations as before, one of them being intended to cover the period from July 1, 1883, to July 1, 1884, and the other the period from July 1, 1884, to September 20, 1884, each of the informations complaining of the use by complainant of about 100 street cars without having paid license therefor; that these two cases are now pending and undecided in the police court, "but the said municipal authorities threaten to proceed to judgment, and the complainant fears that said court will again render judgment against it, and impose burdensome and harassing fines upon it, and issue harassing and unlawful writs *229 by way of execution of its judgment." Copies of the informations accompanied and were made parts of the bill.

The bill charged the invalidity of the license tax in question for various reasons therein set forth, and, among others, upon the ground of the repeal of the act of the legislative assembly, so far as stock corporations were concerned, by certain designated acts of congress.

The bill then alleged "that the complainant is now and has been during the year 1884 running one hundred and six cars, (106,) sixty-four (64) of which are two-horse and forty-two (42) of which are one-horse cars. The complainant has always insisted that said tax was unlawful, and has refused to pay it ever since July, 1876; and, if it shall be held to be a lawful tax, the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly, if not quite, the sum of fifty-two hundred dollars, besides interest, fines, and penalties."

Complainant thereupon averred that, unless the defendants were enjoined, irreparable injury to its business would result; that it was without adequate remedy at law; and that, inasmuch as the criminal court had decided adversely to the municipal authorities, "complainant ought to be protected from multiplicity of suits and harassing and annoying writs."

The prayers were for process, and for an injunction "from prosecuting the said actions in the said police court, or either of them, and also from instituting any other like actions for like purposes in said court, and also from attempting in any manner, directly or indirectly, to collect said license tax mentioned and described in the said twenty-sixth (26th) paragraph of section twenty-one (21) of the said act of the legislative assembly of the District of Columbia, approved August 23, 1871, and also from charging up or entertering upon the books of said municipal corporation against the complainant any sum or sums on account of said license tax," and for general relief.

The defendants demurred, and on November 23, 1886, the supreme court in special term rendered judgment sustaining the demurrer and dismissing the bill with costs. *231 The demurrer was decided by the special

term upon the merits, and the validity of the tax sustained. On appeal to the supreme court in general term, that court, without considering the merits, affirmed the decree below dismissing the bill upon the ground that it was brought for the purpose of enjoining quasi criminal proceedings, and hence was beyond the jurisdiction of a court of equity. 6 Mackey, 570.

From this decree an appeal was allowed to this court.

Enoch Tollen and Walter D. Davidge, for appellant. Geo. C. Hazelton and S. T. Thomas, for appellees.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

Both sections of the act of March 3, 1885, regulating appeals from the supreme court of the District of Columbia, (23 St. p. 443, c. 355,) apply to cases where there is a matter in dispute measurable by some sum or value in money. Farnsworth v. Montana, 129 U. S. 104, 112, 9 Sup. Ct. Rep. 253; Cross v. Burke, 13 Sup. Ct. Rep. 22. By that act no appeal or writ of error can be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, except that where the case involves the validity of any patent or copyright, or the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question, jurisdiction may be maintained irrespective of the amount of the sum or value in dispute.

It was not suggested in argument that the present appeal falls within the exception. Manifestly it does not, since the contention that the provision for a license tax contained in the act of the legislative assembly was repealed by implication by the acts of congress referred to involved no question of legislative power, but simply one of judicial construction.

It is well settled that our appellate jurisdiction, when dependent upon the sum or value really in dispute between the parties, is to be tested without regard to the collateral effect of the judgment in another suit between the same or other parties. No matter that it may appear that the judgment would be conclusive in a subsequent action, it is the direct effect of the judgment that can alone be considered. Security Co. v. Gay, 145 U. S. 123, 130, 12 Sup. Ct. Rep. 815; Clay Center v. Trust Co., 145 U. S. 224, 12 Sup. Ct. Rep. 817; Gibson v. Shufeldt, 122 U. S. 27, 7 Sup. Ct. Rep. 1066, and cases cited.

The inquiry at once arises in this case, therefore, whether it appears from the record that the matter in dispute, exclusive of costs, exceeds the sum of $5,000; and, without confining the scope of the bill to the prosecutions for penalties, we are of opinion that that fact does not appear in any aspect, and that this appeal must be dismissed for want of jurisdiction.

It is true that the bill states that complainant has refused to pay the license tax since July, 1876, and that if it be held to be a lawful tax "the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly, if not quite, the sum of fifty-two hundred dollars, besides interest, fines, and penalties;" but this averment, taken with the other allegations, is entirely insufficient, for the number of the company's cars is not shown except for the years 1883 and 1884, and the amount of the tax for the preceding years is not disclosed in any other manner. Nor is the averment of a probable computation and charge by the District officials equivalent to a denial of other defenses than illegality, to taxes in arrears, and a concession that if the tax be lawful the company is liable in the sum stated.

The matter in dispute in its relation to jurisdiction is the particular taxes attacked, and unaccrued or unspecified taxes cannot be included, upon conjecture, to make up the requisite amount.

The taxes for 1883 and 1884, and the maximum penalties of the prosecutions referred to, do not approach the jurisdictional sum, and in this state of the record the appeal cannot be retained.

Appeal dismissed.

(146 U. S. 240)

THOMPSON et al. v. ST. NICHOLAS NAT. BANK.

(November 28, 1892.)

No. 49.

NATIONAL BANKS—PLEDGE—NEGOTIABLE BONDS—CERTIFICATION OF CHECKS.

1. Plaintiff's testator deposited with a firm of brokers certain bonds as margins for purchases of stocks, and the brokers, without his knowledge, delivered them to a bank under a standing agreement, previously made, that, if the brokers became indebted to the bank, it might at any time, in its discretion, sell any collateral held by it to secure such debt. On the day of the pledge, but not in pursuance of any agreement made at the time of receiving the bonds, the bank, on the faith of the bonds, certified and subsequently paid certain checks drawn by the brokers. The bank took the bonds in good faith, without notice of the testator's title. *Held*, that the bonds were a valid security for the debt created by the certified checks, notwithstanding that the certification was in violation of Rev. St. § 5208, which makes it unlawful for any national bank to certify any check unless the person drawing the same has on deposit sufficient money to meet it; and plaintiffs could not recover the bonds without first paying the debt. 21 N. E. Rep. 57, affirmed.

2. Rev. St. § 5208, which makes it unlawful for any national bank to certify any check unless the drawer has on deposit money sufficient to meet the same, but declares that a check so certified shall be a valid obligation against the bank, does not, as between the parties, invalidate a pledge of bonds made by the drawer of such checks to secure the indebt-

edness thereby created from him to the bank, when the transaction has been completed by payment of the checks.

In error to the court of appeals of the state of New York. Affirmed.

Lewis Sanders, for plaintiffs in error. Wm. Allen Butler and John A. Taylor, for defendant in error

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action brought by John B. Thompson, in the supreme court of the state of New York, against the Saint Nicholas National Bank of New York, a national banking association. The complaint alleged that on the 18th of April, 1874, the plaintiff was the owner of 73 mortgage bonds, of $1,000 each, of the Jefferson, Madison & Indianapolis Railroad Company, and 20 mortgage bonds of $1,000 each, of the Indianapolis, Bloomington & Western Railroad Company, of the value of $150,000; that on or about that date the defendant became wrongfully and illegally possessed of the bonds; and that, before the suit was brought, the plaintiff demanded from the defendant the possession of them, but the defendant refused to deliver up any portion thereof.

The answer of the defendant set up that at the time named in the complaint, and for a long time before, Capron & Merriam, bankers and brokers in the city of New York, were customers of, and regular depositors with, the defendant, and kept a large account in its bank; that it was the custom of Capron & Merriam to procure call loans, advances, and discounts from the defendant, for the benefit of themselves and also of their customers, and they pledged to the defendant, as collateral security for such loans, advances, and discounts, various bonds, stocks, and commercial paper, under an agreement on their part that in case they should be at any time indebted to the defendant for money lent or paid to them, or for their use, in any sum, the defendant might then sell, in its discretion, at the brokers' board, public auction, or private sale, without advertising and without notice, any and all collateral securities and property held by the defendant for securing the payment of such debt, and apply the proceeds to that object; that the bonds specified in the complaint were a part of the securities so pledged by Capron & Merriam to the defendant; that the defendant, at the time of such transactions, did not have any knowledge in respect to any person interested in such loans or in said securities, except Capron & Merriam, and, the latter having failed to pay such loans on proper demand, the defendant proceeded to sell and dispose of said securities, pursuant to such agreement, and gave to Capron & Merriam credit for the net proceeds thereof; and that there still remained due to the defendant, on account of such loans and advances, after such credit, a large balance.

The plaintiff having died, and his executors having been substituted as plaintiffs, the case was tried at a circuit of the supreme court before a jury, which, under the direction of the court, found a verdict for the defendant. The exceptions of the plaintiffs, taken at the trial, were heard in the first instance at the general term of the supreme court, on a case made by the plaintiffs, containing the exceptions. A motion for a new trial was made thereon before the general term, and was denied, with an order that the defendant have judgment against the plaintiffs upon the verdict, with costs. Such judgment was entered, the principal portion of the opinion of the general term being reported in 47 Hun, 621. The plaintiffs then appealed to the court of appeals, which affirmed the judgment, and remitted its own judgment to the supreme court, where a final judgment was entered against the plaintiffs. The opinion of the court of appeals is reported in 113 N. Y. 325, 21 N. E. Rep. 57. The plaintiffs have brought a writ of error.

The 93 bonds in question were all coupon bonds, payable to bearer. The testator of the plaintiffs delivered them to Capron & Merriam, who were his brokers, as margin for purchases of stock by them for his account. Capron & Merriam pledged the bonds to the defendant, they being its customers, as collateral security for the repayment of any indebtedness which might exist at any time to it on their part. That pledge was made under a written agreement, dated December 2, 1873, and signed by Capron & Merriam, which read as follows: "We hereby agree with the St. Nicholas National Bank of New York, in the city of New York, that, in case we shall become or be at any time indebted to said bank for money lent or paid to us or for our account or use, or for any overdraft, in any sum or amount then due and payable, the said bank may, in its discretion, sell at the brokers' board or at public auction or private sale, without advertising the same, and without notice to us, all, any, and every collateral securities, things in action, and property held by said bank for securing the payment of such debt, and apply the proceeds to the payment of such indebtedness, the interest thereon, and the expenses of the sale, holding ourselves responsible and liable for the payment of any deficiency that shall remain unpaid after such application." Afterwards the defendant paid and advanced for Capron & Merriam large sums of money on the faith of the bonds and of such other securities as it held for their account. They failed in business on April 20, 1874, owing the defendant $71,920.17, for checks certified by it and outstanding, and for money paid by it up to the close of business on April 18, 1874. On April 20, 1874, before the defendant heard of such failure, it paid $210 more, making a total debt of $72,130.17, which remained unpaid. No notice or claim as to the ownership of the 93 bonds by the testator of the plaintiffs came to the defend-

*243 ant until May 5, 1874. The bonds came into the possession of the defendant before it made the certifications of checks for the account of Capron & Merriam, which were made on April 18, 1874; and the certifications were made on the faith of the deposit of the bonds and of the other securities which the defendant held for the account of Capron & Merriam. The defendant used its best efforts to procure as large a price as possible for all the securities which had been pledged to it by Capron & Merriam, including the 93 bonds; but, after crediting to Capron & Merriam the entire proceeds of sales, there was a deficiency on their debt to the defendant of about $1,800. No payment on account of such deficiency, and no tender or offer of any kind in respect to said bonds, was ever made to the defendant by the testator of the plaintiffs. This action was not commenced until April 18, 1880, six years after the bonds came into the possession of the defendant.

At the trial the plaintiffs asked the court to direct a verdict for them on the ground that the contract of certification of the checks by the defendant was void, because it was unlawful, being a certification of checks drawn by Capron & Merriam when they had no money on deposit to their credit with the defendant, and the defendant could not hold the 93 bonds as against such unlawful certification; and on the further ground that *247 the defendant did not take the bonds in the ordinary course of business.

The federal question thus involved is the only one which we can consider on this writ of error. It arises under the act of March 3, 1869, c. 135, (15 St. p. 335,) which was the statute in force on April 18, 1874, and read as follows: "It shall be unlawful for any officer, clerk, or agent of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank, at the time such check is certified, an amount of money equal to the amount specified in such check, and any check so certified by duly authorized officers shall be a good and valid obligation against such bank; and any officer, clerk, or agent of any national bank violating the provisions of this act shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in section fifty of the national banking law, approved June third, eighteen hundred and sixty-four." 13 St. c. 106, p. 114. The provisions of that section 50 were that the comptroller of the currency might forthwith appoint a receiver to wind up the affairs of the banking association. The provisions of the act of March 3, 1869, are now embodied in section 5208 of the Revised Statutes.

In regard to the federal question involved, namely, the certification of checks by the defendant for Capron & Merriam without having on deposit an equivalent amount of money to meet them, and the contention that the defendant did not become a bona fide holder of the bonds in virtue of payments made in pursuance of the agreement with that firm, the court of appeals remarked, in its opinion, given by Ruger, C. J., that the statute of the United States affirmed the validity of the contract of certification, and expressly provided the consequences which should follow its violation; that the penalty incurred was impliedly limited to a forfeiture of the bank's charter and the winding up of its affairs; that it was thus clearly implied that no other consequences were intended to follow a violation of the statute; and that it would defeat the very policy of an act intended to promote the security and strength of the national banking system if its provisions should be so construed as to inflict a loss upon the banks, and a consequent impairment of their financial responsibility. The court then cited, to support that view, Bank v. Matthews, 98 U. S. 621; Bank v. Whitney, 103 U S. 99; and Bank v. Stewart, 107 U S. 676, 2 Sup. Ct. Rep. 778.

The court of appeals further said that it was of opinion that the statute in question had no application to the question involved in this suit, which concerned only the relations between Capron & Merriam and the defendant; that, by the deposit of the bonds, the former secured the promise of the defendant to protect their checks of a certain day for a specified amount; that the certification of the checks was entirely aside from the agreement between Capron & Merriam and the defendant, and was a contract between the defendant and the anticipated holders of the checks; that Capron & Merriam had received the consideration of their pledge, when the defendant agreed with them to honor their checks, and that would have been equally effectual, between the parties, without any certification; that the certification was simply a promise to such persons as might receive the checks that they should be paid on presentation to the defendant, in accordance with its previous agreement with Capron & Merriam; that the legal effect of the agreement was that the defendant should loan a certain amount to Capron & Merriam, and would pay it out on their checks to the persons holding such checks; that it was entirely legal for the defendant to contract to pay Capron & Merriam's checks, and it did not affect the legality of that transaction that the defendant also represented to third parties that it had made such an agreement and would pay such checks; that Capron & Merriam could not dispute their liability for the amount paid out in pursuance of such agreement, nor could any other party, standing in the shoes of Capron & Merriam; that the fact that the defendant, *249 in connection with the agreement to pay such checks, had also promised third parties to pay them, could not invalidate the liability previously incurred, or impair the security which had previously been given to the defendant upon a valid consideration; that the fact of the certification was entirely immaterial in respect to the liability in-

curred by Capron & Merriam to the defendant; that there was no evidence impairing the title to the bonds acquired by the defendant through the transfer of them to it by Capron & Merriam; that the purpose for which the bonds were transferred by the testator of the plaintiffs to Capron & Merriam contemplated their transfer and sale by the latter to third persons; that the defendant acquired a valid title to them by their transfer to it; that the transaction between Capron & Merriam and the defendant was in the ordinary course of business pursued by the latter; that it received the bonds in good faith, for a valuable consideration, and within all the authorities this gave it a good title to the bonds; that it was authorized to deal with them for the purpose of effecting the object for which they were transferred to it; that its right to hold the bonds continued so long as any part of its debt against Capron & Merriam remained unpaid; that the testator of the plaintiffs could at any time have established his equitable right to a return of the bonds, and could have procured their surrender, by paying the amount for which they were pledged, but he refrained from doing so, and impliedly denied any right in the defendant by demanding the unconditional surrender of the bonds; and that he never became entitled to such surrender, and of course was not authorized to recover possession of them. We regard those views as sound, and as covering this case.

The agreement of December 2, 1873, between Capron & Merriam and the defendant, did not call for any act violating the statute. There was nothing illegal in providing that the securities which the bank might hold to secure the debt to it of Capron & Merriam should be available to make good such debt. The statute does not declare void a contract to secure a debt arising on the certifications which it prohibits.

In addition to that, the statute expressly provides that a check certified by a duly-authorized officer of the bank, when the customer has not on deposit an amount of money equal to the amount specified in the check certified, shall nevertheless be a good and valid obligation against the bank; and there is nothing in the statute which, expressly or by implication, prohibits the bank from taking security for the protection of its stockholders against the debt thus created. There is no prohibition against a contract by the bank for security for a debt which the statute contemplates as likely to come into existence, although the unlawful act of the officer of the bank in certifying may aid in creating the debt. In order to adjudge a contract unlawful, as prohibited by a statute, the prohibition must be found in the statute. The subjection of the bank to the penalty prescribed by the statute for its violation cannot operate to destroy the security for the debt created by the forbidden certification.

If the testator of the plaintiffs had pledged the bonds to the defendant, he could not, after receiving the defendant's money, have replevied the bonds; and, after possession of the bonds had been given by him to Capron & Merriam, and after they had been subsequently taken by the defendant in good faith, neither he nor his executors can set up the statute to destroy the debt.

This construction of the statute in question is strengthened by the subsequent enactment, on July 12, 1882, of section 13 of the act of that date, c. 290, (22 St. p. 166,) making it a criminal offense in an officer, clerk, or agent of a national bank to violate the provisions of the act of March 3, 1869. This shows that congress only intended to impose, as penalties for overcertifying checks, a forfeiture of the franchises of the bank, and a punishment of the delinquent officer or clerk, and did not intend to invalidate commercial transactions connected with forbidden certifications. As the defendant was bound to make good the checks to the holders of them, because the act of 1869 declares that the checks shall be good and valid obligations against the defendant, it follows that Capron & Merriam were bound to make good the amounts to the defendant. It necessarily results that the defendant, on paying the checks, was as much entitled to resort to the securities which Capron & Merriam had put into its hands as it would have been to apply money which they might have deposited to meet the checks.

Moreover, it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. Bank v. Matthews, 98 U. S. 621; Bank v. Whitney, 103 U. S. 99; Bank v. Stewart, 107 U. S. 676, 2 Sup. Ct. Rep. 778.

The bonds in question came into the possession of the defendant before it certified the checks. They were not pledged to it under any agreement or knowledge on its part, or, in fact, on the part of Capron & Merriam, that subsequent certifications would be made. The certifications were made after the pledge, and created a debt of Capron & Merriam to the defendant, which arose after the pledge. The agreement of December 2, 1873, applied and became operative simultaneously with the certifications, but independently of them, as a legal proposition.

In Bank v. Townsend, (decided in March, 1891,) 139 U. S. 67, 77, 11 Sup. Ct. Rep. 496, after the present case was decided by the court of appeals of New York, this court approved the decision in Bank v. Whitney, 103 U. S. 99, and said that a disregard by a national bank of the provisions of the act of congress forbidding it to take a mortgage to secure an indebtedness then existing, as well as future advances, could not be taken advantage of by the debtor, but "only laid the

institution open to proceedings by the government for exercising powers not conferred by law."

Judgment affirmed.

(146 U. S. 252)

TOPLITZ et al. v. HEDDEN, Collector.

(November 28, 1892.)

No. 45.

CUSTOMS DUTIES—ACTIONS TO RECOVER PAYMENTS — EVIDENCE — DIRECTING VERDICT — "SCOTCH CAPS."

1. In an action to recover duties paid under protest the inquiry was whether the goods were dutiable under Schedule K of the act of March 3, 1883, as "knit goods, made on knitting frames," as assessed by the collector, or under Schedule N, as "bonnets, hats, and hoods for men, women, and children," etc., as claimed by the importers. One of the latter testified that the goods were "Scotch bonnets," known and sold in this country as such. On cross-examination he testifies that he had before had a suit against the government, under the old tariff, and was then asked if the claim then was that these goods were caps made on frames. *Held*, that this question could not be excluded on the ground that the record of the prior suit was the best evidence of the claim, but that it was competent for the purpose of impeaching the witness' credibility.

2. The same witness was asked whether in 1882, when a bill was pending before congress to exclude woolen goods from the provision for caps and other articles made on frames, his firm addressed a letter to the member from their district, protesting against the passage of the law. Objection was made because of immateriality, because witness had no right to state the contents of the letter, and because the letter itself was the best evidence. The objection was overruled, the witness answered in the affirmative, and was then shown what purported to be a copy of the letter, and was asked if it was a copy. Defendant objected, without specifying any grounds. The objection was overruled, an exception taken, and the copy was then read in evidence. *Held*, that plaintiffs were precluded from contending that the paper was read in evidence without any proof that it was a copy of the letter, for there was no exception based on that ground.

3. It was proper to admit evidence that the commercial designation of the article in question at the date of the act was "Scotch caps," and not "bonnets for men," for, if no such term as "bonnets" was applicable to head coverings for men, congress could not have intended to apply the term to goods which were elsewhere specifically described as "goods made on knitting frames."

4. The court having offered to submit to the jury the question whether the word "bonnet" had any well-known commercial meaning, such as would cover the goods in question, and the offer being declined by plaintiffs, a verdict was properly directed for the United States; for this was the only question which plaintiffs could properly ask to have submitted.

In error to the circuit court of the United States for the southern district of New York.

Affirmed.

Edwin B. Smith, for plaintiffs in error.

Sol. Gen. Aldrich, for defendant in error.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action at law, brought by Lippman Toplitz and Herman Schwarz, composing the firm of L. Toplitz & Co., against Edward L. Hedden, late collector of the port of New York, to recover the sum of $6,896.06 as an excess of duties paid under protest by the plaintiffs on 24 importations made into the port of New York from Glasgow, in Scotland, from July, 1885, to December, 1885, both inclusive. The suit was commenced in the superior court of the city of New York, in July, 1886, and removed by the defendant, by certiorari, into the circuit court of the United States for the southern district of New York. At the trial before Judge Lacombe, and a jury, in January, 1888, the court directed a verdict for the defendant, which was rendered, and judgment was entered thereon against the plaintiffs in November, 1888, to review which the plaintiffs have brought a writ of error. 33 Fed. Rep. 617.

In the invoices of the articles imported, they were described as "Scotch bonnets," and in the entries thereon at the customhouse they were in some described as "worsted knit bonnets," and in others as "worsted caps." The collector assessed duties upon them as "knit goods, made on knitting frames," under the following provisions of "Schedule K —Wool and Woolens," of section 2502 of the Revised Statutes, as enacted by section 6 of the act of March 3, 1883, c. 121, (22 St. p. 509:) "Flannels, blankets, hats of wool, knit goods, and all goods made on knitting frames, balmorals, woolen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca goat or other animals, (except such as are composed in part of wool,) not specially enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound, and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound,—and, in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and, in addition thereto, forty per centum ad valorem." The goods were shown to be made of wool, knitted on frames.

The plaintiffs duly protested against the assessment of more than 30 per cent. ad valorem, claiming that the goods were dutiable under the following provision of "Schedule N—Sundries," of the same section, (2502,) p. 511: "Bonnets, hats, and hoods for men, women, and children, composed of chip, grass, palm leaf, willow, or straw, or any other vegetable substance, hair, whalebone, or other material, not specially enumerated or provided for in this act, thirty per centum ad valorem." They contended that, under that provision, the articles were "bonnets for men." The court, in directing the verdict for the defendant, gave its reasons

for doing so, which are reported in 33 Fed. Rep. 617. Various errors are assigned.

1. One of the plaintiffs, having been examined as a witness for them, testified, on cross-examination, that he had had a suit against the government other than the one on trial, under the old tariff; and he was further asked, on cross-examination, "Was the claim then that these goods are caps made on frames?" To this question the plaintiffs objected, on the ground that the record was the best evidence of the claim. The court overruled the objection, and the plaintiffs duly excepted. The witness answered: "Yes, I think that is it. Similar goods were concerned in that."

The plaintiffs contend that the matter of a claim regarding similar goods under the different phraseology of an earlier tariff was immaterial. We think that the question was a competent one, as affecting the credibility of the witness. He had testified in this case, on his direct examination, that the goods in question were Scotch bonnets, were known in this country as "Scotch bonnets," and sold as such, and that they were called "bonnets" more frequently than "caps." It was proper to show, on cross-examination of the witness, that he had made contradictory statements, oral or written, on the subject; and, if he wished to appeal to the prior record, to refresh his recollection, he could call for it, and do so. But the evidence, as offered, was competent, irrespective of the prior record.

2. The same witness was asked, on cross-examination, whether he remembered that in the summer of 1882, when a bill was pending before congress to amend the statutes by excluding wool goods from the provision for caps and other articles made on frames, his firm addressed a letter to Hon. S. S. Cox, a member of congress from the city of New York, protesting against the passage of that law. The plaintiffs objected to that question as immaterial, and because the witness had no right to state the contents of the letter, and because the letter itself would be the best evidence. The court overruled the objection, and the plaintiffs duly excepted. The witness answered that his firm wrote such a letter. He was then shown what purported to be copy of that letter, and asked if it was a copy. This was objected to, on the ground that the original was not produced, but the objection was overruled, and the plaintiffs duly excepted. The defendant then offered the copy in evidence, and the plaintiffs objected; but the court overruled the objection, and the plaintiffs duly excepted. The copy was then read in evidence, and is set forth in the record.

The plaintiffs contend that the copy was read in evidence without any proof that it was a copy. What was before said as to the first assignment of error is applicable here also. The objection that there was no proof that the copy was a copy is not taken in the bill of exceptions. The copy was treated by both sides as a copy, and the bill of exceptions merely states that when the defendant offered the copy in evidence the plaintiffs objected, but no ground of objection is set forth. The exception, therefore, is unavailing. Camden v. Doremus, 3 How. 515; U. S. v. McMasters, 4 Wall. 680; Burton v. Driggs, 20 Wall. 125; Evanston v. Gunn, 99 U. S. 660.

It appeared from the letter to Mr. Cox that it was written when the tariff act of 1883 was pending before congress; that the letter related to woolen knitted caps, worn by men; and that it protested against the existing duty on such articles, and against any increase of duty upon them. It appears by the record that Mr. Schwarz, one of the plaintiffs, appeared before the tariff committee in October, 1882, and made a statement with regard to the duties on those articles, as an importer of "Scotch caps," "to speak in regard to the tariff on worsted and knitted goods," and stated that L. Toplitz & Co. were importers of "worsted knitted caps," which were "classed as worsted and knitted goods." It also appeared that the sign over the plaintiffs' place of business in New York city was "Importers of Scotch Caps."

3. The defendant called a witness, who was asked on direct examination the following question: "Please state by what name, on the 3d of March, 1883, or immediately prior thereto, these goods were known in trade and commerce." The plaintiffs objected to that question on the grounds—First, that congress, in the enactment, did not have reference to commercial designation; and, second, that the time to which the question referred should be stated more definitely. The court overruled the objections, and the plaintiffs excepted. The witness answered, "Scotch caps." The following question was then put to him: "Please state whether, on the 3d of March, 1883, or immediately prior thereto, these goods were known in trade and commerce as 'bonnets for men.'" The plaintiffs objected to that question as immaterial, and for the same reason as before the objection was overruled, the plaintiffs excepted, and the witness answered, "No, sir." The same course of examination was pursued in regard to several witnesses introduced by the defendant.

It is contended by the plaintiffs that the phrase, "Bonnets, hats, and hoods for men, women, and children," is not a commercial designation, but is only descriptive; and the case of Barber v. Schell, 107 U. S. 617, 621, 2 Sup. Ct. Rep. 301, is cited. But we think no error was committed in admitting the testimony, and that it was important to ascertain the commercial name of the article in question. If no such term as "bonnets," applicable to head coverings for men, was known or used in this country in March, 1883, and if, even though known before, the term was then obsolete, it would follow that it could not have been intended to apply the

term to goods which were specifically described elsewhere in the act as "goods made on knitting frames." If the commercial designation of the article gave it its proper place in the classification of the statute, resort to the common designation was unnecessary and improper. *Arthur v. Lahey, 96 U. S. 112, 118; Barber v. Schell, 107 U. S. 617, 623, 2 Sup. Ct. Rep. 301; Worthington v. Abbott, 124 U. S. 434, 436, 8 Sup. Ct. Rep. 562; Arthur's Ex'rs v. Butterfield, 125 U. S. 70, 75, 8 Sup. Ct. Rep. 714; Robertson v. Salomon, 130 U. S. 412, 415, 9 Sup. Ct. Rep. 559.

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The evidence shows that the goods in question were known commercially in the United States as "caps," and not as "bonnets," and that "caps" was also the common designation. It cannot be properly said that the statute uses the phrase "bonnets for men." The language is, "bonnets, hats, and hoods for men, women, and children. That expression is fully answered by the words "hats for men."

The circuit court, in its opinion, said correctly: "Words used in these tariff statutes, when not technical, either as having a special sense by commercial usage, or as having a scientific meaning different from the popular meaning,—in other words, when they are words of common speech,—are within the judicial knowledge, and their interpretation is a matter of law." The court held, on the evidence set forth in the bill of exceptions, that the word "bonnet" in the act of March 3, 1883, was not sufficiently broad to cover the goods in question, unless it was made so by having affixed to it at the time congress passed the act some peculiar, technical, trade meaning, which coupled it, in the minds of the legislators, with those particular goods, or goods similar to them; and that there was no proof of that.

Moreover, at the close of the trial, both parties asked for the direction of a verdict. The court denied the plaintiffs' motion, and they duly excepted. They then asked the court to submit the case to the jury, but the court refused to do so; but it offered, however, to submit to the jury the sole question whether, at the time of the passage of the tariff act of March 3, 1883, the word "bonnet" had in this country a well-known technical, commercial designation such as would cover goods of this kind. The plaintiffs disclaimed any desire to go to the jury on that question alone, but asked leave of the court to go to the jury generally. The court refused such leave, and the plaintiffs excepted. Thereupon a verdict for the defendant was directed, and the plaintiffs duly excepted. It seems to us that this action of the court was correct, and that it offered to submit to the jury the only question which the plaintiffs could properly ask to have submitted.

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4. The other assignments of error are either immaterial, or are covered by what has been already said.

Judgment affirmed.

(146 U. S. 279)

WILMINGTON & W. R. CO. v. ALSBROOK, Sheriff.

(December 5, 1892.)

No. 1,074.

APPEAL — JURISDICTION — OBLIGATION OF CONTRACTS—RAILROAD COMPANIES—TAXATION—EXEMPTION.

1. By an act passed in 1834, the legislature of North Carolina exempted a certain railroad, thereby chartered, from taxation. Under an act of 1891, certain of its branch lines were taxed. In a suit to enjoin the collection of the tax the state supreme court acknowledged the obligation of the contract of exemption, but held that the branches in question were not included therein. *Held*, that the supreme court of the United States had jurisdiction to review this decision. Henderson Bridge Co. v. Henderson City, 12 Sup. Ct. Rep. 114, 141 U. S. 679, and Railway Co. v. Todd Co., 12 Sup. Ct. Rep. 281, 142 U. S. 282, distinguished.

2. Act N. C. Jan. 3, 1834, incorporating the W. & W. R. Co., provided in section 19 that such road should be free from taxation. Subsequent sections authorized the construction of branches, and provided that all powers, rights, and privileges conferred by preceding sections in respect of the main road should extend thereto, in the laying out, construction, use, and preservation of said branches. *Held*, that the privileges extended to the branches were limited to the purposes enumerated, and did not exempt the branch lines from taxation. 14 S. E. Rep. 652, affirmed.

3. By a subsequent act (2 Rev. St. N. C. pp. 334, 335) the H. & W. R. Co., which had not been exempt from taxation, was absorbed into the W. & W. R. Co., its stockholders taking W. & W. stock in lieu of their own, and it was provided that the property of the absorbed road should be held in the same manner as all other property of the absorbing road. *Held*, that the absorbed road was not exempt from taxation. 14 S. E. Rep. 652, affirmed.

4. In 1869 a tax was imposed upon the franchise and rolling stock of the W. & W. R. Co., and on certain lots belonging to it in Halifax county, where a part of the absorbed road was situated. In a suit to enjoin the collection thereof by the sheriff of that county it was held by the supreme court of the United States (Railroad Co. v. Reid, 13 Wall. 264) that the property and franchise were exempt. The question then presented and determined, however, was that the terms of the charter exempting all the company's property included not only its rolling stock and real estate, but its franchise also, and the distinction between the main road and the absorbed road was not adverted to. *Held* that, even if the latter question might have been litigated in that case, the decision therein was neither an estoppel nor a controlling authority, in the present litigation, as the cause of action was different. 14 S. E. Rep. 652, affirmed.

In error to the supreme court of the state of North Carolina. Affirmed.

Statement by Mr. Chief Justice FULLER:

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*This was an action brought in the superior court of Halifax county, N. C., by the Wilmington & Weldon Railroad Company, to restrain the sheriff of that county from collecting certain taxes assessed on so much of a branch road of the plaintiff known as the "Scotland Neck Branch" as lay therein, and on that part of the plaintiff's road which formerly constituted the Halifax & Weldon Railroad, and the rolling stock used with said roads. The plaintiff was incorporated under an act of the general assembly of North Carolina, approved January 3, 1834,

entitled "An act to incorporate the Wilmington and Raleigh Railroad Company." 2 Rev. St. N. C. 1837, pp. 335, 347. By the first section of this act commissioners were designated "for the purpose of receiving subscriptions to an amount not exceeding eight hundred thousand dollars, in shares of one hundred dollars each, to constitute a joint capital stock, for the purpose of effecting a communication by a railroad, from some point within the town of Wilmington, or in the immediate neighborhood of the said town, to the city of Raleigh, or in the immediate neighborhood of the said city, the route of which road shall be determined on by the company hereby incorporated." The first 20 sections of the act relate to the main line thus described.

The nineteenth section is as follows:

"That it shall and may be lawful for the said president and directors to determine from time to time what installments shall be paid on the stock subscribed; to purchase with the funds of the company, and place on the said railroad constructed by them, all machines, wagons, vehicles, carriages, and teams of any description whatsoever, which may be deemed necessary and proper for the purposes of transportation; and all the property purchased by the said president and directors, and that which may be given to the company, and the works constructed under the authority of this act, and all profits accruing on the said works, and the said property shall be vested in the respective shareholders of the company, and their successors and assigns forever, in proportion to their respective shares; and the shares shall be deemed personal property, and the property of said company; and the shares therein shall be exempt from any public charge or tax whatsoever."

The 21st, 22d, 23d, and 25th sections read thus:

"Sec. 21. That the stockholders, in general meeting, may, if they think fit, resolve to construct a branch or branches to the main road, to be connected with the main road at such point or points as they may determine on, and to lead in such direction, and to such a point or points, as they may think best; and, in order that they may do so, the said stockholders are fully authorized to cause books to be opened for subscriptions to the said lateral road or branch of the main road; and the subscribers for stock shall be subject to all the rules previously made by the company, and become members of the company, with this exception only, viz., that the stock subscribed by them shall be faithfully and honestly applied to the construction of that branch of the road for which they subscribed it; but the subscribers for the main road and the branches shall constitute but one company, and their rights of property and estate shall be in common, and not separate: provided, however, that the whole capital of subscribed stock shall not exceed one million of dollars.

"Sec. 22. That all the powers, rights, and privileges conferred by the preceding sections upon the said company, in respect to the main road, and the lands through which it may pass, are hereby declared to extend in every respect to the said company, and the president and directors thereof, in the laying out, in the construction, and in the use and preservation of said lateral or branch roads.

"Sec. 23. That it shall and may be lawful for the said company to construct a branch to the main road as aforesaid, under the restrictions aforesaid, so soon as the main road has reached the point at which the branch road is intended to be joined with the main road; but they shall not, under any pretense whatever, apply the funds of the company to the construction of a lateral or branch road, until the main road is completed, except they be subscriptions specifically made for the branch or lateral road."

"Sec. 25. That, where a branch or lateral road to the main road is shorter than twenty miles, no other person or company shall be authorized and empowered to build a railroad from any point near its termination, so as to intersect with this main road, in order to injure this company."

Section 24 refers to the right to connect or intersect with "said railroad or any of its branches," and these 5 sections, out of 38 in all, relate to branch roads.

On December 15, 1835, an act of the general assembly was approved, entitled "An act to amend an act passed in the year one thousand eight hundred and thirty-three, entitled 'An act to incorporate the Wilmington and Raleigh Railroad Company.'" 2 Rev. St. N. C. pp. 347, 348. This act authorized the capital stock of the company to be increased to any sum not exceeding $1,500,000, and provided "that the stockholders of said company shall and may be at liberty to run the main road from some point within or near the town of Wilmington to some point in the city of Raleigh, or in the immediate neighborhood thereof, or from Wilmington, or near it, as aforesaid, to some point at or near the River Roanoke, in this state, at the election of said stockholders, with the view of connecting with the Petersburg and Norfolk railroads;" "that the said company may be at liberty to lay off and construct any lateral road, under the rules and regulations provided in the aforesaid act, before or after they have completed the main railroad aforesaid;" "that it shall and may be lawful for the said company to purchase, own, and possess steamboats, and other vessels, to ply and sail from the port of Wilmington to Charleston or elsewhere, and to take and receive for the use of said company, over and besides the profits allowed in the said original act, such sums of money or other property for freight, passengers, or other accommodation on said boats and vessels as they may be able to make by contracts with their customers, and according to such rates as they may from time to time establish;" and enlarged the time for

commencing the road to three years from January 1, 1836.

*283 At the session of 1833 of the general assembly an act was passed entitled "An act to incorporate the Halifax and Weldon Railroad Company." 2 Rev. St. N. C. pp. 325, 334. This act contained no exemption from taxation, and was subject to be altered, amended, or modified by future legislatures. Under its provisions, the Halifax & Weldon Railroad Company procured its right of way, and laid out and constructed the roadbed and road from Weldon to Halifax, a distance of some eight miles, and entirely in the county of Halifax. The corporation had no rolling stock, but permitted the Portsmouth Railroad Company, during the year 1836, to run its cars over its roadbed and track. In 1836 an act was passed entitled "An act empowering the Halifax & Weldon Railroad Company to subscribe their stock to the Wilmington & Raleigh Railroad Company." 2 Rev. St. N. C. pp. 334, 335. Pursuant to the provisions of this act, the Halifax & Weldon Railroad Company and the Wilmington & Raleigh Railroad Company entered into an agreement, February 14, 1837, which agreement was in all respects executed and carried into effect by those corporations. The act authorized the stockholders of the Halifax Company to subscribe its stock on the books of the Wilmington Company, and sections 2 and 3 were as follows:

"Sec. 2. Upon the subscription of the stock held by the stockholders in the Halifax and Weldon Railroad Company in the books of the Wilmington and Raleigh Railroad Company, all the property, real and personal, owned and held by the Halifax and Weldon Railroad Company shall vest in and be owned and possessed by the Wilmington and Raleigh Railroad Company aforesaid, and be owned and held and possessed by the said company in the same manner that all the other property, real and personal, which has been acquired by the said company is owned, held, and possessed; and the road which may have been built, or partly built, by the Halifax and Weldon Railroad Company, shall thenceforward be deemed, to all intents, as well criminal as civil, a part of the Wilmington and Raleigh road.

*284 "Sec. 3. So soon as the subscription hereby authorized shall have been made, all the rights and privileges acquired under the before recited act of assembly, passed in the year one thousand eight hundred and thirty-three, entitled 'An act to incorporate the Halifax and Weldon Railroad Company,' shall cease, and the corporate existence of said company be determined."

The terms of the agreement between the two companies were that the Wilmington Company should receive the assets of the Halifax Company, and pay its debts, and the stockholders in the Halifax Company should be entitled to their respective number of shares of stock in the Wilmington Company.

The complaint alleged that "in the year 1840 the plaintiff completed the construction of its main road from the town of Wilmington, through the town of Halifax, to the town of Weldon, on the Roanoke river, in said state, and thereby connected its main line with the Portsmouth & Norfolk Railroad, and has had the same in use or operation ever since." The defendant denied the averment as made, and said that the part of the road between Halifax and Weldon was built by the Halifax Company, under its charter, and acquired by the plaintiff in 1837, in pursuance of the act of 1836. The plaintiff, in reply, averred that the Halifax road was only partially completed, and that the Halifax Company owned no rolling stock or other property of any description except its roadbed and right of way, and referred to the agreement of February, 1837. Plaintiff also, for further reply, set up the proceedings and judgment in an action commenced by plaintiff in 1869 in the superior court of Halifax county against the sheriff of that county, to enjoin the sale of property for taxes, partly assessed, as alleged, upon a portion of the roadbed and right of way acquired from the Halifax Company, and pleaded the same as an estoppel. It appeared that the agreement between the two companies above referred to was not registered, as required by the act of 1836, but that this was subsequently done under an act approved February 5, 1875. It further appeared that after the execution of the agreement of February 14, 1837, the Halifax Company ceased to exercise any corporate acts, or maintain any corporate existence or organization, and its road- *285 bed, track, and right of way passed under the control of the Wilmington Company, and has ever since been under its control, as a part of its main line of road. Another act amending the charter was approved January 24, 1851, which authorized the capital stock to be increased to $2,500,000, and the issue of scrip to the extent of the increase. By the third section it was provided "that said scrip shall represent shares in the capital stock of said company as though the said shares had been originally subscribed for by the holders thereof; and the said holders of the scrip thus issued under the provisions of this act shall be members of the said corporation, with the same privileges, rights, and immunities, and subject to the same rules and regulations, as the original stockholders of said company." By an act approved February 15, 1855, the name of the Wilmington & Raleigh Railroad Company was changed to the name of the Wilmington & Weldon Railroad Company. At the session of 1867 of the general assembly an act was passed amending the act incorporating the Wilmington Company, which was duly accepted by its stockholders, November 13, 1867. This act provided for the opening of books for subscriptions, to any amount deemed necessary, but not to exceed $25,000 per mile, for the construction of any branch to the

main line, which stock was to be separate and independent of the stock of the main road, and to be applied exclusively to the branch road for which it was subscribed.

The case came on in the superior court before Connor, J., who, from the pleadings, affidavits, and exhibits, made and filed findings, in substance as heretofore stated, and further therein found that during the year 1882 the plaintiff began and completed a branch road connecting with its main road at a point near the town of Halifax, in Halifax county, and running to the town of Scotland Neck, in that county, which branch was extended to the town of Greenville, in Pitt county, during 1890, and in 1891 to the town of Kinston, in Lenoir county; being in all a distance of 85 miles; that the branch road ran through the county of Halifax for 23⅛ miles. That it was not shown that the said branch was built pursuant to the provisions of the original charter or amendments thereto. That the branch road was operated and managed by the officers of the plaintiff company, and known as the "Scotland Neck Branch of the Wilmington & Weldon Railroad." That, in addition to the said Scotland Neck branch, the plaintiff company owned and operated in the same manner the following other branch roads in the state: The Clinton & Warsaw branch, 13 miles in length; the Nashville or Spring Hope branch, 18 miles in lenth; the Wilson & Fayetteville branch, 73.6 miles in length; the Tarboro branch, 17 miles in length; making a total of 206.6 miles, the main road being 162 miles in length. That the said branch roads, except the Tarboro branch, had been built within the past 10 years; and that the plaintiff company also owned other investments in railroads and other properties.

A transcript of the proceedings and judgment roll in the case of Wilmington & Weldon Railroad Company v. John H. Reid was attached to the findings.

The railroad commission of North Carolina, pursuant to the provisions of the revenue act of 1891 of that state, (Acts 1891, c. 323,) assessed for taxation the portion of plaintiff's main road and rolling stock from Halifax to Weldon, being the portion acquired from the Halifax Company, and also that part of the Scotland Neck branch in Halifax county, and directed the commissioners of Halifax county to place the same upon the tax list of the county for the year 1891, which was done by the county commissioners, and taxes were levied by them thereon accordingly. The tax list was duly placed in the hands of the defendant, the sheriff of the county, and he demanded payment of the taxes, which being refused, he threatened to collect the same by distraint.

The superior court was of opinion that the tax upon the roadbed and rolling stock between Halifax and Weldon was void, and enjoined the defendant from enforcing its payment; but that the tax levied upon the Scotland Neck branch was valid, and vacated the preliminary restraining order against its collection. Both parties appealed to the supreme court, which held that the superior court had decided correctly as to the branch line, but should have also decided the roadbed and rolling stock between Halifax and Weldon to be taxable, and therefore, in that respect, reversed the judgment of that court. Final judgment having been afterwards entered in the superior court in accordance with the opinion and judgment of the supreme court, the case was again taken by plaintiff to the supreme court, and the judgment affirmed, whereupon this writ of error was sued out. The opinions of the supreme court, by Clark, J., which discuss the questions involved in all their aspects, will be found reported in 110 N. C. 137, 14 S. E. Rep. 652.

S. F. Phillips, Thos. N. Hill, F. D. McKenney, and Wm. H. Day, for plaintiff in error.
R. O. Burton and Theo. F. Davidson, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The jurisdiction of this court is questioned upon the ground that the decision of the supreme court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a federal question.

In arriving at its conclusions, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and, as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed. New Orleans Water Works Co. v. Louisiana Sugar Co., 125 U. S. 18, 38, 8 Sup. Ct. Rep. 741.

We do not regard Bridge Co. v. City of Henderson, 141 U. S. 679, 12 Sup. Ct. Rep. 114, and Railway Co. v. Todd Co., 142 U. S. 282, 12 Sup. Ct. Rep. 281, cited by defendant in error, as qualifying the rule upon this subject.

In Bridge Co. v. City of Henderson, it was held by the court of appeals of Kentucky that the city of Henderson, under a certain city ordinance accepted by the bridge company, had acquired a contract right to tax that part of the bridge within the city limits in consideration of rights and privileges granted the company by the ordinance, and, as this interpretation justified the municipal taxation in question, and could not be reviewed by us, we declined to maintain jurisdiction.

In Railway Co. v. Todd Co., certain lands were considered by the state court as not within the exemption claimed, under the revenue law existing at its date.

But in the case in hand the court passed

upon the action of the authorities in virtue of a legislative act approved more than 50 years after the making of the supposed contract, and explicitly upheld the law.

We are obliged, then, to consider the legality of this taxation in respect of the branch road proper and of the road from Halifax to Weldon.

The inquiry is limited to taxation on corporate property only, though the original exemption also covered the shares of the capital stock in the hands of its shareholders. The legislature recognized the distinction between the one class and the other; and, if it were conceded that all the shares should be treated as exempt, as contended, in respect of which we are called upon to express no opinion, yet the entire property of the company might or might not be exempt, in the light of all the provisions of the charter with its amendments, and the terms of the authority under which it may have been acquired.

The applicable rule is too well settled to require exposition or the citation of authority. The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance, unless the deliberate purpose of the state to that effect clearly appears. The surrender of a power so vital cannot be left to inference, or conceded in the presence of doubt, and, when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power.

By its charter the Wilmington & Raleigh Railroad Company, with a capital stock of $800,000, was empowered to construct, repair, and maintain a railroad from Wilmington to Raleigh, and by its nineteenth section it was provided (the punctuation being corrected) that "the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever."

By section 21 branch roads were authorized, the whole capital of subscribed stock not to exceed $1,000,000, and by section 22 it was provided "that all the powers, rights, and privileges conferred by the preceding sections upon the said company in respect to the main road, and the lands through which it may pass, are hereby declared to extend in every respect to the said company, and the president and directors thereof, in the laying out, in the construction, and in the use and preservation of said lateral or branch road."

So far from it plainly appearing from this language that the exemption from taxation was thereby extended to branch roads, it seems to us entirely clear that the words used were words of limitation, and, in terms, confined the powers, rights, and privileges granted to those relating to the laying out, the construction, the repair, and the operation of the branches.

The powers, rights, and privileges conferred by the preceding sections upon the company in respect to the main road, and the lands through which it might pass, embraced the rights and powers necessary for the laying out, construction, repair, maintenance, and operation of a railroad, including the power of eminent domain in the various forms of its exercise; in short, the positive rights or privileges, without which the branch roads could not be constructed or successfully worked, but which did not in themselves include immunity from taxation,—a privilege having no relation to the laying out, construction, use, or preservation of the road.

In Railroad Co. v. Commissioners, 103 U. S. 1, the Annapolis & Elk Ridge Railroad Company was "invested with all the rights and powers necessary to the construction and repair" of its railroad, and for that purpose was to "have and use all the powers and privileges" and be subject to the obligations contained in certain enumerated sections of the charter of the Baltimore & Ohio Railroad Company. Among these sections was one containing this provision: "And the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the states assenting to this law." It was held that exemption from taxation was not one of the privileges of the Baltimore & Ohio Company, which the new company was permitted "to have and use," since the powers and privileges conferred were only such as were necessary to the construction, repair, and use of the railroad. And Railroad Co. v. Gaines, 97 U. S. 697, and Morgan v. Louisiana, 93 U. S. 217, where similar rulings were made, were cited and approved.

The language of the section under consideration requires the same construction, although the section relates to branch roads of the same company, and not to the roads of different companies. The facts that the branches may be component parts of an organic whole; that "the subscribers for the main road and the branches shall constitute but one company, and their rights of property and estate shall be in common, and not separate," (section 21,)—do not change the rule, for restrictive words cannot be wrested from their apparent meaning because used in the same charter, and with regard to the creation of certain parts of one system, if those subdivisions as authorized have a separate physical existence, and constitute in themselves a certain class of property. If other companies had been chartered in the language employed in these sections, there could be no question that their property would be liable to taxation, and no reason is perceived for treating these branches as differently situated in this regard.

We cannot accede to the ingenious suggestion of counsel that section 22 was simply a provision for extending to the branches the previous provisions of the charter as to eminent domain only. The powers, rights, and privileges were those pertaining to the use, as well as the construction, of the branches; and if a necessity ap-

peared to exist of specifically conferring upon the company the power of eminent domain in respect of its branch roads, because of the character of the power, it is difficult to see why exemption from taxation should not have been mentioned, for the same reason, if it had been intended to extend that also to the branches. Nor by a play upon the word "extend" can the section be regarded as an enlargement to the exclusion of restriction. To extend the powers, rights, and privileges of the company existing as to the main road so as to comprehend the branches, may, it is true, be said to have enlarged their application, but only in the particulars named, and as restricted by the enumeration.

We do not deny that exemption from taxation may be construed as included in the word "privileges," if there are other provisions removing all doubt of the intention of the legislature in that respect, (Picard v. Railroad Co., 130 U. S. 637, 642, 9 Sup. Ct. Rep. 640,) but we have none such here.

And in this connection some further observations may properly be made. As pointed out by the supreme court, the charter, as originally granted, was for the construction of a railroad from Wilmington to Raleigh, a distance of something over 100 miles, with a capital stock of $800,000; and branches were authorized under the sections referred to, interjected into the body of the act, the capital being, however, limited to $1,000,000. The act of 1835 authorized a change of terminus "to some point at or near the River Roanoke," and an increase of the capital stock to $1,500,000, and the company was also empowered to purchase, own, and possess steamboats and other vessels, to ply from Wilmington to Charleston or elsewhere. The act of 1851 permitted an increase of the capital stock to $2,500,000. These acts contained no exemption of property from taxation, nor did the act of 1867, which authorized the company to open books for subscription to build branch roads to the amount of $25,000 per mile, nor any other amendatory act availed of by the company.

Under the act of 1835 the road was built to Halifax, 154 miles, and by the acquisition of the Halifax & Weldon Railroad was extended to Weldon, making a distance of 162 miles. The findings show over 200 miles in branch roads. Doubtless these, or some of them, might be treated as constituting parts of the main line in fact, but under the charter that term is applicable to the line from Wilmington to Halifax, or to Weldon, a consideration involved in another aspect of the case.

By section 33 of the act of 1834, the completion of "the main line from Wilmington to Raleigh within twelve years" was required, but it is insisted that this limitation had no application to the branches; that, as to the main line, its construction was a duty, but as to the branches, their construction was simply licensed; and that under the acts of 1834 and 1835 it was competent for the company, at discretion and at any time, to construct branches from any point on its main road in any direction, and to any point, within the state. None of the branch roads were either commenced or finished within the 12 years. The Tarboro branch, it is said, was built in 1860, and the others, according to the findings, within 10 years prior to December, 1891. We find nothing in the record to indicate that, if the legislature intended to empower this company to tessellate the state with branch roads, it was designed that they should be exempted from the payment of taxes. Whatever effect the acceptance of the amendments and the delay in building the branches may have had, it is quite clear that their immunity from taxation cannot be successfully asserted under the circumstances.

It remains to examine the case as respects the road from Halifax to Weldon.

Under the amendment of 1835, the Wilmington Company was at liberty to run its main road from Wilmington to Raleigh, or from Wilmington "to some point at or near the River Roanoke."

The supreme court held that Halifax was the point on the Roanoke river which, by election of the company, was made the terminus of the main road as authorized, instead of Raleigh. This followed from the fact that the company only built its road to Halifax under its charter, and that Weldon was reached by the acquisition of the road of the Halifax Company under the act of 1836, passed for that purpose.

The main road of the Wilmington Company was exempt; but if the Halifax road, after its transfer, be regarded as a branch or connecting road, and, at all events, as in law not a part of the main road, then it was not within the exemption of the charter, and the taxation complained of was not illegal. It must be borne in mind that the Halifax road was constructed under an act of incorporation which did not withdraw the property of the Halifax Company from taxation. The legislature apparently did not consider it necessary to hold out that inducement to the building of a line between Halifax and Weldon, and when, for the benefit of these railroad companies, it authorized the transaction in question, it must be assumed to have done this as a matter of favor, and not upon the consideration of benefit to the public by the creation of what had already been brought into existence without any special release from common burdens.

The act of 1836 was an act, as its title stated, "empowering the Halifax & Weldon Railroad Company to subscribe their stock to the Wilmington & Raleigh Railroad Company." This was to be done upon such terms as might be stipulated between the two companies, and the terms agreed on were the payment of the Halifax Company's debts, the transfer of its assets, and the issue

of certificates to its stockholders of their respective number of shares in the Wilmington Company. Upon that subscription being effected, the act provided that "all the property, real and personal, owned and held" by the Halifax Company should become vested in and be owned and possessed by the Wilmington Company, and be "owned and held and possessed by the said company in the same manner that all the other property, real and personal, which has been acquired by the said company, is owned, held, and possessed;" and that the road of the Halifax Company "shall thenceforward be deemed, to all intents, as well criminal as civil, a part of the Wilmington & Raleigh Railroad." The rights and privileges of the Halifax Company thereupon ceased, and its corporate existence was determined. The legal identity of the Wilmington Company remained, while that of the Halifax Company was destroyed; and, although the transaction was described by the legislature, in the act of 1875, as a consolidation, it amounted rather to a merger or an amalgamation, and need not be held to have resulted in the new corporation. But it by no means follows that the transfer of the road of the one company to the other made it in law such an extension
300 of the main road of the latter as to bring it within the exemption from taxation, which, as we have seen, was confined to the main road alone. The main road built by the Wilmington Company under its charter terminated at Halifax. The prolongation of the line to Weldon was the result of acquisition under another and different act, required to be passed in order to allow this to be done, and not conferring any exemption. As already indicated, if the construction of the main road could be presumed to have been partially induced by the promise of exemption, no such presumption arose from the mere legislative concession of authority to obtain an existing road.

The property acquired was, indeed, to be owned, held, and possessed by the Wilmington Company in the same manner as its other property,—the real estate as in fee simple, and the personalty as used and enjoyed; but the way in which property is owned and handled has no necessary relation to an exemption. The branch roads are owned, held, and possessed in the same manner as the main road, but the extent of the exemption is limited by the charter; and that limitation was neither explicitly nor by fair implication removed by the language of the act of 1836.

Railroad Co. v. Georgia, 92 U. S. 665, is much in point. There the Central Company and the Macon Company were authorized to unite and consolidate their stocks and all their rights, privileges, immunities, property, and franchises, under the name and charter of the Central Company, and thereupon the holders of the shares of the stock of the Macon Company became entitled to receive a like number of shares of stock in the Central Company, upon surrendering their certificates of stock in the Macon Company. It was held that the consolidation did not amount to a surrender of the existing charters of both companies, and the creation of a new company; that the purpose and effect of the consolidation act were to provide for a merger of the Macon Company into the Central Company, and to vest in the latter the rights and immunities of the former, but not to enlarge them; and that, as the Macon Company held its franchises and property subject to taxation, the Central Company, succeeding to the ownership, held them alike sub-301 ject. It was not doubted that the Macon Company was intended to go out of existence, for, as said by the court through Mr. Justice Strong, provision was made for the surrender of all the shares of its capital stock, and without stockholders it could not exist. The Central Company absorbed the Macon Company, and it ceased to be, just as in the case at bar the merger was to result and did result in the determination of the corporate existence of the Halifax Company.

In Railroad Co. v. Wright, 116 U. S. 231, 6 Sup. Ct. Rep. 375, the question related to the liability of the railroad company for taxes on different parts of its road. The original charter contained an exemption from taxation, and as to two of the parts acquired or built under subsequent legislation there was a reservation of the right to tax. A third division was constructed under an amendatory act giving authority so to do, "under the rules and restrictions" originally prescribed, but containing nothing about taxation. As the original charter was not the source of power to build the division, it was decided that the exemption therein contained did not extend to the latter. Mr. Chief Justice Waite, delivering the opinion of the court, said: "In building this extension or branch the company was placed 'under the rules and restrictions' they were subjected to in building the original road; but that did not necessarily imply an exemption of this line from taxation to the same extent that the old road was exempted. That exemption was only for that road, and, as the amending act does not in terms or by fair implication apply the exemption to the additional road, which was to be built under it, we must presume that nothing of the kind was intended, and that the state was left free to tax that road like other property."

We concur with the state court in the conclusions reached, as sustained by reason and authority.

It appears from the record of the case of Wilmington & Weldon Railroad Company v. John A. Reid that certain taxes were imposed in 1869 upon the franchise and rolling stock of the Wilmington Company, and upon certain lots of land situated in the county of Halifax, forming part of the property of the
302 company, and necessary to be used in the operation of its business; and that the defendant, Reid, sheriff of the county, had seized an engine and tender belonging to the plain-

tiff in the effort to collect the tax. A demand was made on the county commissioners to correct the tax list in the particular of the levy against the franchise and rolling stock, and subsequently a complaint was filed by the company against the sheriff, the county commissioners not being made parties, setting up that neither the lots nor the franchise or rolling stock were liable to be taxed, because exempt under section 19 of the company's charter. The facts being admitted, judgment was entered sustaining the exemption claimed, and the sheriff was enjoined.

The case was then taken to the supreme court of the state, where it was held that the franchise was liable to taxation, and the order of the superior court was reversed. 64 N. C. 226. To review this judgment a writ of error was sued out from this court, and it was thereon decided that a statute exempting all the property of a railroad company from taxation exempts not only the rolling stock and real estate owned by it, and required by the company for the successful prosecution of its business, but its franchise also, and the judgment of the supreme court was in turn reversed. Railroad Co. v. Reid, 13 Wall. 264. These proceedings are relied on as an estoppel, so far as the road from Halifax to Weldon is concerned, or as controlling authority in the premises. We think they cannot be so regarded. The causes of action are not identical, and the points or questions actually litigated are not the same. The distinction between the road from Halifax to Weldon and the main road from Wilmington to Halifax was not adverted to; and, even if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case cannot operate as determining what might have been, but was not, brought in issue and passed upon. Cromwell v. County of Sac, 94 U. S. 351; Nesbit v. Independent Dist., 144 U. S. 610, 12 Sup. Ct. Rep. 746.

It is quite evident that the former action was simply availed of in order to obtain a decision as to the power to tax the main line, and that no other point was controverted.

Judgment affirmed.

(146 U. S. 338)

UNITED STATES v. DUNNINGTON et al. DUNNINGTON et al. v. UNITED STATES.

(December 5, 1892.)

Nos. 51, 52.

CONFISCATION ACT — SUBSEQUENT CONDEMNATION — RIGHTS OF HEIRS.

1. Under the confiscation act of 1862, (12 St. at Large, pp. 589, 627,) the estate forfeited is the life estate. The fee remains in the offender, but without power of alienating it during life, unless his disability is removed. Wallach v. Van Riswick, 92 U. S. 202, modified; Railroad Co. v. Bosworth, 10 Sup. Ct. Rep. 231, 133 U. S. 92; and Jenkins v. Collard, 12 Sup. Ct. Rep. 868, 145 U. S. 546, approved.

2. Certain land in Washington, sold under the confiscation act of 1862, was thereafter condemned under Act May 8, 1872, (17 St. at Large, p. 83,) for an enlargement of the capitol grounds, an appraisement was had, and the value was deposited in court. These proceedings took place during the life of the fee-simple owner, who had lost the estate by confiscation. *Held*, that the condemnation operated upon the whole fee, and vested a perfect title in the United States; that the disability of the former owner was removed by the amnesty and pardon proclamation of December 25, 1868; and that consequently the appraisement was valid, and binding upon him and his heirs, as well as upon the tenant during his life, under the confiscation sale.

3. The entire value of the condemned land was paid out under order of court to the heirs of the last tenant under the confiscation sale, neither the owner in fee nor his heirs appearing. *Held*, that if there was any error in such payment the United States was not chargeable therewith, since the court was not the agent of the government in such payment, and the government was under no obligation to see that the money was properly distributed.

Appeals from the court of claims. Reversed.

Statement by Mr. Justice BROWN:

This was a petition to recover from the United States the sum of $12,644, the alleged value of lot 3, square 688, in the city of Washington, condemned for the enlargement of the capitol grounds. The following facts were found by the court of claims:

(1) Charles W. C. Dunnington, the ancestor of the claimants, *was, on April 2, 1852, and subsequently up to June 29, 1863, seised or well entitled in fee simple of and to lot No. 3, in square No. 688, on the plats of the squares and lots of the city of Washing- , with the improvements, buildings, rights, privileges, appurtenances, and hereditaments, containing 5,572 square feet. Said Dunnington, the ancestor, died August 14, 1887, leaving as his sole heirs the claimants in this case, as set out in their petition. *339

(2) May 12, 1863, proceedings in rem, under the confiscation act of July 17, 1862, and joint resolution of the same date, (12 St. pp. 589, 627,) were begun by the defendants in the supreme court of the District of Columbia to confiscate said lot as the property of Dunnington, who was in rebellion against the United States. Under these proceedings the lot was duly condemned as enemy's property, and exposed to public sale, at which A. R. Shepherd became the purchaser and entered into possession.

(3) Under the act of May 8, 1872, (17 St. p. 83,) proceedings were commenced in the supreme court of the District of Columbia, at the instance of the defendant, for the acquisition of land to enlarge the grounds around the capitol, in which contemplated enlargement said lot No. 3 was included.

June 11, 1872, the secretary of the interior informed the court that he was unable to obtain the titles to said lands by mutual agreement with the owners. Thereupon the court appointed commissioners "to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements necessary to be taken for public use, and make return to said court."

October 16, 1872, said commissioners filed their report, in which the cash value of said lot No. 3 is appraised at $1.50 a square foot, and the improvements thereon at $1,500. They also report that said lot contained 5,572 square feet, thus making the whole value of lot and improvements $9,858.

On the same day said appraisement was approved and adopted by the court, and the same was reported to the secretary of the interior.

*340 March 15, 1873, the court made the following order:

"Whereas, it appears to the court that the owner or owners of each of said lots and parts of lots have failed and neglected to demand of the secretary of the interior the said appraised cash value of said lots and parts of lots, respectively, for fifteen days after the appraisement thereof by this court, it is therefore ordered that leave be, and is hereby, granted to said relator to deposit the said appraised values of said lots and parts of lots in this court, to the credit of the owners thereof, respectively, subject to be drawn therefrom only upon an order of this court for payment to the parties entitled; and it is further ordered that upon the depositing of the money by the relator as hereinbefore provided, and notice thereof filed with the clerk of this court, possession of the property for which said deposit is made may be taken by the United States."

(4) March 31, 1873, in pursuance of the above order, a certificate of deposit for the amount of said appraisement was filed with the court by the secretary of the interior.

Thereupon defendants took possession of said lot, and the same is now embraced in the ornamental grounds about the capitol.

(5) April 3, 1873, upon the petition of the heirs of Martin King, deceased, the appraised value of said lot and improvements, amounting to $9,858, was, by order of the court, paid to William F. Mattingly, attorney of record for said heirs.

Said King was the vendee, through several intermediate conveyances, of said A. R. Shepherd.

(6) The cash value of said lot No. 3 on August 14, 1887, was, at the rate of $2 a square foot, $11,144; improvements, $1,500; making together, $12,644.

Upon the foregoing finding of facts the court decided, as a conclusion of law, that the claimants were entitled to recover $9,858, for which judgment was entered. 24 Ct. Cl. 404. Both parties appealed to this court.

Sol. Gen. Aldrich, for the United States. Chas. W. Hornor and Geo. A. King, for Dunnington and others.

*343 *Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the *344 opinion of the court.

*This was a proceeding by the heirs at law of a person formerly in rebellion against the United States to recover the value of a lot of land, which had first been confiscated as enemy's property, and then condemned, in the hands of the purchaser, for the use of the government and for the enlargement of the capitol grounds.

If the case were the simple one assumed by the claimants of a piece of private property taken for the public use without compensation to the owners, their right to recover its value would be beyond question; but there are other facts which put the case in a somewhat different light. Under the confiscation act of July 17, 1862, (12 St. p. 589,) the lot had been seized as the property of a public enemy and sold to Shepherd. By these proceedings the estate of Charles W. C. Dunnington, the ancestor of the claimants, was forfeited and vested in the purchaser. There remained, however, the reversionary interest, which upon his demise would become vested in these heirs.

During his life, and on May 8, 1872, congress passed an act for the enlargement of the capitol grounds, by taking in square No. 688, which included the lot in question. 17 St. pp. 61, 83. By section 7 it was made "the duty of the secretary of the interior to purchase, from the owner or owners thereof, at such price, not exceeding its actual cash value, as may be mutually agreed on, * * * such private property as may be necessary for carrying this act into effect." By section 8 it was directed "that if the secretary of the interior shall not be able to agree with the owner or owners * * * upon the price, * * * it shall be his duty to make application to the supreme court of the District of Columbia, which court is hereby authorized and required, upon such application, in such mode, and under such rules and regulations, as it may adopt, to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate," etc. By section 9, "that the fee simple of all premises so appropriated * * * shall, upon payment to the owner or owners, respectively, of the appraised value, or in case the said owner or owners refuse or neglect *344 for *fifteen days after the appraisement* * * * to demand the same, * * * upon depositing the said appraised value in the said court to the credit of such owner or owners, respectively, be vested in the United States." Section 11 provided "that no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners, but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases, as soon as the United States shall have paid the compensation assessed, or secured its payment, by a deposit of money, under the order of the court, possession of the property may be taken."

The secretary of the interior, being unable

to agree with the owners upon a price, on June 11, 1872, informed the court to that effect, and applied for the appointment of commissioners to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements, etc. On October 16, 1872, the commissioners filed their report, appraising the property at $9,858. This appraisement was approved, and on March 15, 1873, the court made an order in the terms of the act, reciting that the owners had neglected to demand of the secretary of the interior the appraised cash values of said lots for 15 days after the appraisement thereof by the court, and directing that leave be granted to deposit the appraised values in court to the credit of the owners, subject to be drawn therefrom only upon the order of the court for payment to the parties entitled, and that, upon the deposit of the money and notice to the clerk, possession of the property might be taken by the United States. In pursuance of this order the money was deposited, and the United States took possession of the lot, which is now embraced within the ornamental grounds of the capitol. Three days thereafter the entire appraised value of the lot, viz., $9,858, was paid to the heirs of Martin King, who had become vested, through several intermediate conveyances, with the title acquired at the confiscation sale.

*1. It is insisted by the claimants, in this connection, that these proceedings in condemnation were a nullity as to them; that from the time the estate was forfeited under the confiscation act until August 14, 1887, neither Charles W. C. Dunnington nor his heirs retained any right, title, or interest in this property which could be asserted in a court of law or equity; that neither of them had any day in court in the condemnation proceedings, nor was it in law possible for them in any way to intervene or assert any claim whatever. By the joint resolution accompanying the confiscation act, (12 St. p. 627,) no proceedings under such act could be considered "to work a forfeiture of the real estate of the offender beyond his natural life." The status of the fee between the time the forfeiture took effect and the termination of the life estate, by the death of the offender, when his heirs took title to the property, has been the subject of much discussion and of some conflict of opinion in this court.

In the first case that arose under this act, (Bigelow v. Forrest, 9 Wall. 339,) Mr. Justice Strong suggested anomalies presented by the forfeiture of lands of which the offender was seised in fee, during his life and no longer, without any corruption of his heritable blood, and declined to inquire how, in such a case, descent could be cast upon his heir notwithstanding he had no seisin at the time of his death. In Day v. Micou, 18 Wall. 156, it was held that it was not the property itself of the offender which was made the subject of the seizure, even during his life, but it was his interest in the property, whatever that interest might be, and if he had, previously to his offense, mortgaged the land to a bona fide mortgagee, the mortgage was not divested, and the sale under the confiscation act passed the life estate subject to the charge.

The subject was considered at length in the case of Wallach v. Van Riswick, 92 U. S. 202, which was a bill for the redemption of a deed of trust of property in Washington, subsequently confiscated, given by Wallach, a public enemy, to secure the payment of a promissory note. Wallach's interest in the property was therefore an equity of redemption, which the purchaser at the confiscation sale acquired and held with *the security of the deed of trust, which he had also purchased. Wallach, having returned to Washington after the war, made a deed purporting to convey the lot in fee, with covenants of general warranty, to Van Riswick, the purchaser at the confiscation sale. The case stood in this condition until Wallach died, when his heirs, claiming that, after the confiscation proceedings, nothing remained in him which could be the subject of sale or conveyance, filed a bill to redeem the deed of trust, which was admitted to be still a valid lien upon the property. This court decided that the heirs had a right to redeem, holding, in effect, that, after the confiscation proceedings, the offender had no interest in the thing confiscated which he could convey, or any power over it which he could exercise in favor of another. It was thought that congress could not have intended to leave in the enemy a vested interest in the property which he might sell, and with the proceeds of which he might aid in carrying on the war against the government; and support was found for that conclusion in the fact that the sixth section of the confiscation act declared that all sales, transfers, or conveyances of any such property should be null and void. The question whether the fee remained in abeyance pending the life of the offender, or, if not, in whom it was vested, though discussed, was not decided.

In Pike v. Wassell, 94 U. S. 711, the question arose whether the heirs of the person whose estate had been confiscated could maintain an action to require the purchaser to keep down the taxes during the life of the offender. The defendants insisted that until the death of the offender the children had no interest in the property, and therefore could not appear to protect the inheritance. It was held to be true, as a general rule, that so long as the ancestor lives the heirs have no interest in his estate; but, without undertaking to determine where the fee dwelt during the life estate, it was held that the heirs had an estate in expectancy, and, as there was no one else to look after the interests of the succession, they might properly be permitted to do whatever was necessary to protect it from forfeiture or incumbrance. The case was held a proper one for a court of equity to in-

*348 terfere and grant proper relief. It is evident from the language of the opinion in this case that the necessity of having some one to represent the fee and to protect the expectant estate of the heirs was present to the mind of the court. The question decided in Wallach v. Van Riswick was raised again in French v. Wade, 102 U. S. 132, and the former case was unequivocally affirmed.

The question what became of the fee was also discussed in Railroad Co. v. Bosworth, 133 U. S. 92, 10 Sup. Ct. Rep. 231, and it was intimated, as a logical consequence from the decision in Shields v. Schiff, 124 U. S. 351, 8 Sup. Ct. Rep. 510, that the heirs took as heirs, and not by donation from the government; "that, after the confiscation of the property, the naked fee, * * * subject, for the lifetime of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise," said Mr. Justice Bradley, "how could his heirs take it from him by inheritance? But, by reason of his disability to dispose of or touch it, or affect it in any manner whatsoever, it remained, as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood; the offender can transmit by descent; his heirs take from him by descent; why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?" It was further held in that case that, if the disability of the offender be removed by a pardon or armistice, it restored him to the control of his property, so far as the same had never been forfeited or never become vested in another person.

In Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. Rep. 868, the estate of a public enemy was confiscated and sold. Subsequent to the sale he returned to Cincinnati, gave a deed in fee simple with covenants of general warranty, and it was held that he and all persons claiming under him were thereby estopped from asserting the title to the premises, as against the grantee, or from conveying them to any other parties. It was further held that no disposition was ever made by the government of the reversion of the estate of the offending party; that it must, therefore, *349 be construed to have remained in him, but without power to alienate it during his life; that the covenant of seisin in his deed estopped him and his heirs from asserting title to the premises against the grantee; and that the disability, if any, which had rested upon him against disposing of the fee was removed by the proclamation of pardon and amnesty of December 25, 1868, and he stood, with reference to that estate, precisely as though no confiscation proceedings had ever been had. "The amnesty and pardon, in removing the disability, if any, resting upon him, respecting that estate, enlarged his estate, the benefit of which inured equally to his grantee."

Upon the whole, we think the doctrine was too broadly stated in Wallach v. Van Riswick, that the effect of the confiscation was to divest the owner of every vestige of proprietary right over the property, and that the sounder view is that intimated in Railroad Co. v. Bosworth and Jenkins v. Collard; that the estate forfeited is the life estate of the offender; and that the fee remains in him, but without the power of alienating it during his life, unless the disability be removed. The theory of the common law, that the fee can never be in abeyance, but must reside somewhere, though seemingly somewhat fanciful, is founded upon a consideration of good sense that there shall always be some one in existence to represent it in actions brought for its recovery, and to protect the interest of the heirs. In treating of this subject, Mr. Fearne, in his work on Contingent Remainders, (volume 2, § 60,) observes "that, if a person limits a freehold interest in the land, by way of use or devise, which he may do, though he could not do so at the common law, to commence in futuro, without making any disposition of the intermediate legal seisin * * * the legal seisin, property, or ownership, except such part thereof, if any, as is comprised within a prior disposition of a vested interest, of course remains in the grantor and his heirs, or the heirs at law of the testator, until the arrival of the period when, according to the terms of the future limitation, it is appointed to reside in the person to whom such interest in futuro is limited." That the fee is not forfeited by the confiscation is also the logical deduction from the ruling in Shields v. Schiff, 124 U. S. 351, 8 Sup. Ct. Rep. 510, *350 that the heirs take by descent from the offender, and not by donation from the government, inasmuch as, if there be no vestige of the estate left in the ancestor, it would be impossible for them to take by descent from him. This, too, disposes of the theory that the fee resides in the United States in trust for the heirs.

A necessary inference from the position assumed by the claimants, that neither Dunnington nor his heirs retained any interest in the forfeited estate, nor any right to intervene in these proceedings, is that the government can obtain no title by condemnation to confiscated property during the life of the offender; that it can only condemn his life estate in the hands of the purchaser; and that, upon the termination of such estate, the heirs can recover the property, or at least compel the government to institute new proceedings for its condemnation. Such a construction would be intolerable. The march of public improvement cannot thus be stayed by uncertainties, complications, or disputes regarding the title to property sought to be condemned; and the language of section 8 of the act of May 8, 1872, requiring the appraisement to be made of the several interests of each and every owner of the real estate, evidently contemplated an investiture of the entire title and of the interest of every

owner, present and prospective, in the United States. We are therefore of opinion that the condemnation in this case operated upon the fee as well as upon the life estate, and, as the presumption is that due and legal notice was given of the proceedings, the appraisement was valid and binding upon Dunnington and his heirs. Assuming that, after the confiscation proceedings, he held only the naked fee without the power of alienation, the amnesty and pardon proclamation of the president of December 25, 1868, before the proceedings to condemn, removed his disability in this particular, and restored to him the right to make such use of the remainder as he saw fit.

2. A further question remains to be considered with regard to the proceedings taken after the payment of the money into court. It is insisted by the claimants that it was the duty of the United States, as plaintiffs in the condemnation proceedings, to take proper steps for the payment of the sum fixed by the appraisers to the persons entitled thereto, by apportioning the sum between the tenants of the life estate and the heirs of Dunnington, or by the investment of the entire amount in interest-bearing securities, for the benefit of the tenants of the life estate, until its termination, and for the ultimate delivery of the same to the heirs. It is a necessary deduction from our conclusion upon the other branch of the case that the appraised value of the property represents the whole fee, and the interests, both present and prospective, of every person concerned in the property, and such are the authorities. Canal Co. v. Archer, 9 Gill & J. 479, 525; Ross v. Adams, 28 N. J. Law, 160. The money, when deposited, becomes in law the property of the party entitled to it, and subject to the disposal of the court. In re New York Cent. & H. R. R. Co., 60 N. Y. 116; Commissioners v. Todd, 112 Ill. 379.

It is evident that the gist of the petitioners' complaint in this connection lies in the order of the supreme court of the District of Columbia of April 3, 1873, directing the payment of the entire appraised value of the lot to the heirs of Martin King, the vendee of Shepherd, who had purchased the life estate of Dunnington under the confiscation proceedings. Neither Dunnington, who is still living, nor his heirs, the present claimants, appear to have intervened in the condemnation proceedings, or to have raised a question as to the propriety of this payment. The proceedings, however, appear to have been carried on in strict conformity with the act, which required the secretary of the interior, in case he should be unable to purchase at private sale, to apply to the court for an appraisement; and, in case the owner neglected to demand of him the appraised value within 15 days, to pay the same into court, subject to being paid out to the persons entitled to it. Assuming that the payment of the entire amount to the heirs of King was a mistake, it is difficult to see how the United States can be held responsible for it. The courts of the United States are in no sense agencies of the federal government, nor is the latter liable for their errors or mistakes. They are independent tribunals, created and supported, it is true, by the United States, but the government stands before them in no other position than that of an ordinary litigant. If the federal government should proceed in a state court to condemn a piece of land for a public building, under a similar statute, and should pay the appraised value into court, and the court should award the money to the wrong party, it could not be seriously claimed that the government should pay it a second time. So, if a railway company should proceed to condemn land in this city for the purposes of a station, it would be completely exonerated from all further obligation by the payment of the appraised value to the depositary designated by the law under which the proceedings were taken. What was the United States to do, after the deposit was made, to protect itself? It had discharged its entire liability by the payment into court, and was not entitled to notice even of the order for the distribution of the money. If the attorney general had appeared, it might have been charged that he was a mere interloper, and that only the owners of the land were interested in the distribution of its proceeds. We are not without authority upon this subject. In a well-considered case in New Jersey, (Crane v. City of Elizabeth, 36 N. J. Eq. 339,) it was held that the compensation fixed for the taking of certain land for streets was to include the value of all the interests, and was to be paid to the owner of the land if no other claimant intervened; and that, if in any case such owner ought not to receive the whole, timely resort must be had to the court of chancery, which would see to the equitable distribution of the fund. "The price to be paid," said the court, "by the city is to be the full value of all rights which may be impaired for the public benefit, and this is to be ascertained only after notice, not specially to individuals who alone may appear to guard their claims, but generally by the publicity which attends the doings of the council, and by newspaper advertisement, which will reach all alike, and under which all may be protected. The action of the city authorities has thus the distinctive quality of a proceeding in rem, a taking, not of the rights of designated persons in the thing needed, but of the thing itself, with a general monition to all persons having claims in the thing. When, by the appraisement of the commissioners, the price of the thing is fixed, that price stands in place of the thing appropriated, and represents all interests acquired. * * * But if, in any special case, this owner ought not, in equity, to receive the fund, the court of chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute

has left without express protection." In the case of Heirs of John Van Vorst, 2 N. J. Eq. 292, it was held that, when the amount to be paid by a railroad company for land taken was directed by the statute to be paid into court for the use of the owner or owners, no notice to the company was necessary of an application by the owners for an order upon the clerk to pay over the money so deposited. A like ruling was made in Haswell v. Railway Co., 23 Vt. 228, wherein the court observed that the purpose of the statute was to give railroad companies a certain and expeditious mode of relieving themselves from any further responsibility in the matter, by depositing the money according to the order of the chancellor; and that the railroad company, though cited by the claimant, was not bound to appear, and that, having no interest in the matter, it had no right to appeal the case. See, also, Railroad Co. v. Prussing, 96 Ill. 203; Bridge Co. v. Geise, 34 N. J. Law, 268; and Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 10 Sup. Ct. Rep. 965. We think the United States discharged its entire duty to the owners of this property by the payment of the amount awarded by the commissioners into court, and that, if there were any error in the distribution of the same, it is not chargeable to the government.

We do not wish to be understood as holding that there was necessarily an error in paying the money to the heirs of King. That question is not before us for consideration, and we are not called upon to express an opinion with regard to it.

*354 The case is doubtless a hardship for the claimants, but it would be a still greater hardship if the government, without fault upon its part, were obliged to pay the value of this lot a second time.

The judgment of the court below must be reversed, and the case remanded, with directions to dismiss the petition.

(146 U. S. 303)

BUTLER v. GORELEY.

(December 5, 1892.)

No. 20.

INSOLVENCY—VALIDITY OF MASSACHUSETTS LAW—CLAIM AGAINST UNITED STATES.

1. The court of commissioners of Alabama claims gave judgment for a person who had previously been declared an insolvent debtor under the Massachusetts law. A draft in satisfaction of this judgment, payable to the debtor's order, was received in Boston by his attorney. A few days thereafter the debtor died intestate, and the attorney received payment of the draft, acting under power of attorney from the widow, who took out letters of administration in the District of Columbia. All the parties were citizens of Massachusetts. *Held*, that the debtor's claim and its proceeds were within the jurisdiction of Massachusetts, and the right to them there vested in the assignee in insolvency before the debtor's death.

2. Since the assignee demanded the draft from the attorney in Boston before the widow applied for letters of administration in the District of Columbia, she had no right to the proceeds as against the assignee.

3. The debtor's death extinguished the authority he had given the attorney, who therefore had no right to withdraw the draft from administration in Massachusetts, and transfer its proceeds to the District of Columbia for ancillary administration.

4. The title of the assignee accrued before the recovery of judgment by the debtor on his claim, and the transfer of the claim to the assignee in insolvency, either by operation of law or voluntary assignment, is not forbidden by Rev. St. § 3477, prohibiting the transfer of claims against the United States. Railroad Co. v. U. S., 5 Sup. Ct. Rep. 366, 112 U. S. 733, distinguished. 16 N. E. Rep. 734, affirmed.

5. The insolvency law of Massachusetts is constitutional, and after the repeal of the federal bankruptcy act became operative without re-enactment. 16 N. E. Rep. 734, affirmed.

In error to the superior court of the state of Massachusetts.

Action by Charles P. Goreley, assignee in insolvency of Isaac H. Taylor, against Benjamin F. Butler, to recover the amount of a judgment in favor of the insolvent rendered in the court of commissioners of Alabama claims. A judgment was rendered for plaintiff, which was affirmed by the supreme judicial court. 147 Mass. 8, 16 N. E. Rep. 734. Defendant brings error. Affirmed.

Benjamin F. Butler, for plaintiff in error. Chas. Levi Woodbury, Geo. E. Jacobs, and W. H. H. Andrews, for defendant in error.

*304 *Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action of contract, brought in the superior court for Suffolk county, Mass., by writ, dated October 20, 1886, returnable on the first Monday in November, 1886, by Charles P. Goreley, assignee in insolvency of the estate of Isaac H. Taylor, an insolvent debtor, against Benjamin F. Butler, to recover the sum of $5,874.15, and interest thereon from April 6, 1885. The particulars of the plaintiff's demand, as set forth in the writ, are to the purport and effect contained in the agreed facts hereinafter set forth. The defendant appeared in the suit, and filed an answer denying all the allegations in the writ and declaration. A jury trial was waived by a written agreement, and the parties filed the following statement of agreed facts:

"Isaac H. Taylor, of Boston, in said county, mentioned in the declaration, filed his voluntary petition in insolvency, in said county, June 20, 1883, on which he was duly adjudged an insolvent debtor, and his assignee was appointed on the 20th day of July in the same year, and his deed of assignment was thereupon issued to him on the same day, a copy of which is annexed and made a part hereof, and is marked 'A,' and the plaintiff accepted the same, proceeded to the discharge of his duties, and published due notice of his appointment in the Boston Post in September, 1883, a newspaper published at Boston, Mass.

"The second and third meetings of the

creditors were duly held and due notice thereof published in newspapers at said Boston, at which claims were proved, but no discharge was granted to the insolvent. The schedule of assets of said Taylor did not disclose the claim hereinafter mentioned. Prior to said insolvency said Isaac H. Taylor, on or about the 14th day of June, 1863, in or near latitude 23 degrees south, longitude 43 degrees west, was a passenger on board the bark Good Hope, which was captured and burned by a tender of the Confederate cruiser Alabama named the Georgia; and said Isaac H. Taylor, being a passenger lawfully on board said bark Good Hope, an American vessel, by reason of said capture and burning of said bark, became the loser of his personal effects, expenses, and other losses, amounting in all, as he claimed, to five thousand three hundred and fifty dollars, with interest thereon.

"Whereupon, after congress had passed an act known as 'An act in regard to Alabama claims,' by which citizens of the United States proving their losses should be indemnified out of the treasury of the United States, from the proceeds of the money paid to the United States by Great Britian under the Geneva award appointed under the treaty of Washington, which was then in the treasury of the United States, said Taylor filed his claim on the 13th day of January, 1883; which claim was duly prosecuted and heard, and was adjudicated in favor of Isaac H. Taylor by the court of commissioners of Alabama claims, in the sum of three thousand seven hundred and eighty-five dollars and twenty-five cents, actual loss and damage sustained by him, with interest thereon at the rate of four per cent. per annum from June 14, 1863, to March 31, 1877, which interest amounted to the sum of two thousand and eighty-eight dollars and ninety cents, making a total sum adjudicated to him of five thousand eight hundred and seventy-four dollars and fifteen cents. No other assets of value came to the hands of the plaintiff as assignee aforesaid.

"That on the 20th of February, 1885, a draft issued from the treasury, a copy whereof, with the indorsements thereon, is hereto annexed and made a part hereof, and is marked 'B,' payable to the order of Isaac H. Taylor, for said sum, and was thereupon duly mailed to the care of Benjamin F. Butler, the defendant, E. J. Hadley and E. L. Barney, attorneys of record, at 16 Pemberton square, Boston, which was received by them in due course of mail.

"On February 24, 1885, Isaac H. Taylor died at said Boston intestate. On March 31, 1885, Sallie B. Taylor, of Duxbury, Mass., the widow of said Isaac H. Taylor, upon her petition filed March 7, 1885, and on giving bond with sureties, was duly appointed by the probate court of the District of Columbia administratrix of the personal estate of said Isaac H. Taylor. There has been no appraisal, nor has she as administratrix filed an inventory or done any act, so far as the records show, since the letters of administration issued to her.

"That on April 4, 1885, said Sallie B. Taylor executed a power of attorney, a copy of which is annexed and made a part hereof, and is marked 'C,' to said Butler, the defendant, to indorse said draft and receive payment thereon from the treasury of the United States, and thereupon said Butler received said sum of five thousand eight hundred and seventy-four dollars and fifteen cents; that said Butler thereafterwards paid, before the commencement of this suit, the attorneys' fees upon said draft, amounting to $1,087, and on the 26th day of July, 1886, he paid the sum of one hundred and twenty-six dollars for undertaker's services, but without the knowledge of the plaintiff.

"It is further agreed that the acts passed Jnne 23, 1874, and June 5, 1882, made provision for the payment of losses suffered through certain cruisers called the 'inculpated cruisers,' among which were the Alabama and her tenders, of which said Georgia was one.

"That when said Sallie B. Taylor, the widow, applied to said Butler to have said money paid to her, he advised her that that could not be done unless she took out administration in the District of Columbia, and she accompanied him to Washington, and there applied to the court for such letters of administration, and said Butler, the defendant, signed her bond as such administratrix, she having no property in the District of Columbia, and made an agreement with her to retain the draft and the moneys received thereon as security for his becoming surety on said bond. Owing to the claim made in this suit, said administration has not yet been settled and concluded in said District, but awaits the determination thereof.

"That demand was made upon the defendant for said draft by the plaintiff in person, at Boston, before the filing of said petition for administration by said Sallie B. Taylor, and defendant was at the same time notified by the plaintiff that he was assignee, as aforesaid, of the estate of said Taylor, and that as such assignee he was entitled to the amount of said draft and the proceeds thereon. The treaty of Washington, the award of the arbitrators thereunder, and the acts of congress of June 23, 1874, and June 5, 1882, the laws of Maryland as continued in force by the laws of the District of Columbia, and the laws of the District of Columbia, may be referred to and are made a part hereof.

"If the court find that the plaintiff is entitled to recover, judgment shall be entered for the plaintiff for the sum of forty-six hundred and sixty-one and 15-100 dollars, and interest thereon from June 1, 1887; otherwise plaintiff to become nonsuit."

The deed of assignment annexed to the agreed facts, and marked "A," set forth that Charles P. Goreley had been duly appointed assignee in the case of Isaac H. Taylor, in-

solvent debtor, by the court of insolvency of Suffolk county, and that the judge of that court, by virtue of the authority vested in him by the laws of Massachusetts, thereby conveyed and assigned to said assignee all the estate, real and personal, of Taylor, including all the property of which he was possessed, or which he was interested in or entitled to, on June 20, 1883, excepting property exempt from attachment, in trust for the uses and purposes, with the powers, and subject to the conditions and limitations, set forth in said laws. The deed was executed by the judge of the court of insolvency on July 20, 1883.

The draft referred to in the agreed facts, and marked "B," was dated February 20, 1885, and was drawn by the treasurer of the United States on the assistant treasurer at Boston, Mass., payable to the order of Isaac H. Taylor, for $5.874.15, and was indorsed on the back as follows: "Sallie B. Taylor, adm'x of Isaac H. Taylor, by her attorney in fact, Benj. F. Butler. Payable to Benj. F. Butler, attorney. Authority on file. J. R. Garrison, Dep'ty First Comptroller." It was paid by the treasurer of the United States on April 6, 1885, and was accompanied by a power of attorney, marked "C," dated April 4, 1885, executed by Sallie B. Taylor, appointing Benjamin F. Butler her attorney to indorse her name on said draft, and to receive and receipt for the money. This power of attorney was duly acknowledged before a notary public of the county of Suffolk, Massachusetts, on April 4, 1885.

On November 15, 1887, the case was heard on the agreed facts, by the superior court, which on that day entered a judgment for the plaintiff in the sum of $4,789.33. The defendant appealed to the supreme judicial court of Massachusetts, which, on May 4, 1888, transmitted a rescript to the superior court, directing its clerk to enter a judgment for the plaintiff for $4,661.15, and interest thereon from June 1, 1887. The superior court, on June 4, 1888, entered a judgment in favor of the plaintiff against the defendant for $4,943.14 damages, and $34.41 costs. The defendant has brought the case to this court by a writ of error.

The opinion of the supreme judicial court of Massachusetts is reported in 147 Mass. 8, 16 N. E. Rep. 734. That court held that, under the insolvent law of the state, (Pub. St. c. 157, § 46,) which provided that "the assignment shall vest in the assignee all the property of the debtor, real and personal," the claim in question was "property;" that under the act of congress of June 5, 1882, c. 195, (22 St. p. 98,) proceedings under which had been begun by Taylor, on January 13, 1883, before his petition in insolvency was filed on June 20, 1883, the claim was property which passed by the assignment; that there was no force in the objection that the claim could not be assigned in insolvency before it was allowed by the court of commissioners of Alabama claims; and that the claim was clearly within the general intent of Pub. St. c. 157, §§ 44–46, and the specific words, "rights of action for goods or estate, real or personal."

The court refused to consider the question of the constitutionality of the state insolvent law, holding that the question was settled affirmatively by the decision in Ogden v. Saunders, 12 Wheat. 213, and the cases which had followed it. The court further held that the action could be maintained against the defendant; that the plaintiff had no notice of the proceeding instituted by Taylor in the court of commissioners of Alabama claims until Taylor had got his judgment and a draft for the amount was in the defendant's hands; that then the plaintiff demanded the draft, and was entitled to receive it; that the fact that the defendant subsequently advised the widow of Taylor to take out administration at Washington, that she did so, and that he signed her bond, with an agreement that he should retain the draft as security, could not better his case; that the effect of the judgment of the court of commissioners of Alabama claims was to appropriate a fund to the claim, and to transfer the claim to that fund, leaving the question of title open to subsequent litigation in the ordinary courts; and that the statute did not leave the United States subject to be charged a second time, notwithstanding a payment by the United States to the wrong person, any more than, on the other hand, it made the decision of the commissioners' court conclusive as to the person entitled to the bounty of the United States.

The assignments of error made in this court by the defendant are as follows: "(1) That the state court, against the contention of the defendant, held and declared that the laws of insolvency of the state could and did affect, assign, and transfer the claim of Isaac H. Taylor against the United States, being in the form of an adjudication of the court of Alabama claims, as against his widow, his administratrix in the District of Columbia; (2) that the state court decided, against the contention of the defendant, that the insolvent law of Massachusetts transferred the property of said Isaac H. Taylor, to wit, a claim against the United States, evidenced by an award of the court of commissioners of Alabama claims; (3) that the state court decided, against the contention of the defendant, that the insolvent laws of Massachusetts, as enforced, took effect upon the person and property of said Isaac H. Taylor, as a system of bankruptcy, in contravention of the constitution and laws of the United States."

We regard this case as controlled by the decision of this court in Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. Rep. 885. In that case, it was held that the decisions and awards of the court of commissioners of Alabama claims, under the statutes of the United States, were conclusive as to the amount to be paid on each claim adjudged to be valid, but not as to the party entitled

to receive it; and that a claim decided by that court to be a valid claim against the United States was property which passed to the assignee of a bankrupt, under an assignment made prior to the decision of the commissioners' court.

Both parties to the present suit were citizens of Massachusetts, and Taylor, at the time of his insolvency and to the time of his death, resided at Boston. His wife, who became his widow, resided at Duxbury, in Massachusetts. The proceeds of Taylor's claim were in Massachusetts, in the shape of the draft of the treasurer of the United States, dated February 20, 1885. It was mailed that day to the defendant at Boston, and received there in due course of mail, previous to the death of Taylor, and was payable to Taylor's order by the assistant treasurer of the United States at Boston; and, after the death of Taylor, the proceeds of the draft were in the hands of the defendant at Boston. Taylor's claim and its proceeds became assets within the jurisdiction of Massachusetts, and the right to them had there vested in the plaintiff before the death of Taylor. No person had a right to take the draft or its proceeds out of the jurisdiction of that state, on the facts of this case. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269.

The plaintiff having demanded the draft from the defendant at Boston, before Mrs. Taylor applied for letters of administration in the District of Columbia, and then notified him that the plaintiff was assignee in insolvency of Taylor, and entitled to the proceeds of the draft, Mrs. Taylor had no right to them as against the plaintiff, and the defendant became liable to the plaintiff for them. The defendant had no right to withdraw the draft from administration in Massachusetts, and transfer its proceeds to the District of Columbia for ancillary administration. On the death of Taylor, the attorneyship of the defendant for him became extinct. The title of the plaintiff, as assignee in insolvency, accrued before the recovery of judgment by Taylor against the United States in the court of commissioners of Alabama claims, and before the death of Taylor.

The defendant raises the point that, if there was any claim against the United States due to Taylor at the time of the assignment in insolvency, such assignment of it was prohibited by section 3477 of the Revised Statutes of the United States, which provides as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

As to this point, the supreme judicial court of Massachusetts said that section 3477 did not apply to assignments in bankruptcy, although upon a voluntary petition, (Erwin v. U. S., 97 U. S. 392,) and, by parity of reasoning, did not apply to assignments in insolvency. Sections 44, 46, 51, c. 157, Pub. St. Mass., read as follows: "Sec. 44. The judge shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the debtor, except such as is by law exempt from attachment, and all his deeds, books, and papers relating thereto." "Sec. 46. The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, * * * all debts due to the debtor or any person for his use, and all liens and securities therefor, and all his rights of action for goods or estate, real or personal, and all his rights of redeeming such goods or estate." "Sec. 51. He [the assignee] shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if no assignment had been made." The supreme judicial court said, in the present case, that, if it should be suggested that, although the claim was property of the insolvent, it was not property which he could have lawfully assigned in person, and therefore was not within the words of the statute of the state; the answer was that it was clearly within the general intent of sections 44, 46, and within the specific words, "rights of action for goods or estate, real or personal." Taylor's right vested before it was assigned to the plaintiff, and the plaintiff took it in the lifetime of Taylor.

In U. S. v. Gillis, 95 U. S. 407, 416, this court, speaking of section 1 of the act of February 26, 1853, c. 81, (10 St. p. 170,) now embodied in section 3477 of the Revised Statutes, said that there might be assignable claims against the United States, which could be sued on in the court of claims, in the name of the assignee; and that "there are devolutions of title by force of law, without any act of parties, or involuntary assignments compelled by law, which may have been in view."

In Erwin v. U. S., 97 U. S. 392, 397, this court said, speaking of the act of 1853, that it applied only to cases of voluntary assignment of demands against the government, and also: "It does not embrace cases where

there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute aimed, nor does the construction given by this court deny to such parties a standing in the court of claims."

In Goodman v. Niblack, 102 U. S. 556, the act of 1853 was under consideration. A person had made an assignment, in 1860, for the benefit of his creditors, which included all his rights, effects, credits, and property of every description; and this court held that the assignment, although it covered whatever might be due to him under a contract *311 which he had with the United States for the transportation of the mails in steam vessels, was not within the prohibition of the act of 1853, nor in violation of public policy. It said, (page 560:) "In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor, of all his effects, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? * * * We cannot believe that such a meritorious act as this comes within the evil which congress sought to suppress by the act of 1853." See, also, Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. Rep. 417; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. Rep. 441; Williams v. Heard, 140 U. S. 529, 540, 11 Sup. Ct. Rep. 885.

In Bailey v. U. S., 109 U. S. 432, 438, 3 Sup. Ct. Rep. 272, the cases of Erwin v. U. S. and Goodwin v. Niblack were cited as showing that there might be assignments or transfers of claims against the government, such as, for instance, those passed upon in those two cases, which were not forbidden by the act of 1853.

In St. Paul & D. R. Co. v. U. S., 112 U. S. 733, 736, 5 Sup. Ct. Rep. 366, this court cited Erwin v. U. S., as holding that the assignment by operation of law to an assignee in bankruptcy was not within the prohibition of section 3477 of the Revised Statutes; and also Goodman v. Niblack, as holding that a voluntary assignment by an insolvent debtor, for the benefit of creditors, was valid to pass title to a claim against the United States; but it held that the case then before it was within the prohibition of the statute, because it involved a voluntary transfer by way of mortgage to secure a debt, finally completed and made absolute by a judicial sale.

As to the point made by the defendant, that the insolvency law of Massachusetts was unconstitutional, we think there is no force in it, in view of the decisions of this court on the subject. Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; Boyle v. Zacharie, 6 Pet. 348; Cook v. Moffat, 5 How. 295; Bank v. Horn, 17 How. 157; Baldwin v. Hale, 1 Wall. 223; Baldwin v. Bank, 1 Wall. 234; Gilman v. Lockwood, 4 Wall. 409; Crapo v. Kelly, 16 Wall. 610; *314 Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269; Geilinger v. Philippi, 133 U. S. 246, 10 Sup. Ct. Rep. 266; Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. Rep. 958.

Nor is there any force in the position taken by the defendant, that it was necessary, after the repeal in 1878 of the bankruptcy act of 1867 and of the provisions of the Revised Statutes of the United States in regard to bankruptcy, that the insolvency statute of Massachusetts should have been re-enacted in order to become operative. In re Rahrer, 140 U. S. 545, 11 Sup. Ct. Rep. 865. The repeal of the bankruptcy act of the United States removed an obstacle to the operation of the insolvency laws of the state, and did not render necessary their re-enactment.

Judgment affirmed.

(146 U. S. 223)

JUNGE v. HEDDEN, Collector.

(November 28, 1892.)

No. 44.

CUSTOMS DUTIES—CLASSIFICATION—DENTAL RUBBER—MEANING OF "ARTICLE."

1. "Dental rubber," although composed of a mixture of rubber with sulphur and coloring matter, is dutiable, as an "article composed of India rubber," at 25 per cent. ad valorem, under Act March 3, 1883, Schedule N, § 2502. 37 Fed. Rep. 197, affirmed.

2. The word "article," in this section, includes things partly or not at all manufactured, as well as those completely manufactured. 37 Fed. Rep. 197, affirmed.

In error to the circuit court of the United States for the southern district of New York.

Action by Henry Junge against Edward L. Hedden to recover duties paid under protest. A verdict was directed for defendant. 37 Fed. Rep. 197. Plaintiff brings error. Affirmed.

Statement by Mr. Chief Justice FULLER.

This was an action to recover an alleged excess of duties exacted upon importations of dental rubber into the port of New York in 1885.

The duty was assessed under the paragraph of Schedule N of section 2502 of the Revised Statutes, as re-enacted by the act of March 3, 1883, which reads: "Articles composed of India rubber, not specially enumerated or provided for in this act, twenty-five per centum ad valorem." 22 St. p. 513, c. 121.

The substance of the protests is stated in the record as follows: "Upon certain 'India rubber in sheets,' claiming said goods to be entitled to free entry under the provisions in the free list for 'India rubber' crude, (Act March 3, 1883;) or, second, if deemed not crude, it is nevertheless not a manufactured 'article of rubber' in the meaning of the law, but is entitled to free entry under the proviso of section 2499 of said act as crude; or, third, at no more than 20 per cent. ad val., as a partially manufactured, nonenumerated article under section 2513, Act March 3, 1883, (see section 23, Act March 2, 1861, as to rubber in sheets,) and not at 25 per cent. ad val., as charged by you."

The proviso of section 2499, and section 2513, thus referred to, are:

"'Provided, that nonenumerated articles, similar in material and quality and texture and the use to which they may be applied to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free." 22 St. p. 491.

"Sec. 2513. There shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum ad valorem; and all articles manufactured, in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem." 22 St. p. 523.

Section 23 of the act of March 2, 1861, (12 St. p. 195,) the free list, contains this item: "India rubber, in bottles, slabs, or sheets, unmanufactured."

The paragraph of Schedule N of section 2502 of the act of March 3, 1883, under which the collector proceeded, is one of three, reading as follows:

"India rubber fabrics, composed wholly or in part of India rubber, not specially enumerated or provided for in this act, thirty per centum ad valorem.

"Articles composed of India rubber, not specially enumerated or provided for in this act, twenty-five per centum ad valorem.

"India rubber boots and shoes, twenty-five per centum ad valorem."

In the free list (section 2503) is to be found: "India rubber, crude, and milk of."

Upon the trial various exhibits of crude rubber, washed rubber, dental rubber, and dental plates were put in evidence, and the proofs established that these importations were dental rubber, which was commercially so known, and fit for dental purposes only.

It further appeared that dental rubber was crude rubber put through a masticator, by which it was torn up and shredded into a state of pulp, sulphur and coloring matter added, and the mass rolled into sheets, cut into proper sizes, and backed with linen, to prevent the pieces from sticking together; that the heat of the mill, or masticator, was not a vulcanizing heat, but sufficient to render the rubber elastic. The circuit court, (Lacombe, J.,) refused to direct the jury to find for the plaintiff, but, on the contrary, directed a verdict for the defendant. There were a verdict and judgment accordingly, and plaintiff sued out this writ of error. The opinion of Judge Lacombe will be found in 37 Fed. Rep. 197.

Edwin B. Smith, for plaintiff in error.

Asst. Atty. Gen. Maury, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

In Arthur v. Butterfield, 125 U. S. 70, 76, 8 Sup. Ct. Rep. 714, it was said by Mr. Justice Field, speaking for the court: "To place articles among those designated as 'enumerated,' it is not necessary that they should be specifically mentioned. It is sufficient that they are designated in any way to distinguish them from other articles." And this language was quoted with approval, as defining the general scope of the similitude clause in the customs acts, in Mason v. Robertson, 139 U. S. 624, 627, 11 Sup. Ct. Rep. 668, in which it was held that bichromate of soda was subject to the duty of 25 per centum ad valorem, imposed under the act of March 3, 1883, c. 121, upon "all chemical compounds and salts, by whatever name known," and not subject, by virtue of the similitude clause, to the duty of three cents per pound, imposed on bichromate of potash.

If these importations should be held as enumerated, within the rule thus laid down, then sections 2499 and 2513 have no application; and this is no more than to inquire whether they came within the paragraph prescribing the tax on "articles composed of India rubber."

In common usage, "article" is applied to almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity.

The learned circuit judge was of opinion that the word "articles" was used in this paragraph in a broad sense, and covered equally things manufactured, things unmanufactured, and things partially manufactured; and he sustained this view by reference to the use of the word elsewhere in the statute. Thus, in section 2500, relating to reimportations, they are referred to as "articles once exported, of the growth, product, or manufacture of the United States." Section 2502 commences: "There shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty," etc. Section 2503 reads: "The following articles, when imported, shall be exempt from duty," and then follows the free list, including "articles imported for the use of the United States," and "articles, the growth, produce, and manufacture of the United States." We agree with the circuit court that the word must be taken comprehensively, and cannot be restricted to articles put in condition for final use, but embraces as well things manufactured only in part, or not at all.

But it is said that this dental rubber is not "composed of India rubber," within the intent and meaning of the statute, because of the admixture of sulphur and coloring matter; or, in other words, that it is not wholly so composed. The prior tariff act in section 2504 of the Revised Statutes (Rev. St. p. 477) contained the same paragraph as that under consideration, except that it read, "articles composed wholly of India rubber." The preceding paragraph related to "braces, suspenders, webbing, or other fabrics, composed wholly or in part of India rub-

ber." The act of 1883 retained the words "wholly or in part," as applied to fabrics, but omitted the word "wholly" in connection with articles. It is not to be doubted that this omission was advisedly made. The manifest intention was that articles of India rubber should not escape the prescribed taxation because of having been subjected to treatment fitting them for a particular use, but not changing their essential character.

Such is the fact with the article in question. It has not lost its identity by a chemical change, and become a new and different species. It is not crude rubber, nor milk of rubber, nor is it a fabric of rubber; but it is rubber rendered elastic and more attractive by coloring.

Nor are we impressed with the argument that, being rubber itself, it must be regarded as a material, and not an article composed of rubber, for its adaptation to dental purposes has differentiated it commercially. Washing and scouring wool do not make the resulting wool a manufacture of wool; cleaning and ginning cotton do not make the resulting cotton a manufacture of cotton; but sulphur and coloring matter, when applied as here, make the resulting rubber, while still remaining rubber, an article of rubber, as contradistinguished from rubber crude, or rubber merely cleansed of impurities.

Judgment affirmed.

(146 U. S. 258)

HAMILTON GASLIGHT & COKE CO. v. CITY OF HAMILTON.

(November 21, 1892.)

No. 32.

OBLIGATION OF CONTRACTS — MUNICIPAL ORDINANCE—CITY GAS WORKS—POWER TO ALTER OR REPEAL CHARTERS.

1. A claim that a municipal ordinance impairs the obligation of a contract will not sustain the jurisdiction of a federal court unless the ordinance is authorized, or supposed to be authorized, by a law of the state.

2. Rev. St. Ohio, §§ 2480, 2482, provide that on the failure of a city gas company to extend its lines, make connections, or perform certain other duties, when required to do so by the municipal authorities, the charter of such company shall be forfeited, and the city be at liberty to establish and maintain gas works of its own. Section 2486 provides that any city, whenever it may be deemed expedient, may erect or purchase gas works. *Held*, that a city can erect gas works at pleasure, and without any failure on the part of the gas company already existing to perform the duties required by the statute. State v. City of Hamilton, 23 N. E. Rep. 935, 47 Ohio St. 52, followed. 37 Fed. Rep. 832, affirmed.

3. The grant of such power to a city by the legislature does not impair the obligation of contracts, within the meaning of the federal constitution, although the value of the existing company's franchise is diminished thereby.

4. Const. Ohio, art. 1, § 2, and article 13, §§ 1, 2, provide that corporations may be formed under general laws, and that all such laws may, from time to time, be altered or repealed. *Held*, that this reservation of power became a part of the charter of every corporation formed under such general laws, and that such laws could be repealed or amended at the pleasure of the legislature.

Appeal from the circuit court of the United States for the southern district of Ohio.

Bill by the Hamilton Gaslight & Coke Company to enjoin the city of Hamilton, Ohio, from erecting and maintaining gas works. A temporary injunction was dissolved, and the bill dismissed. 37 Fed. Rep. 832. Complainant appeals. Affirmed.

Statement by Mr. Justice HARLAN:

The Hamilton Gaslight & Coke Company invokes against a certain ordinance of the 259
city of Hamilton, a municipal corporation of Ohio, the protection of the clause of the constitution of the United States which forbids the passage by a state of any law impairing the obligation of contracts, as well as the clause declaring that no state shall deprive any person of property without due process of law. By the final judgment a temporary injunction granted against the city was dissolved, and the bill dismissed. 37 Fed. Rep. 832.

The appellant became a corporation on the 6th day of July, 1855, under the general statute of Ohio of May 1, 1852, providing for the creation and regulation of incorporated companies. By the fifty-third section of that statute it was provided that any corporation formed under it should have full powers, if a gas company, to manufacture and sell and to furnish such quantities of gas "as might be required in the city, town, or village where located, for public and private buildings, or for other purposes," with authority to lay pipes for conducting gas through the streets, lands, alleys, and squares, in such city, town, or village, "with the consent of the municipal authorities of said city, town, or village, and under such reasonable regulations as they may prescribe." The fifty-fourth section gave the municipal authorities power "to contract with any such corporation for lighting * * * the streets, lands, squares, and public places in any such city, town, or village." 1 Swan & C. pp. 271, 300; 50 Ohio Laws, 274.

On the 11th of March, 1853, a supplementary act was passed, authorizing the city council to regulate, by ordinance, from time to time, the price which gaslight or gaslight and coke companies should charge for gas furnished to citizens, or for public buildings, streets, lanes, or alleys in such cities; and providing that such companies should in no event charge more than the price specified by ordinance of the city council, and that the city council might, by ordinance, regulate and fix the price for the rent of meters. Other sections of the act were in these words: "Sec. 31. That, if such companies shall at any time hereafter be required by any city council, as aforesaid, to lay pipes and light any street or streets, and shall refuse or neglect for six months after being notified by authority of such city council to lay pipes and light said streets, then, and in that case, 260
such city council may lay pipes and erect gas works for the supply of said streets, and all other streets which are not already light-

ed; and the said gas companies, gaslight and coke companies, shall thereafter be forever precluded from using or occupying any of the streets not already furnished with gas pipes of such companies; and such city council may have the right to open any street for the purpose of conveying gas as aforesaid. Sec. 32. That a neglect to furnish gas to the citizens or other consumers of gas, or to any city, by such companies, in conformity to the preceding section of this act, and in accordance with the prices fixed and established by ordinance of such city council, from time to time, shall forfeit all rights of such company under the charter by which it has been established; and any such city council may hereafter proceed to erect, or by ordinance empower any person or persons to erect, gas-works for the supply of gas to such city and its citizens, as fully as any gaslight or gaslight and coke company can now do, and as fully as if such companies had never been created." Curwen St. c. 1248, pp. 2153, 2164, 2165; 51 Ohio Laws, 360.

Another act was passed April 5, 1854, empowering the city council to fix from time to time, by ordinance, the minimum price at which it would require the company to furnish gas for any period not exceeding 10 years; and providing that from and after the assent of the company to such ordinance, by written acceptance thereof, filed in the clerk's office of the city, it should not be lawful for the council to require the company to furnish gas to the citizens, public buildings, public grounds, or public lamps of the city at a less price during the period of time agreed on, not exceeding 10 years. That act, it was declared, should not operate to impair or affect any contract theretofore made between any city and any gaslight or gaslight and coke company. It was further provided: "Sec. 2. That the city council of such city may, at any time after the default mentioned in the thirty-first section of the act to which this is supplementary, (chapter 1248, p. 2164,) by ordinance permit such gas company to use and occupy the streets of such city for the purpose of lighting the same, and furnishing the gas to the citizens and public buildings. Sec. 3. That any temporary failure to furnish gas shall not operate as a forfeiture, under the thirty-second section of the act to which this is supplementary, unless such failure shall be by neglect or misconduct of such gaslight or gaslight and coke company: provided, that such company shall, without unnecessary delay, repair the injury, and continue to supply such gas." Curwen St. c. 1248, p. 2164; 52 Ohio Laws, 30.

When the municipal laws of Ohio relating to gas companies were revised and codified in 1869, the above provisions were retained without material alteration, and now appear in the Revised Statutes of Ohio. 66 Ohio Laws, tit. "Municipal Code," 145, 149, 218, 219, §§ 415-423; 1 Rev. St. Ohio, tit. 12, div. 8, c. 3, p. 637 et seq.

But this revision and codification contained a provision not appearing in any previous statute, and now constituting section 2486 of the Revised Statutes of Ohio. That section is in these words:

"Sec. 2486. The council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase any gas works already erected therein."

By an ordinance of the city of Hamilton, passed July 9, 1855, the appellant was authorized to place pipes in streets, lanes, alleys, and public grounds to convey gas for the use of the city and its inhabitants; the company to have "the exclusive privilege of laying pipes for carrying gas in said city, and of putting up pipes in dwellings in connection with the street pipes for the term of twenty years from the passage of this ordinance;" but not to charge for gas furnished the city or its inhabitants a price greater than, during the period of the contract, was usually charged in cities of similar size and with like facilities for the making and furnishing of gas. The company, from time to time, as required by the city, placed lamp-posts at the points indicated by resolutions passed by the council.

Written contracts were made, from time to time, between the parties, for lighting the city. The first one was dated April 10, 1862. The last one was dated July 16, 1883, and expired, by its terms, January 1, 1889.

On the 2d day of January, 1889, the council passed a resolution reciting the termination of the last contract, and declaring that the city no longer desired the company to furnish gas for lighting streets and public places, and would not, after that date, pay for any lighting furnished or attempted to be furnished by the company, which was forbidden the use of the lamp posts and other property of the city, and notified to remove without delay any attachment or connection theretofore maintained with the city's lamp posts and other property. The company, having been served with a copy of this resolution, protested against the validity of this action of the city. In a written protest, addressed to the council, it announced that its gas mains, filled with gas, extended throughout all the streets, etc., as theretofore designated and required by the city; "that all said mains are connected with your lamp posts, lamps, and the burners thereon, and are all ready and fit for the purpose for which they were constructed and connected, and that this company is ready now and at all times to supply all the gas needed for the wants of your city and its inhabitants, and will furnish the same upon notice from you. This company owns the mains through which such gas is furnished and distributed for said public and private lighting; you own the lamp posts, lamps, and burners connected therewith."

The city, January 4, 1889, passed an ordinance looking to the issuing (such issuing

being first approved by the popular vote) of bonds for the purpose of itself erecting works to supply the city and its inhabitants with gas.

The present suit was thereupon commenced by the company. The relief asked was a decree perpetually enjoining the city from disconnecting its lamp posts from the company's mains, or from lighting the city by any means or process other than that of the plaintiff's gas, as well as from issuing bonds for the purpose of erecting gas works, or for the purpose of providing gas works to supply gaslight for the streets, lanes, alleys, public buildings and places, and for private consumers.

John F. Follett and J. F. Neilan, for appellant. Allen Andrews, Israel Williams, H. L. Morey, Michael O. Burns, and E. E. Hull, for appellee.

*265 *Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The plaintiff's first contention is that there is no statute of Ohio authorizing any city, in which there are already gas works in full and complete operation, to erect gas works, or to levy a tax for that purpose. If this were conceded, we should feel obliged—the plaintiff and defendant both being corporations of Ohio—to reverse the judgment, and remand the cause with directions to dismiss the suit for want of jurisdiction in the circuit court. *266 The jurisdiction of that court can be sustained only upon the theory that the suit is one arising under the constitution of the United States. But the suit would not be of that character if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the state has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state, within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. Murray v. Charleston, 96 U. S. 432, 440; Williams v. Bruffy, Id. 176, 183; Water Co. v. Easton, 121 U. S. 388, 392, 7 Sup. Ct. Rep. 916; New Orleans Water Works v. Louisiana Sugar Co., 125 U. S. 18, 31, 38, 8 Sup. Ct. Rep. 741. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States. We sustain the jurisdiction of the circuit court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas works of its own, upon that section of the Municipal Code of Ohio, adopted in 1869, (now section 2486 of the Revised Statutes,) providing that the city council of any city or village should have power, whenever it was deemed expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase gas works already erected therein; which section, the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the state and the city.

What, then, we must inquire, is the scope and effect of section 2486? This precise question has been determined by the supreme court of Ohio in State v. City of Hamilton, 47 Ohio St. 52, 23 N. E. Rep. 935, which was an action brought in the name of the state to determine whether the city had authority to erect its own gas works. It was there contended, both by the attorney general and the Hamilton Gaslight & Coke Company, that by sections 2480 and 2482 of the Revised Statutes (which are the same as sections 31 and 32 of the act of March 11, 1853) the legislature specified the conditions under which the council might build gas works; that, in the absence of those conditions, the city was without power to do what it proposed to do; and that such an expression of the legislative will excluded the right of the city to erect gas works under any circumstances. But the court said: "Those two sections designate what refusal or neglect on the part of gas companies to meet the requirements of law would work a forfeiture of their rights under their charter, and authorize the council to lay pipes, and erect gas works, and exclude a gas company already in operation from occupying any streets not already furnished with gas pipes of such companies; but such authority is very different from the general power conferred upon the council by section 2486 to construct gas works without reference to the manner in which the existing company may use its franchise." "Section 2486," the court proceeds, "in plain language gives the power to the council either to erect gas works, or to purchase such works already erected. The authority granted is not coupled with any conditions or contingency, but is to be exercised when the council may deem it expedient and for the public good. The language is free from ambiguity. The discretionary power would hardly seem consistent with the limitation sought to be imposed, that the council can build gas works only where there are no gas works in the municipality, or where gas companies, already organized, refuse or neglect to comply with the requirements of the law as to lighting or laying pipes, or neglect to furnish gas to citizens. The interest of the city may demand that a gas company established and doing business, although complying with all statutes and ordinances, should not continue to enjoy exclusive possession of the field of operation." Again: "In its present form, section 2486 was passed many years after the two sections which are reproduced in section 2480 and section 2482. Between the earlier and later statutory provisions we discover no repugnancy, and the canons of statutory construction do not require that either should prevail over the oth-

er. The authority given to municipalities by the later section is distinct from and independent of the power granted by the two antecedent sections."

Accepting, as we do, this decision of the highest court of the state as correctly interpreting the legislative will, and, therefore, assuming that the legislature intended by section 2486 to confer authority upon the city of Hamilton to erect gas works at its expense, whenever deemed by it expedient or for the public good to do so, the next contention of the plaintiff is that such legislation is within the constitutional inhibition of state laws impairing the obligations of contracts. This view is inadmissible. The statutes in force when the plaintiff became a corporation did not compel the city to use the gaslight furnished by the plaintiff. The city was empowered to contract with the company for lighting streets, lanes, squares, and public places within its limits, but it was under no legal obligation to make a contract of that character, although it could regulate by ordinance the price to be charged for gaslight supplied by the plaintiff and used by the city or its inhabitants. It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. As said by this court in Curtis v. Whitney, 13 Wall. 68, 70: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public. Upon this ground it was held in Stein v. Bienville Water Supply Co., 141 U. S. 67, 81, 11 Sup. Ct. Rep. 892, that "we are forbidden to hold that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river." What was said in Turnpike Co. v. State, 3 Wall. 210, 213, is quite applicable to the present case. The state of Maryland incorporated a company with power to construct a turnpike between Baltimore and Washington; and subsequently incorporated a railroad company, with authority to construct a railroad between the same cities, the line of which ran near to and parallel with the turnpike. One of the questions in the case was whether the last act impaired the obligation of the contract with the turnpike company, it appearing that the construction of the railroad had rendered it impracticable for the company, out of its diminished income, to maintain the turnpike in proper order. This court said: "The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defense, is that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms or by necessary implication; and hence, whatever may have been the general injurious effects and consequences to the company from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress." So, it may be said, in the present case, neither the statutes under which the plaintiff became a corporation, nor in any contract it had with the city, after January 1, 1889, was there any provision that prevented the state from giving the city authority to erect and maintain gas works at its own expense, or that prevented the city from executing the power granted by the section of the Code of 1869 to which we have referred.

This conclusion is required by other considerations. By the constitution of Ohio, adopted in 1851, it was declared that "no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly;" that "the general assembly shall pass no special act conferring corporate powers;" and that "corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed." Const. Ohio, § 2, art. 1; sections 1, 2, art. 13. If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gaslight to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the power of the legislature, reserved by the state constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where

one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation. These views are supported by the decisions of this court. In Greenwood v. Freight Co., 105 U. S. 13, 17, the question was as to the scope and effect of a clause in a general statute of Massachusetts, providing that every act of incorporation passed after a named day "shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature." This court, referring to that clause, said: "Such an act may be amended; that is, it may be changed by additions to its terms, or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it, may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends, which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it." The words, "at the pleasure of the legislature," are not in the clauses of the constitution of Ohio, or in the statutes to which we have referred. But the general reservation of the power to alter, revoke, or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the legislature.

We perceive no error in the record in respect to the federal question involved, and the judgment must be affirmed.

It is so ordered.

(146 U. S. 120)

SAN PEDRO & CANON DEL AGUA CO. v. UNITED STATES.

(November 14, 1892.)

No. 7.

APPEAL FROM TERRITORIAL SUPREME COURT—REVIEW—RECORD — EVIDENCE — SUIT TO VACATE LAND PATENT—WHEN MAINTAINABLE.

1. On an appeal from the supreme court of a territory the review is limited to determining whether the judgment or decree is supported by the findings of fact made and certified by the court in pursuance of the act of April 7, 1874, (18 St. at Large, p. 27,) and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence, and does not extend to the question whether the evidence supports the findings of fact.

2. On appeal in a suit brought by the United States to annul for fraud a patent issued pursuant to an old Mexican grant, the record contained a letter written by the attorney general to one who was formerly clerk of the district court in which the cause was pending, stating, in answer to inquiry, that the United States would not pay the costs, because it had no beneficial interest in the litigation, and that the same was instituted at the request of parties claiming a beneficial interest in the land, with the understanding that they were to pay costs. It did not appear that the letter was offered in evidence, or proved in any way, and the court took no notice of it. *Held* that, as there was no proof of its genuineness, it could have no weight on the appeal.

3. Even if conceded to be genuine, this letter does not deny that the United States is under obligation to third parties in respect to the relief invoked, which obligation is sufficient ground for maintaining a suit to set aside the patent. U. S. v. Tin Co., 8 Sup. Ct. Rep. 850, 125 U. S. 273, and U. S. v. Beebe, 8 Sup. Ct. Rep. 1083, 127 U. S. 338, followed.

4. Where a patent issued pursuant to an old Mexican grant is made according to a survey which is fraudulently extended so as to include a town where the inhabitants hold possession by the indefinite and unrecorded titles of dwellers in Mexican villages, the United States, in view of the stipulation to respect existing rights contained in the treaty of cession, is under obligation to set aside the patent, even though the same expressly recites that it is not to affect the claims of third persons; for the government owes at least a moral obligation not to burden the equitable rights of the villagers by an apparently adverse legal title.

5. Where one claiming under an old Mexican grant has obtained a patent, which by a fraudulent extension of the survey is made to include valuable mineral lands, the United States has a direct pecuniary interest, which will enable it to maintain a suit to set aside the patent.

6. In such a suit there can be no defense on the ground of laches, for laches is not imputable to the United States when it has a direct pecuniary interest in the subject of litigation.

7. In a suit in a territorial district court, motions to suppress a deposition, and to strike out certain parts of it, were made and overruled, and no exception taken. The decree was in favor of the moving party, but on appeal to the territorial supreme court, whither the entire record was transferred, this was reversed, and he thereupon appealed to the supreme court of the United States. The record in the latter court did not show that either motion was renewed in the territorial supreme court, or that any action was there asked or taken before judgment in respect to such deposition. *Held*, that the judgment could not be reversed on the ground that the evidence contained in the deposition was incompetent, and should have been excluded.

8. A petition for rehearing was filed in the territorial supreme court, one of the grounds assigned being that the court based its decision largely on the incompetent evidence contained in such deposition, "which defendant moved to strike out and suppress before the final hearing, as is shown by the record." The petition was denied, and in its opinion the court said in respect to this ground that the points made were but a repetition of those urged in the oral arguments and the briefs, and were fully met by the prior opinion. *Held*, that the motion referred to in the assignment as "shown by the record" was the motion made in the district court, and that the court's language in reference to the assignment did not show that any motion was made in the territorial supreme court, or any ruling had thereon.

9. The fact that the competency of the testimony was called in question by the petition for rehearing, and that the petition was denied, could not of itself constitute a sufficient objec-

tion and exception to the testimony to warrant a review of the question.

Appeal from the supreme court of the territory of New Mexico.

Suit brought by the United States against the San Pedro & Canon del Agua Company in the district court of the first judicial district of the territory of New Mexico to set aside a patent for certain lands. A decree was entered dismissing the bill, which was reversed on appeal to the territorial supreme court, and a rehearing was there applied for and denied. See 17 Pac. Rep. 337. Defendant appeals. Affirmed.

121 *Statement by Mr. Justice BREWER:

On February 12, 1844, Jose Serafin Ramirez, a citizen of the republic of Mexico, and a resident of Santa Fe, in the department of New Mexico, petitioned the governor of that department for a grant of a tract of land known as the "Canon del Agua," together with the confirmation of the title to a mine claimed as an inheritance from his grandfather. The material part of the petition is as follows:

"I apply to your excellency in the name of the donation laws of the 4th of January, 1813, and 18th of August, 1824, and in the name of the Mexican nation, asking for a tract of vacant land known as the 'Canon del Agua,' near the placer of San Francisco, called 'Placer del Tuerto,' and distant from that town about one league, more or less.

"The land I ask for is vacant, and without owner, and I solicit it because I have no possession or property by which I can support my family. The boundaries solicited are: On the north, the road leading from the placer to the Palo Amarillo; on the south, the northern boundary of the grant of San Pedro; on the east, the spring of the Canon del Agua; on the west, the summit of the mountain of the mine known as 'My Own,' as will appear by the accompanying document No. 1, for which I ask your ratification and that of the departmental assembly, in the manner that I received it, as an inheritance from my grandfather, Don Francisco Dias de Moradillos; and I ask that this title be ratified according to the mining ordinances 122 dated in the year 1813, title 5, article 1; in view of all of which I pray and request your excellency to grant me possession of the mine, to work it, and the land which it embraces, which is about one league, for cultivation and pasturing my animals, and for grinding ore and smelting metal.

"Jose Serafin Ramirez.

"Sante Fe, February 12, 1844."

To which petition the departmental assembly and the governor thus responded:

"Departmental Assembly of New Mexico. In session of to-day the departmental assembly decrees that Don Serafin Ramirez, auditor of the departmental treasury, and the other heirs of Don Francisco Dias de Moradillos, deceased, have a right, as grandchildren, to the mine referred to in the petition, and title of possession and property, as expressed in the mining laws; and further decrees that his excellency, the governor of the department, in conformity with the colonization laws, shall grant the tract of land prayed for.

"Martinez, President.

"Thomas Oztiz, Secretary.

"Sante Fe, February 13, 1844. And in answer to your petition I grant you the tract asked for, and revalidation of the title to the mine, which are inclosed herewith. God and liberty. Mariano Martinez.

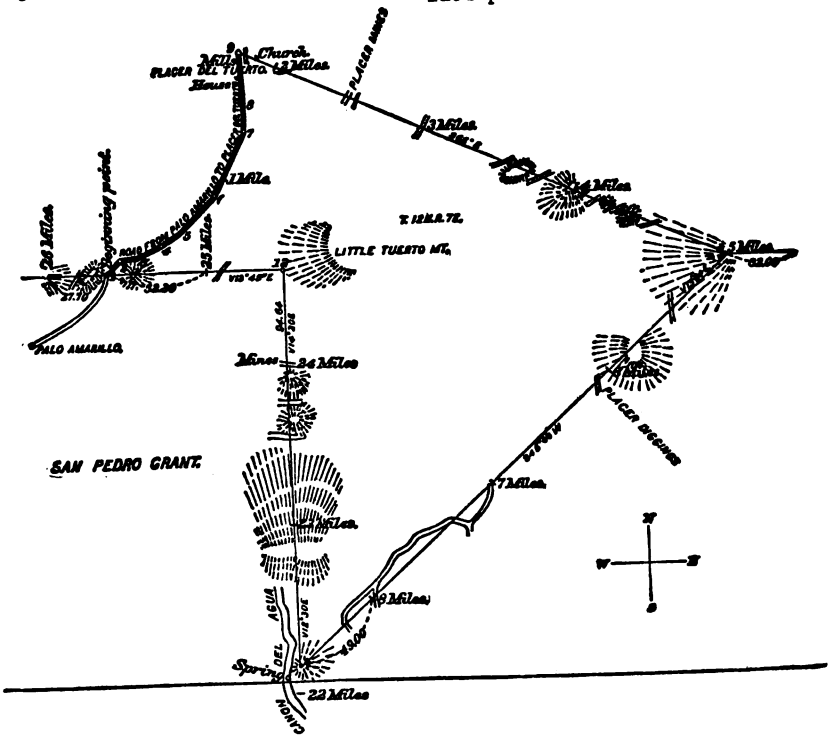
"To Don Serafin Ramirez, auditor of the departmental treasury, Santa Fe."

The same year juridical possession of the tract was given, the description in the certificate thereof being: "On the north, the road of the Palo Amarillo; on the south, the boundary of the Rancho San Pedro; on the east, the spring of the Canon del Agua; on the west, the highest summit of the little mountain of El Tuerto, adjoining the boundary of the mine known as 'Inherited Property,' from this date, according to the colonization laws of the republic." 123

By the treaty of Guadalupe Hidalgo, in 1848, (9 St. p. 922,) the territory of New Mexico was transferred to the United States. In 1859, Ramirez filed with the surveyor general of New Mexico his petition, asking official recognition by this government of his grant. The description in this petition was: "The quantity of land claimed is five thousand varas square, making one Castilian league, and bounded on the north by the placer road that goes down to the yellow timber; on the south, the northern boundary of the San Pedro grant; on the east, the spring of the Canon del Agua; on the west, the summit of the mountain of the mine known as the property of your petitioner, as appears by the original title deeds accompanying the notice, numbered 1, 2, 3, 4, 5." A hearing was had on this application on the 10th day of January, 1860. The surveyor general reported in favor of the grant, and on June 12, 1866, congress passed the following act of confirmation:

"An act to confirm the title of Jose Serafin Ramirez to certain lands in New Mexico. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the grant to Jose Serafin Ramirez of the Canon del Agua, as approved by the surveyor general of New Mexico January twenty, eighteen hundred and sixty, and designated as number seventy in the transcript of private land claims in New Mexico, transmitted to congress by the secretary of the interior January eleven, eighteen hundred and sixty-one, is hereby confirmed: provided, however, that this confirmation shall only be construed as a relinquishment on the part of the United States, and shall not affect the adverse rights of any person whatever. Approved June 12, 1866. 14 St. p. 538."

*124 On August 9, 1866, a survey was made by a deputy surveyor, under the direction of the surveyor general of New Mexico. This survey, after approval by such surveyor general, was forwarded to the land department at Washington, and on July 1, 1875, a patent was issued granting the land with boundaries as established by this survey. The following is a plat of the property as surveyed and patented:



based, from which decree the defendant has appealed to this court.

George Hoadly, for appellant. A. X. Parker, Asst. Atty. Gen., Warren, Ferguson & Bruner, and Thomas Smith, for the United States. *130

*Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The supreme court of the territory, at the

In 1866, Ramirez conveyed the property to Cooley and others, from whom, in 1880, it passed to the present defendant. Thereafter, and on September 15, 1881, this suit *125 was commenced by the United States in the district court of the first judicial district of the territory of New Mexico, to set aside the patent and annul the title conveyed thereby, on the ground of fraud in the survey. An answer was filed, proofs were taken, and the case went to final hearing before the district court. By that court, on February 16, 1885, a decree was entered in favor of the defendant dismissing the bill. From such decree an appeal was taken to the supreme court of the territory, which, on January 28, 1888, reversed the decision of the district court, and entered a decree in favor of the government, setting aside and annulling the patent and the survey upon which it was request of the defendant, made and certified a statement of the facts in the case. This is in accordance with the act of April 7, 1874, (18 St. p. 27,) which, in section 2,—a section providing for the exercise of the appellate jurisdiction of this court over the judgments and decrees of territorial courts,—reads: "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree." Construing this statute, it was held, in the case of Improvement Co. v. Bradbury, 132 U. S. 509, 514, 10 Sup. Ct. Rep. 177, that "the authority of this court, on appeal from a territorial court, is

limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court. Stringfellow v. Cain, 99 U. S. 610; Cannon v. Pratt, Id. 619; Neslin v. Wells, 104 U. S. 428; Hecht v. Boughton, 105 U. S. 235, 236; Gray v. Howe, 108 U. S. 12, 1 Sup. Ct. Rep. 136; Eilers v. Boatman, 111 U. S. 356, 4 Sup. Ct. Rep. 432; Zeckendorf v. Johnson, 123 U. S. 617, 8 Sup. Ct. Rep. 261." Hence, notwithstanding the large volume of testimony taken and used in the court below has been incorporated into the record sent to us, we are not at liberty to review that testimony for the purpose of ascertaining whether the findings in the statement of facts are or are not in accordance with the weight of the evidence. This narrows materially the range of our inquiry.

The first proposition of the appellant is that the United States has no interest in the controversy, and did not in good faith institute and prosecute this suit. This claim rests upon the fact that in the record is found the following letter:

"Department of Justice, Washington, October 17, 1883. F. W. Clancy, Esq., 1426 Corcoran St., Washington, D. C.—Sir: To your inquiry whether the United States will pay the costs incurred in the case against the San Pedro and Canon del Agua Company, I answer that the United States has no beneficial interest in the proceeding. It was instituted at the instance of parties who claimed a right to the possession of the lands. Upon their request special counsel were appointed by this department to commence and carry on the suit, but they were not to be compensated by the United States, and it was the understanding of this department, as in other similar cases, that whatever costs and expenses were incurred in the preparation and conduct of the case should be paid by the parties on whose petition the proceedings were instituted. I must decline, therefore, for the government, to pay said costs and expenses, or any part thereof. Very respectfully, Benjamin Harris Brewster, Attorney General."

Apparently the attention of the court below was not called to this letter, nor any action taken in reference to it. It simply appears as a paper filed by some one in the clerk's office, and by the clerk, of his own motion, incorporated into the record. Mr. Clancy, to whom the letter was addressed, was up to January, 1883, the clerk of the court in which the suit was pending; subsequently, although, so far as the record discloses, not till after October, 1883, he became one of the counsel for defendant.

There are several reasons why the claim of the defendant in this respect cannot be sustained. In the first place, we have no assurance that the letter is genuine. Such a paper does not prove itself. It was not offered in evidence. The court took no notice of it. It was addressed, not to an officer of the court or a counsel in the case, but to a stranger. The clerk, by merely filing such a document, does not adjudicate that it is in fact that which on its face it purports to be.

Again, even if it be regarded as the letter of the attorney general, it does not contain any such statement as precludes the government from maintaining this action. There is nowhere an intimation that Attorney General MacVeagh, the predecessor of the writer of the letter, when commencing the suit, was not acting in the utmost good faith, and in the belief that the government had a pecuniary interest in the lands, or was under an obligation to third parties, which it could protect only by setting aside this patent; and, while the letter declares that the United States has no beneficial interest in the controversy, it does not deny that the United States is under obligation to other parties respecting the relief invoked; and that, it is now settled, is sufficient for maintaining an action to set aside a patent. U. S. v. Tin Co., 125 U. S. 273, 8 Sup. Ct. Rep. 850; U. S. v. Beebe, 127 U. S. 338, 342, 8 Sup. Ct. Rep. 1083,—in which latter case it was said: "And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud where the government has a direct interest, or is under an obligation respecting the relief invoked." See, also, U. S. v. Missouri, K. & T. Ry. Co., 141 U. S. 358, 380, 12 Sup. Ct. Rep. 13.

But, chiefly, the statement made by the supreme court shows that in fact there were parties to whom the United States was under obligation in respect to the relief invoked, and also that the government had a direct pecuniary interest in the relief sought. The application for a grant described a tract of vacant land near the placer of San Francisco, called "Placer del Tuerto," and distant from that town about one league, more or less. This town, with a varying population of a few hundreds, perhaps thousands, of people, was in existence before the application of Ramirez for the grant, at the date of the annexation of New Mexico to this country, and at the time of the survey and patent. The inhabitants held their possessions by the indefinite and unrecorded titles of dwellers in Mexican villages. By the treaty of cession, as well as the general law in respect to the acquisition of foreign territory, the United States was bound to respect all existing rights, and, among them, the rights and titles of these inhabitants. Yet the survey and patent included the town. It is true that the act of confirmation as well as the patent recites that it is only a relinquishment on the part of the United States, and is not to affect the adverse rights of any person, and it is very likely that the equitable titles of the inhabitants could be established

notwithstanding the patent; but the government owed it to them not to burden their equitable rights by an apparently adverse legal title, and, having been induced to do so through the fraudulent acts of the patentee and his associates, it is discharging a moral obligation, at least, when it takes steps to set aside such patent, and to relieve them from the apparent cloud on their title.

Further, the statement of facts finds that—

"Outside of the boundary line of the said Canon del Agua grant as granted to said Ramirez by the government of Mexico there was at the time when the supplemental bill in this cause was filed a mining property of great value, known as the 'Big Copper Mine,' yielding valuable quantities of both copper and gold. There were also numerous other mines of the precious metals east of the Canon del Agua spring. * These mines were and are upon a part of the public domain of the United States, but within the lines of the said grant as fraudulently extended by Ramirez and his confederates aforesaid. The defendant, as shown by its answer to the supplemental bill at the time of the filing of the same, actually occupied and possessed said Big Copper mine, and was extracting ore therefrom, claiming the legal right to do so as against the United States, and was also in possession of the land upon which said other mines were situated, and also claiming the right to the same. The defendant was not so in possession under the mineral laws of the United States as a locator, or claiming under or through any locator by virtue of such mining laws, but was in possession under and by means of the said fraudulent survey, and was claiming under the agricultural patent to Ramirez, the action of the surveyor general thereon, the confirmation by congress, the survey and patent thereunder, the lawful right to hold said mines and extract therefrom the precious metals for its own use, to the exclusion of the United States therefrom, and in defiance of the mineral laws of the United States, predicating such claim of right upon mesne conveyances from parties holding under and by virtue of said patent.

"The possession of the said mine by the defendant as aforesaid, and the manner in which the same is being worked and carried on, is such as to prevent other mining prospectors from locating thereon or making any claim or acquiring any title thereto by location and development under the mining laws of the United States, and, if permitted to continue, would enable the defendant, under claim of legal title, which does not exist, to continuously extract therefrom large quantities of valuable precious metals, and thus greatly to lessen the value of said property, and to hinder and delay the development thereof, and to prevent location thereon and development under the mining laws of the United States. The claim of said defendant constitutes a cloud upon a title to the said mines and upon the right of the United States to open the same to be prospected, located, and developed as mineral land, and deprives it of the revenue which would otherwise accrue to it, from such settlement and development."

The United States has, therefore, a pecuniary interest in maintaining this action, that it may recover possession of these mines and secure to itself the revenue naturally derivable therefrom.

This last matter is also a sufficient answer to the second point made by the appellant, and that is that the prosecution of this suit is barred by laches, for it is well settled that when the government has a direct pecuniary interest in the subject-matter of the litigation the defenses of stale claim and laches cannot be set up as a bar. U. S. v. Oregon Cent. Military Road Co., 140 U. S. 599, 11 Sup. Ct. Rep. 988, and cases cited in the opinion.

The third point of appellant is that much of the testimony of John B. Treadwell, and the exhibits attached thereto, were incompetent, and should have been excluded, and, because they were not the decree of the supreme court of the territory, ought to be reversed. Mr. Treadwell was a special agent and examiner of surveys for the land department. After this suit had been commenced, he was directed by the land department to proceed to the disputed territory, and make an examination as to the survey. He did so, and, besides making surveys and taking photographic views, he also obtained 13 affidavits of witnesses, selected by himself, as to boundaries, etc. When called as a witness, he produced these affidavits as part of his testimony, and gave his conclusions as to the proper boundaries of the grant, based partly, at least, upon the information obtained from them. After his deposition containing these matters had been filed in the case, and before the hearing in the district court, two motions were made by the defendant,—one to strike out the entire deposition, and the other to suppress parts of it. Both were overruled, and no exception taken. The district court, as heretofore stated, found for the defendant, and entered a decree dismissing the bill. An appeal having been taken to the supreme court of the territory, the entire record was transferred to that court. There, no new motion to strike out this deposition, or any part of it, was presented, nor were the two motions made in the district court renewed in the supreme court, or action asked of that court thereon. Obviously the defendant, relying upon its success in the district court, with this testimony in the case and before the court, did not deem the matter of sufficient importance either to renew the motions made in the district court or to file additional ones, and so let the case pass to the consideration of the supreme court with all the testimony, including this deposition, unchallenged. But our inquiry is limited to the rulings of the supreme court of the territory. It is its judgment which we are reviewing.

By the appeal the case was transferred as a whole from the district court to the supreme court. The rulings of the former court did not bind or become those of the latter, either as to the admission or rejection of testimony or the decree to be entered. All the testimony taken and filed in the one court was spread before the other, and was apparently proper for its consideration. If the defendant had wished to narrow the examination of that court to any portion of the testimony, it should by appropriate motion to it have challenged the supposed objectionable parts. Counsel, appreciating this necessity of the case, has endeavored to show that the supreme court did in fact rule on the admissibility of this testimony, but we think his contention is not borne out by the record. Certainly no new motion was filed in the supreme court, or any entry made of a renewal of the motions in the district court, or of a decision thereon; and, if error is to be predicated upon any ruling of the lower court, it would seem that the ruling should affirmatively and distinctly appear. And in this connection notice may well be taken of rule 13 of this court: "In all cases of equity * * * heard in this court no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent." 3 Sup. Ct. Rep. x.

Upon what grounds does counsel contend that the supreme court did rule upon this matter? In the order of the court refusing the petition for rehearing is the following: "The court * * * does now overrule such petition, and refuses to grant the same, for reasons set forth in an opinion by Chief Justice Long."

This was the second reason assigned for rehearing:

"(2) The court bases its conclusion as to the location of said Sierra del Tuerto largely upon ex parte affidavits taken by one John B. Treadwell, without notice to any one, or opportunity for cross-examination, improperly injected into the record of the court below after all the proofs on both sides were closed, which defendant moved to strike out and suppress before the final hearing, as is shown by the record."

And in the opinion is this statement.

"The defendant has filed a petition for rehearing, assigning therein twelve reasons why the same should be granted. The * * * second * * * points made are but a repetition of those urged both in oral argument and in the printed briefs, and already fully considered and determined. They present no new consideration, and are fully met by the opinion."

But this does not show that any motion was made in the supreme court, or any ruling had thereon. The second reason assigned is that the court based its conclusion upon this improper testimony. It is true, reference is made to a motion to suppress, but it is only by way of description of the improper matter, and the motion referred to is one "shown by the record," and the only such motion is the one made in the district court. The record shows none in the supreme court.

Again, it is insisted that the denial of the rehearing (one of the grounds therefor being that already stated) is in itself a sufficient objection and exception to the testimony. But when the petition for rehearing was filed, the case had been decided. A petition for rehearing is no more significant than a motion for a new trial, which, as well settled, presents no question for review in this court. Further, it would be strange if a case could be submitted on certain testimony and decided, and then the defeated party could, by motion for a new trial or petition for rehearing, compel the striking out of a part of that testimony, and thus a retrial of the case. By not challenging the objectionable testimony until after the decision, he waives his right to challenge it at all.

Again, after the decision the defendant made application for a statement of the facts of the case, and also the rulings of the court on the admission and rejection of the evidence, to be transferred to this court, which motion was consented to by the United States, and a statement of facts prepared. Thereafter the defendant moved to have included in such statement the testimony of Treadwell, the rulings of the district court on the motions, and also the rulings of the supreme court upon said testimony, which motion was denied, and, on complaint of the defendant that the statement did not contain any rulings of that court on the admission or rejection of evidence, and especially with respect to the testimony of John B. Treadwell, and the exhibits filed therewith, the supreme court said: "The motion for an additional finding touching the admission of the deposition, map, and exhibits of John B. Treadwell has been considered. The appeal was taken by the United States. There being no cross appeal by the appellee, we decline to review the action of the court below, as that is not before us on this appeal, and overrule said motion, and decline any action upon it for reasons stated."

Whatever may be thought of the reason given by the supreme court, the fact appears from this language that present action only was invoked, which was action after the decision; and, further, that such action was only in reference to a review of the ruling of the district court. Indeed, not only is the silence of the record conclusive against any motion in the supreme court to exclude the testimony, or any action by that court in the way of exclusion, but also the fair inference from all the matters presented by counsel, is that after the decision it was sought to get from the supreme court only some review of the ruling of the district court on the motion to exclude the testimony. We cannot re-

view the action of the district court, and no action was taken by the supreme court prior to the decision. The appellant can therefore take nothing by this contention.

*139 Again, it is insisted that upon the facts of the case the appellant is entitled to a reversal. But clearly this is untenable. The statement of facts is plain, to the effect that the survey was inaccurate and obtained by fraud. The force of this is not obviated by the fact that Griffin, the surveyor, was not found to have been a party to the fraud. The wrong is the wrong of the patentee; and the fact, if it be a fact, that he did not secure the wrongful assistance of all the officers of the government connected with the survey, does not make his wrong any the less. It may be, as Chief Justice Long intimates, that Griffin, the surveyor, was innocent; that he was misled by the misrepresentations and fraudulent acts of others; but, if it be, as found by this statement of facts, that the survey was erroneous, that it and the patent were obtained by fraud, and that the patentee was a party to such fraud, that is enough to sustain a decree setting aside the survey and the patent, and leaving the defendant to whatever rights may exist under the original confirmation.

Finally, it is insisted that the defendant was a bona fide purchaser, but the findings of fact do not warrant this conclusion. The president of the company, and a large stockholder, together with others interested, visited the property before the purchase. They were warned of the adverse claims. They examined the land, and could easily perceive the situation of some of the points named in the description, and also the presence, within the limits of the patent, of this town of San Francisco. Indeed, it is distinctly stated in the findings that "the said defendant, through its said company, had notice, in fact, by the means aforesaid, of the adverse claim to said grant, and, in addition thereto, information sufficient to put it on inquiry as to the fraud alleged in the bill of complaint."

Undoubtedly, upon the facts as found and stated by the court, the defendant was not entitled to hold as a bona fide purchaser.

These are all the matters complained of, and in them finding no error, the decree of the supreme court of the territory is affirmed.

(146 U. S. 210)

ROOT v. THIRD AVE. R. CO.

(November 21, 1892.)

No. 39.

PATENTS FOR INVENTIONS—ABANDONMENT—PUBLIC USE.

The invention described in letters patent No. 262,126, granted August 1, 1882, to Henry Root, for an improvement in the construction of cable railways, was devised by him in the expectation of being employed as engineer to construct a cable road. The road was in fact constructed by him in that capacity, and since April 9, 1878, has been in successful operation for profit, and was under his superintendence for several years, but he made no application for a patent for more than three years. He testified that he had some doubt about the durability and success of the invention; that in the spring of 1879 he discovered a slight defect in the structure, which he thought might lead to trouble, and that he was not certain of success until 1881; but in the mean time he made no further examination of the defects, and did not express his doubts or discoveries to his employers or others. *Held*, that sufficient time elapsed to test the structure and apply for a patent within the two years; that the use was not an experimental one; and that he had, therefore, abandoned the invention to the public. 37 Fed. Rep. 673, affirmed. Elizabeth v. Pavement Co., 97 U. S. 126, distinguished.

Appeal from the circuit court of the United States for the southern district of New York.

Bill by Henry Root against the Third Avenue Railroad Company to restrain the infringement of letters patent. The circuit court dismissed the bill, holding the patent invalid, because of two years' public use prior to the application. 37 Fed. Rep. 673. Complainant appeals. Affirmed.

F. R. Coudert, for appellant. Edmund Wetmore and Herbert Knight, for appellee.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought July 12, 1886, in the circuit court of the United States for the southern district of New York, by Henry Root against the Third Avenue Railroad Company, founded on the alleged infringement of letters patent No. 262,126, granted August 1, 1882, to the plaintiff, for an "improvement in the construction of cable railways," on an application filed September 3, 1881.

The specification of the patent says: "My invention relates to cable railways, and it consists in the employment of a connecting tie for the rails, and supports for the slot irons, by which both are rigidly supported from the tie, and united to each other. In combination with this construction I employ a substratum of concrete or equivalent material, which will set or solidify and unite the whole into a continuous rigid structure, no part of which is liable to be displaced from its relation to the other, and also provide a support for the roadway. Previous to my invention, all cable railways had been constructed of iron ribs of the form of the tube, set at suitable intervals, to which the slot iron or timber, as the case may be, was bolted, and the spaces between these ribs filled with wood, to form a continuous tube. Outside, and independent of this tube, the rails were laid, supported on short ties or other foundations, and were connected horizontally with the iron ribs by short bolts or rods, but were liable to settle by the undermining of their foundation, without regard to the tube or the other rail of the track. This would frequently occur by the renewal of the paving outside of the track, the introduction of house connections with the main sewer, or other disturbances of the street.

This settling would cause great inconvenience, as the gripping apparatus, which is carried by the rail through the medium of the car or dummy, must travel in a fixed position in the tube, thus making a frequent adjustment of the rails to the tube necessary. The space between the rails and sides of the tube was filled with sand, which could not be securely confined, as the joints in the tube were liable to open by settling, so as to require a frequent relaying of the paving or planking, and making the whole insecure, and expensive to maintain. In my invention the whole forms a single, rigid structure."

The following are the drawings of the patent, Fig. 1 being a cross-section and Fig. 2 a perspective view:

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Fig. 1.

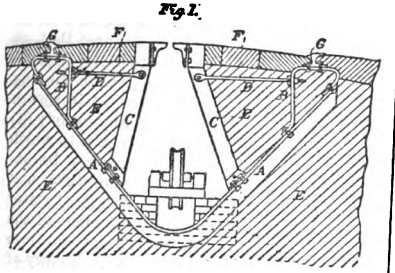
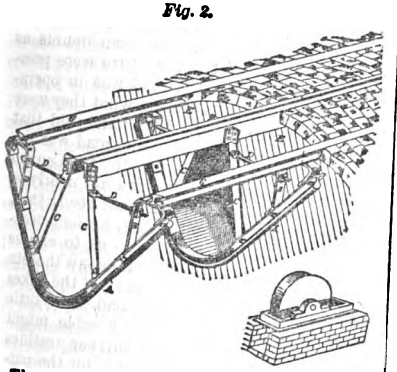


Fig. 2.



The specification says: "A is the main tie, bent so as to embrace the tube, and it has fastened to the ends suitably formed plates or chairs, B, to which the rails, G, are fastened, or, if stringers are used, they may be fastened directly to the ties. The ties may be of various shapes, but in this case I have used old T-rail, turned bottom up, with but one curve or bend, as this requires but one heat, and is thus cheaper. C are upright supports for the slot irons, having one end secured to the tie at points each side of the bend, sufficiently separated to form the necessary width for the tube. D are tie-rods, connecting said supports with the main ties or frames, through the chairs, rails, or stringers, as the case may be. The rods, D, may be fixed or may be screw bolts, having two nuts at one end for the adjustment of the slot irons to or from each other during construction, or other equivalent means may be employed. E is the concrete, in which the ties or frames are imbedded at suitable distances to support the rails and slot irons, which form the top of the tube. This concrete forms a support for the ironwork, the bottom and sides of the tube, and a foundation for the paving, F, which fills the space between the rails and slot iron, thus forming an even and durable roadway, which cannot settle below the level of the rails or slot irons, or cause a side pressure on the tube, as is the case where the roadway is supported on sand or other independent foundation. As nearly all the weight of the traffic is on the rails, the tendency of the rails to go down is resisted by a deep girder, of which the bent tie forms the top and this continuous mass of concrete forms the bottom. I am aware that concrete, as a material for foundations, underground sewers, and conduits, has long been well known, and that concrete, brickwork, or ironstone pipe might be used to form the tube between the iron ribs of the well-known construction without any particular invention, as these materials are as well known as wood; but it would be still subjected to all the danger of unequal settlement, and the short tie and stringer of wood require frequent renewal and adjustment to the level of the tube. It will be seen that a distinguishing feature of my invention is the connecting of the rails in the same structure as the slot irons and the tube, so that all the parts are maintained in their relative position, and whatever may occur to alter the place of one will have no effect, unless the change is sufficient to affect the whole structure." There are seven claims in the patent.

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The answer sets up in defense a denial of the allegation of the bill that the alleged invention was not in public use or on sale for more than two years prior to the application for the patent; and it alleges that the invention had been in public and profitable use in the United States for more than two years before the date of the application. It also sets up want of novelty and noninfringement.

There was a replication to the answer, proofs were taken, and the case was brought to a hearing before the circuit court, held by Judge Wallace, and a decree was entered dismissing the bill. From that decree the plaintiff has appealed.

The opinion of the circuit court, found in 37 Fed. Rep. 673, passed upon a single question. The invention was put into use on the California street railroad, a cable road in the city of San Francisco, on April 9, 1878, the road having been built by the plaintiff, and put into regular operation at that time, and, as constructed, having embodied in it the invention described in the patent. The defendant contended that such use was a public use of the patented invention more than two years before the application, and

that, therefore, the patent was invalid. The plaintiff contended, and now contends, that such use was an experimental use, and that the application was filed within two years after the plaintiff became satisfied that his invention was a practical success.

Section 4886 of the Revised Statutes, which was in force when this patent was applied for and issued, enacts that a patent may be obtained when the invention has not been "in public use or on sale for more than two years prior to the application;" and section 4920 provides that it may be pleaded and proved as a defense in a suit at law or in equity on the patent that the invention "had been in public use or on sale in this country for more than two years before" the application, or had been abandoned to the public.

From the time the cable road mentioned was put into operation, no change or modification was made in its plan or its details. In the summer of 1876, between May and the 1st of September, the plaintiff conceived the invention. Early in that year certain *215 persons in California obtained a franchise for the construction of a wire cable road on California street, in San Francisco, and the plaintiff was led to believe that he would be called upon, as an engineer, to construct the road. He immediately commenced studying up the matter, to be prepared to recommend a plan of construction, whenever called upon. He testifies that he deemed it necessary in a cable road to get a smooth, even roadway and track, and the tube or tunnel way for the cable and its carrying machinery strong enough to resist any tendency towards the closing of the slot, to provide for the grip shank, and to make a structure as a whole so permanent and durable as to stand the wear and jar of heavy street traffic, as well as of the car traffic which it was to carry; and that, for that purpose, he deemed it necessary to have a rib or yoke, with connections to the two rails and the two slot irons, so as to connect them permanently, such yoke to be imbedded in and supported by a surrounding mass of concrete to form a support and foundation for the ribs or yokes, the bottom and sides of the cable tube or tunnel, and a foundation for the paving of the roadway. He says that he explained this invention to several persons prior to September 2, 1876, and on that day discussed the subject and explained the invention in a general way at a meeting of the directors of the proposed road. Between that time and January 1, 1877, he made a model containing two of the ribs, with an outside casing and cover, and had the space between filled in with concrete, incasing the skeleton ribs and forming "the shut section" of the completed track and tube.

His invention was adopted by the projectors of the railroad, and active work was commenced upon the structure in July, 1877. The road cost, with the equipment, $418,000, and is about two miles in length, the roadbed and tunnel construction having cost about $225,000. From April 9, 1878, it has been in regular and successful use as a street railroad, carrying passengers for pay. The plaintiff was superintendent of the road from that time until the date of his application for the patent, and afterwards until 1883.

In explanation of his delay in applying for the patent, he testifies that before he began *216 the construction of the road one of the projectors expressed a doubt in regard to the durability of such a structure, and a fear that the jar of street traffic, as well as that of the cars, would in time loosen the ribs, and separate them from the surrounding concrete, and the structure would thus fail; that doubts were expressed also by others: that, while the plaintiff believed that there was more than an even chance of its proving a durable and desirable structure, he still had some doubt in his own mind, which was somewhat increased by the doubts expressed to him by others, in whom he had confidence; that, as causes which would contribute to the destruction of the road, there were (1) the moving of cars over a rail connected to ironwork without the intervention of any wood; (2) the street traffic of trucks and teams, to which such a structure would necessarily be exposed; (3) the changes of temperature; and (4) the effect of time, and the danger of water following down the different members of the ironwork, and the rust separating them from the concrete; and that there was no way of determining these matters but by a trial in a public street through a long period of time.

He was asked whether his own doubts as to the durability of the structure were present at any time after the road was in operation, and, if so, when, and by what they were caused. He answered "Yes," and said that during the spring of 1879 the road was extended from Fillmore street to Central avenue, by a wooden structure not nearly so durable or costly as the original road; that, in preparing for the extension, he had occasion to dig out and around, so as to expose some of the old structure; that he saw therein some indication of the loosening of the yokes in the concrete; and that he had some little fear at that time that some trouble might arise in that respect. He further testifies that the reason he did not apply for the patent within two years from the time when he first put the structure into use was that, if it proved weak or undesirable, he did not want any patent; and he did not feel certain enough of that fact until the year 1881.

But it does not appear that he expressed his doubts to the projectors of the road, either before its construction was commenced, or during its construction, or while he remained *217 its superintendent after it was completed, or that he communicated to any one what he noticed during the spring of 1879, or that he entertained any fear arising therefrom. *220

The circuit court truly says, in its opinion: "Manifestly the complainant received a consideration for devising and consenting to the *221 use of an invention which was designed to be a complete, permanent structure, which

was to cost a large sum of money, and which he knew would not meet the expectation of those who had employed him, unless it should prove to be in all respects a practically operative and reasonably durable one. If he had entertained any serious doubts of its adequacy for the purpose for which it was intended, it would seem that he would not have recommended it in view of the considerable sum it was to cost. At all events, he did not treat it as an experimental thing, but allowed it to be appropriated as a complete and perfect invention, fit to be used practically, and just as it was, until it should wear out, or until it should demonstrate its own unsuitableness. He turned it over to the owners without reserving any future control over it, and knowing that, except as a subordinate, he would not be permitted to make any changes in it by way of experiment; and at the time he had no present expectation of making any material changes in it. He never made or suggested a change in it after it went into use, and never made an examination with a view of seeing whether it was defective, or could be improved in any particular."

It is contended by the plaintiff that the principles recognized by this court in Elizabeth v. Pavement Co., 97 U. S. 126, establish the patentability of the plaintiff's invention, notwithstanding its embodiment in the California street railroad. But the circuit court held that the proofs in the present case did not show a use of the invention substantially for experiment, but showed such a public use of it as must defeat the patent. The court further said that the facts were in marked contrast with those in Elizabeth v. Pavement Co., because there the use was solely for experiment.

In Elizabeth v. Pavement Co., the original patent was granted in August, 1854. The invention dated back as early as 1847 or 1848. Nicholson, the inventor of the pavement in question in that case, filed a cavent in the patent office in August, 1847, describing the invention. He constructed a pavement, by way of experiment, in June or July, 1848, in a street near Boston, which comprised all the peculiarities afterwards described in his patent, the experiment being successful. The pavement so put down in Boston in 1848 was publicly used for a space of six years, before the patent was applied for; and it was contended that that was a public use, within the meaning of the statute. This court, speaking by Mr. Justice Bradley, said that it was perfectly clear from the evidence that Nicholson did not intend to abandon his right to a patent, he having filed a caveat in August, 1847, and having constructed the pavement in Boston by way of experiment, for the purpose of testing its qualities; that he was a stockholder in, and treasurer of, the corporation which owned the road in Boston where the pavement was put down, and which corporation received toll for its use; and that the pavement was constructed by him at his own expense, and was placed by him there in order to see the effect upon it of heavily loaded wagons, and of varied and constant use, and also to ascertain its durability, and liability to decay. It was shown that he was there almost daily, examining it and its condition, and that he often walked over it, striking it with his cane. This court held that, if the invention was in public use or on sale prior to two years before the application for the patent, that would be conclusive evidence of abandonment, and the patent would be void; but that the use of an invention by the inventor, or by any other person under his direction, by way of experiment, and in order to bring the invention to perfection, had never been regarded as a public use of it; and it added: "The nature of a street pavement is such that it cannot be experimented upon satisfactorily except on a highway, which is always public. When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case, such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it, and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished; and though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a bona fide intent of testing the qualities of the machine, would be a public use, within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. It would not be necessary, in such a case, that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use, within the meaning of the statute. Whilst the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a grist mill, or a carding machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use, within the

meaning of the law. But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale, within the meaning of the law. If, now, we apply the same principles to this case, the analogy will be seen at once. Nicholson wished to experiment on his pavement. He believed it to be a good thing, but he was not sure; and the only mode in which he could test it was to place a specimen of it in a public roadway. He did this at his own expense, and with the consent of the owners of the road. Durability was one of the qualities to be attained. He wanted to know whether his pavement would stand, and whether it would resist decay. Its character for durability could not be ascertained without its being subjected to use for a considerable time. He subjected it to such use, in good faith, for the simple purpose of ascertaining whether it was what he claimed it to be. Did he do anything more than the inventor of the supposed machine might do in testing his invention? The public had the incidental use of the pavement, it is true; but was the invention in public use, within the meaning of the statute? We think not. The proprietors of the road alone used the invention, and used it at Nicholson's request, by way of experiment. The only way in which they could use it was by allowing the public to pass over the pavement. Had the city of Boston, or other parties, used the invention, by laying down the pavement in other streets and places, with Nicholson's consent and allowance, then, indeed, the invention itself would have been in public use, within the meaning of the law; but this was not the case. Nicholson did not sell it, nor allow others to use it or sell it. He did not let it go beyond his control. He did nothing that indicated any intent to do so. He kept it under his own eyes, and never for a moment abandoned the intent to obtain a patent for it. In this connection it is proper to make another remark. It is not a public knowledge of his invention that precludes the inventor from obtaining a patent for it, but a public use or sale of it. In England, formerly, as well as under our patent act of 1793, if an inventor did not keep his invention secret, if a knowledge of it became public before his application for a patent, he could not obtain one. To be patentable, an invention must not have been known or used before the application; but this has not been the law of this country since the passage of the act of 1836, and it has been very much qualified in England. Lewis v. Marling, 10 Barn. & C. 22. Therefore, if it were true that during the whole period in which the pavement was used the public knew how it was constructed, it would make no difference in the result. It is sometimes said that an inventor acquires an undue advantage over the public by delaying to take out a patent, inasmuch as he thereby preserves the monopoly to himself for a longer period than is allowed by the policy of the law; but this cannot be said with justice when the delay is occasioned by a bona fide effort to bring his invention to perfection, or to ascertain whether it will answer the purpose intended. His monopoly only continues for the allotted period, in any event; and it is the interest of the public, as well as himself, that the invention should be perfect, and properly tested, before a patent is granted for it. Any attempt to use it for a profit, and not by way of experiment, for a longer period than two years before the application, would deprive the inventor of his right to a patent."

We think that the present case does not fall within the principles laid down in Elizabeth v. Pavement Co. The plaintiff did not file a caveat, and there is no evidence that he did not intend to abandon his right to a patent. It does not appear that any part of the structure was made at his own expense, or that he put it down in order to ascertain its durability or its liability to decay, or that what he says he noticed in the spring of 1879 led him to make any further examination in that respect, or to test further the fear which he says he had at that time, or that what he then saw led him to think that the structure was weak or undesirable. It cannot be fairly said from the proofs that the plaintiff was engaged in good faith, from the time the road was put into operation, in testing the working of the structure he afterwards patented. He made no experiments with a view to alterations, and we are of opinion, on the evidence, that sufficient time elapsed to test the durability of the structure, and still permit him to apply for his patent within the two years. He did nothing and said nothing which indicated that he was keeping the invention under his own control.

In Manufacturing Co. v. Sprague, 123 U. S. 249, 256, 257, 8 Sup. Ct. Rep. 122, it was said, Mr. Justice Matthews speaking for the court: "A use by the inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal, and not the incident, must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition. The language of section 4886 of the Revised Statutes is that 'any person who has invented or discovered any new and useful * * * machine, * * * not in public use or on sale for more than two years prior to his applica-

tion, * * * may * * * obtain a patent therefor.' A single sale to another of such a machine as that shown to have been in use by the complainant more than two years prior to the date of his application would certainly have defeated his right to a patent, and yet during that period in which its use by another would have defeated his right he himself used it for the same purpose for which it would have been used by a purchaser. Why should the similar use by himself not be counted as strongly against his rights as the use by another, to whom he had sold it, unless his use was substantially with the motive and for the purpose, by further experiment, of completing the successful operation of his invention?"

In that case Elizabeth v. Pavement Co., supra, was cited with approval, and it was said, (page 264, 123 U. S., and page 130, 8 Sup. Ct. Rep.:) "In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by test and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing." The court came to the conclusion that the patentee unduly neglected and delayed to apply for his patent, and deprived himself of the right thereto by the public use of the machine in question, and that the proof fell far short of establishing that the main purpose in view, in the use of the machine by the patentee, prior to his application, was to perfect its mechanism, and improve its operation.

*237 *So, too, in Hall v. MacNeale, 107 U. S. 90, 96, 97, 2 Sup. Ct. Rep. 73, it was contended that the use there involved was a use for experiment; but the court answered that the invention was complete, and was capable of producing the results sought to be accomplished; that the construction, arrangement, purpose, mode of operation, and use of the mechanism involved were necessarily known to the workmen who put it into the safes, which were the articles in question; that, although the mechanism was hidden from view after the safes were completed, and it required a destruction of them to bring it into view, that was no concealment of it, or use of it in secret; that it had no more concealment than was inseparable from any legitimate use of it; and that, as to the use being experimental, it was not shown that any attempt was made to expose the mechanism, and thus prove whether or not it was efficient.

In Egbert v. Lippmann, 104 U. S. 333, 336, the court remarked: "Whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute, even though the use and knowledge of the use may be confined to one person."

Without examining any other of the defenses raised, we are of opinion that the bill must be dismissed, for the reason stated by the circuit court.

Decree affirmed.

(146 U. S. 314)

HALLINGER v. DAVIS, County Jailer.

(November 28, 1892.)

No. 1,100.

DUE PROCESS OF LAW—JURY TRIAL—FOLLOWING STATE DECISIONS.

1. Crim. Proc. Act N. J. § 68, distinguishes two degrees of murder, and provides that upon a plea of guilty the court shall proceed by examination of witnesses to determine the degree of the prisoner's crime and to pass sentence accordingly. *Held* that, when such a proceeding is conducted in strict accordance with the forms prescribed by the constitution and laws of the state, it is due process of law.

2. Where there is no appeal under state laws, the decision of the trial court, as to the validity of a statute under the state constitution, is binding upon the supreme court of the United States.

Appeal from the circuit court of the United States for the district of New Jersey. Affirmed.

B. F. Rice, for appellant. C. H. Winfield, for appellee.

Mr. Justice SHIRAS delivered the opinion of the court.

On the 30th day of May, A. D. 1892, the appellant, Edward W. Hallinger, presented a petition to the circuit court of the United States for the district of New Jersey, wherein, and in a copy of the record of the proceedings in the court of oyer and terminer and general jail delivery of the county of Hudson, state of New Jersey, attached to said petition as part thereof, the following facts appear:

Hallinger, the appellant, was on the 14th day of April, 1891, indicted by the grand jury of Hudson county for the murder of one Mary Hallinger. On the 14th day of April, 1891, he pleaded guilty; whereupon the court ordered the said plea of guilty to be held in abeyance, subject to said defendant's consultation with counsel, then assigned for the purpose of consultation concerning said plea. On the 17th day of April, A. D. 1891, the defendant and his counsel again appeared and insisted on said plea of guilty; whereupon the said court continued said assignment of counsel, and ordered said defendant to be present on Tuesday, April 28, 1891, at an examination to determine the degree of guilt under said plea to be then and there had by said court. On the 28th day of April, 1891, the court, composed of Knapp and Lippincott, justices, in the presence of the defend-

ant and his counsel, heard evidence concerning the degree of defendant's guilt; and on the 12th day of May, 1891, the court adjudged the defendant guilty of murder in the first degree, and committed him to the custody of the jailer of Hudson county, to be confined in the common jail of said county until Tuesday, the 30th day of June, A. D. 1891, on which day he was condemned to be hanged.

Article 1, § 7, of the constitution of the state of New Jersey, provides: "The right of a trial by jury shall remain inviolate, but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men." Section 68 of the criminal procedure act of the state of New Jersey provides: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetrating or in attempting to perpetrate any arson, rape, sodomy, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury, before whom any person indicted for murder *316 shall be tried, shall, if they find such person guilty *thereof, designate by their verdict whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly." In his said petition the defendant alleged that said section 68 of the criminal procedure act of New Jersey is in violation of the constitution of the United States and of the state of New Jersey, and that his sentence and detention are illegal. He also states that, by virtue of the statutes and laws of the state of New Jersey, no right of appeal in murder cases exists, and he has no right to appeal to any higher court in the state to review or annul said illegal judgment and sentence.

On the 30th day of May, 1892, this application for a writ of habeas corpus was by the circuit court of the United States for the district of New Jersey refused.

*317 *It is contended on behalf of the appellant that the judgment and sentence of the court of oyer and terminer of Hudson county, N. J., whereby he is deprived of his liberty and condemned to be hanged, are void, because the act of criminal procedure of the state of New Jersey, in pursuance of the provisions of which such judgment and sentence were rendered, is repugnant to the fourteenth amendment of the constitution of the United States, which is in these words: "Nor shall any state deprive any person of life, liberty, or property without due process of law." Such repugnancy is supposed to be found in *318 the proposition that a verdict by a jury is an essential part in prosecutions for felonies, without which the accused cannot be said to have been condemned by "due process of law;" and that any act of a state legislature providing for the trial of felonies, otherwise than by a common-law jury, composed of 12 men, would be unconstitutional and void.

Upon the question of the right of one charged with crime to waive a trial by jury, and elect to be tried by the court, when there is a positive legislative enactment, giving the right so to do, and conferring power on the court to try the accused in such a case, there are numerous decisions by state courts upholding the validity of such proceeding. Dailey v. State, 4 Ohio St. 57; Dillingham v. State, 5 Ohio St. 280; People v. Noll, 20 Cal. 164; State v. Worden, 46 Conn. 349; State v. Albee, 61 N. H. 428.

If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal effect and nature of a plea of guilty have been very imperfectly understood, not only by the authors of the constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law. It is only necessary, in order to determine whether the legislature transcended its power in the act, to inquire whether it is prohibited by the constitution. The right of the accused to a trial was not affected, and we can therefore have no doubt that the proceeding to ascertain the degree of the crime where, in an indictment for murder, the defendant enters a plea of guilty, is constitutional and valid. Statutes of like or similar import have been enacted in many of the states, and have never been held unconstitutional. On the other hand, they have been repeatedly and uniformly held to be constitutional.

In Ohio, the statute is: "If the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses and determine the degree of the crime, and pronounce sentence accordingly." In Dailey v. State, 4 Ohio St. 57, the statute was held to be constitutional, and a sentence thereunder valid. *319

The statute of California in relation to this subject is in the identical language of the statute of New Jersey. In People v. Noll, 20 Cal. 164, the defendant on arraignment pleaded guilty. Thereupon witnesses were examined to ascertain the degree of the crime. The court found it to be murder in the first degree, and sentenced him accordingly. One of the errors assigned was that, after the plea of guilty by the defendant, the court did not call a jury to hear evidence and determine the degree of guilt. The supreme court held: "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the constitution which prevents a defendant from pleading guilty to the indictment instead of having a trial by jury If he elects to plead guilty to the indictment, the provision of the statute for determining the degree

of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury."

In Connecticut, the act of 1874 provided that in all prosecutions the party accused, if he should so elect, might be tried by the court instead of by the jury, and that, in such cases, the court should have full power to try the case and render judgment. In State v. Worden, 46 Conn. 349, this statute was held not to conflict with the provisions of the state constitution, that every person accused "shall have a speedy trial by an impartial jury, and that the right of trial by jury shall remain inviolate."

And, of course, the decision in the present case, of the highest court of the state of New Jersey having jurisdiction, that the statute is constitutional and valid, sufficiently and finally establishes that proposition, unless the proceedings in the case did not constitute "due process of law," within the meaning of the fourteenth amendment of the constitution of the United States.

That phrase is found in both the fifth and the fourteenth amendments. In the fifth amendment the provision is only a limitation of the power of the general government; it *320 has no application to the legislation of the several states. Barron *v. Baltimore, 7 Pet. 243. But in the fourteenth amendment the provision is extended in terms to the states. The decisions already cited sufficiently show that the state courts hold that trials had under the provisions of statutes authorizing persons accused of felonies to waive a jury trial, and to submit the degree of their guilt to the determination of the courts, are "due process of law." While these decisions are not conclusive upon this court, yet they are entitled to our respectful consideration.

The meaning and effect of this clause have already received the frequent attention of this court. In Murray's Lessee v. Improvement Co., 18 How. 272, the historical and critical meaning of these words was examined. The question involved was the validity of an act of congress giving a summary remedy, by a distress warrant, against the property of an official defaulter. It was contended that such a proceeding was an infringement of the fifth amendment, but this court held that, "tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the act of congress cannot be denied to be due process of law."

In Walker v. Sauvinet, 92 U. S. 90, it was held that a trial by jury in suits at common law, pending in the state courts, is not a privilege or immunity of national citizenship which the states are forbidden by the fourteenth amendment of the constitution of the United States to abridge. The court, by Waite, C. J., said: "A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

In Davidson v. New Orleans, 96 U. S. 97, an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted, and brought into this court by *321 a writ *of error to the supreme court of the *state of Louisiana. In the opinion of the court, delivered by Mr. Justice Miller, will be found an elaborate discussion of this provision as found in Magna Charta and in the fifth and fourteenth amendments to the constitution of the United States. The conclusion reached by the court was that "it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." Mr. Justice Bradley, while concurring in the judgment and in the general tenor of the reasoning by which it was supported, criticised the language of the court as "narrowing the scope of inquiry as to what is due process of law more than it should do."

However, in the very next case in which the court had occasion to consider the provision in question, Mr. Justice Bradley was himself the organ of the court in declaring that "there is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to, for, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws *322 and the same remedies. Great diversities *in these respects may exist in two states *separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of ju-

dicial proceedings. * * * Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. * * * It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies." Missouri v. Lewis, 101 U. S. 22-31.

In Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569, it was held that a proceeding, whereby an attorney at law was stricken from the roll for contempt, was within the jurisdiction of the court of which he was a member, and was not an invasion of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, but that the proceeding itself was due process of law. The dissent of Mr. Justice Field in that case did not impugn the view of the court as to what constituted due process of law, but was put upon the proposition that an attorney at law cannot be summarily disbarred for an indictable offense not connected with his professional conduct.

One of the latest and most carefully considered expressions of this court is found in the case of Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292. The question in the case was the validity of a provision in the constitution of the state of California, authorizing prosecutions for felonies by information, after examination and commitment by a magistrate, without indictment by a grand jury.

In pursuance of that provision and of legislation in accordance with it, Hurtado was charged in an information with the crime of murder, and, without any investigation of the cause by a grand jury, was tried, found guilty, and condemned to death. From this judgment an appeal was taken to the supreme court of California, which affirmed the judgment. 63 Cal. 288. This court, in reviewing and affirming the judgment of the supreme court of California, said: "We are
323 to construe this phrase—due process of law —in the fourteenth amendment by the usus loquendi of the constitution itself. The same words are contained in the fifth amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * * nor be deprived of life, liberty, or property without due process of law.' According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the constitution, 'due process of law' was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible that, when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that, if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to the law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure." The passage from the opinion of Justice Bradley in Missouri v. Lewis, above cited, is then quoted with ap
proval. *324

*In the Case of Kemmler, reported in 136 U. S. 436, 10 Sup. Ct. Rep. 930, a fruitless effort was made to induce this court to hold that a statute of the state of New York, providing that punishment of death should be inflicted by an electrical apparatus, was void under the fourteenth amendment, and it was said: "The enactment of this statute was in itself within the legitimate sphere of the legislative power of the state, and in the observance of those general rules prescribed by our systems of jurisprudence; and the legislature of the state of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the state has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law."

Applying the principles of these decisions to the case before us, we are readily brought to the conclusion that the appellant, in voluntarily availing himself of the provisions of the statute and electing to plead guilty, was deprived of no right or privilege within the protection of the fourteenth amendment. The trial seems to have been conducted in strict accordance with the forms prescribed by the constitution and laws of the state, and with special regard to the rights of the accused thereunder. The court refrained from at once accepting his plea of guilty, assigned him counsel, and twice adjourned,

for a period of several days, in order that he might be fully advised of the truth, force, and effect of his plea of guilty. Whatever may be thought of the wisdom of departing, in capital cases, from time-honored procedure, there is certainly nothing in the present record to enable this court to perceive that the rights of the appellant, so far as the laws and constitution of the United States are concerned, have been in any wise infringed.

Other propositions are discussed in the brief of the appellant's counsel, but they are either without legal foundation or suggest questions that are not subject to our revision.

The judgment of the circuit court is affirmed.

Mr. Justice HARLAN assents to the conclusion, but does not agree in all the reasoning of the opinion.

(146 U. S. 271)

In re CROSS.

(December 5, 1892.)

No. 10.

CRIMINAL LAW—WRIT OF ERROR—POSTPONEMENT OF EXECUTION.

Rev. St. D. C. § 845, provides that when judgment of death or confinement in the penitentiary is pronounced the court shall, on application of the condemned to enable him to apply for a writ of error, postpone the final execution to a reasonable time beyond the next term of the court, in no case exceeding 30 days. *Held*, that this is not a limitation of the time of execution, and when the judgment is affirmed on writ of error the court should set another day for execution, although the 30 days have passed.

Petition by William Douglass Cross for writs of habeas corpus and certiorari. Denied.

C. Maurice Smith and Joseph Shillington, for petitioner.

*277 *Mr. Chief Justice FULLER delivered the opinion of the court.

This is a petition for writs of habeas corpus and certiorari. The matters set up will be found sufficiently reported in Cross v. Burke, 13 Sup. Ct. Rep. 22, and Cross v. U. S., 145 U. S. 571, 12 Sup. Ct. Rep. 842. The application to us is, in effect, the same as that made to the supreme court of the District of Columbia, whose judgment denying the writ of habeas corpus was brought to this court by appeal, upon the hearing of which the merits were fully argued, although we were obliged to decline jurisdiction. Petitioner contends that the postponement of the execution of the sentence of death pronounced against him, by virtue of an order of the supreme court of the District in general term on January 21, 1892, and subsequent postponements by that court in special term, were without authority of law, and in violation of section 845 of the Revised Statutes of the District, and that, therefore, he is unlawfully kept and detained without due process of law, and in violation of the constitution of the United States.

Conceding that the time of execution is not part of the sentence of death unless made so by statute, it is insisted that in the District the time has been made a part of the sentence by section 845, which provides that when the judgment is death or confinement in the penitentiary the court shall on the application of the party condemned, to enable him to apply for a writ of error, "postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term."

*278 *The argument is that the time fixed by such a postponement is to be regarded as a time fixed by statute, and that the power of the court to set a day for execution is thereby exhausted.

The supreme court of the District, upon the prior application, held that this provision related simply to the right of the accused to a postponement of the day of executing his sentence in case he should apply for it in order to have a review of an alleged error, and that, with the exception of this restriction in the matter of fixing a day for execution, the power of the court was not made the subject of legislation, but was left as it had been at common law.

We concur with the views expressed by that court, and in the conclusion reached, that if the time for execution had passed, in any case, the court could make a new order.

Unquestionably, congress did not intend that the execution of a sentence should not be carried out, if judgment were affirmed on writ of error, except where the appellate court was able to announce a result within the time allowed for the application for the writ to be made. The postponements were rendered necessary by reason of delays occasioned by the acts of the condemned in his own interest, and the position that he thereby became entitled to be set at large cannot be sustained. McElvaine v. Brush, 142 U. S. 155, 159, 12 Sup. Ct. Rep. 156; People v. Treza, 128 N. Y. 529, 536, 28 N. E. Rep. 533.

It may be admitted that section 1040 of the Revised Statutes applies only to cases which can be brought to this court; but, apart from the fact that, as pointed out in Cross v. U. S., ubi supra, the supreme court of the District, whether sitting in general or in special term, is still the supreme court, it is unnecessary to consider the validity of the postponement, since section 845 of the Revised Statutes of the District has not the effect contended for. Without reference to the state of case when a statute fixes or limits the time, the sentence of death remained in force, and was sufficient authority for holding the convict in confinement after the day fixed had passed, when it became the duty of the court to assign, if there had been no other disposition of the case, a new time for *279 *execution. Rex v. Harris, 1 Ld. Raym. 482;*

Rex v. Rogers, 3 Burrows, 1809, 1812; Rex v. Wyatt, Russ. & R. 230; Ex parte Howard, 17 N. H. 545; State v. Kitchens, 2 Hill, (S. C.) 612; Bland v. State, 2 Ind. 608; Lowenberg v. People, 27 N. Y. 336; State v. Oscar, 13 La. Ann. 297; State v. Cardwell, 95 N. C. 643; Ex parte Nixon, 2 S. C. 4.

The application for the writs must be denied.

(146 U. S. 387)

ILLINOIS CENT. R. CO. v. STATE OF ILLINOIS et al. CITY OF CHICAGO v. ILLINOIS CENT. R. CO. et al. STATE OF ILLINOIS v. ILLINOIS CENT. R. Co. et al.

(December 5, 1892.)

Nos. 419, 608, 609.

CONSTITUTIONAL LAW—TIDE LANDS — LANDS UNDER THE GREAT LAKES—RIPARIAN RIGHTS.

1. The common-law doctrine as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; and in this country such dominion, sovereignty, and ownership belongs to the states, respectively, within whose borders such lands are situated, subject always to the right of congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce.

2. The title which a state holds to lands under tide waters bordering on the sea or under the navigable waters of the Great Lakes, lying within her limits, is different in character from the title of the state to lands intended for sale, or from that of the United States to the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from obstruction or interference by private parties, and it is not within the legislative power of the state to abdicate this trust by a grant whereby it surrenders its property and general control over the lands of an entire harbor, bay, sea, or lake, though it may grant parcels thereof for the foundations of wharves, piers, docks, and other structures in aid of commerce, or parcels which, being occupied, do not substantially impair the public interest in the waters remaining. Mr. Justice Shiras, Mr. Justice Gray, and Mr. Justice Brown dissenting.

3. Act Ill. April 16, 1869, purporting to grant to the Illinois Central Railroad Company all the right and title of the state to the submerged lands constituting the bed of Lake Michigan, for one mile from the shore opposite the company's tracks and breakwater in the city of Chicago, to be held in perpetuity without power to alienate the fee, was in excess of the legislative power of the state, and inoperative to affect, modify, or in any respect control the sovereignty and dominion of the state over such lands, or its ownership thereof, and was annulled by the repealing act of April 15, 1873, which was valid and effective to that extent. Mr. Justice Shiras, Mr. Justice Gray, and Mr. Justice Brown, dissenting.

4. The reclamation by the Illinois Central Railroad Company from the waters of Lake Michigan of a tract 200 feet wide, extending along the front of the city of Chicago, and the construction of its tracks, crossings, guards, etc., and the erection of the breakwater on the east thereof, and the necessary works for the protection of the shore on the west, all as required by the ordinance under which it was permitted to enter the city, did not interfere with any useful freedom in the use of the waters of the lake for commerce,—foreign, interstate, or domestic,—or constitute such an encroachment upon the domain of the state as to require the interposition of a court for their removal, or for any restraint in their use. 33 Fed. Rep. 730, affirmed.

5. The railroad company did not, however, acquire, by such reclamation, an absolute fee in the lands reclaimed, or any right of use, disposal, or control, except for a right of way and for railroad purposes; nor did it thereby acquire any rights, as a riparian owner, to reclaim still further lands from the lake for its use, or for the construction of piers, docks, and wharves in furtherance of its business.

6. In respect to the lots lying north of Randolph street, in said city, and the lots in front of Michigan avenue, all bordering on the lake, and to which the company acquired the fee by purchase, it was vested with riparian rights, and thereby became entitled to fill up the shallow waters of the lake, and to construct piers, wharves, docks, and slips not extending beyond the point of navigability. 33 Fed. Rep. 730, affirmed.

7. The fee in the streets, alleys, commons, and public grounds, as exhibited on the maps of subdivision of fractional sections 10 and 15, lying on the lake front of Chicago, is vested in the city, together with the riparian rights appertaining thereto; and these rights were not divested by the fact that the Illinois Central Railroad occupied the lands underlying the immediate front, and filled them in for its right of way, under authority of a city ordinance; and the city still has the right to exercise such riparian rights, subject to the terms of the ordinance and to the authority of the state to prescribe the lines beyond which no structures may be extended, and also subject to such supervision and control as the United States may lawfully exercise. 33 Fed. Rep. 730, affirmed.

Appeals from the circuit court of the United States for the northern district of Illinois. Modified and affirmed.

B. F. Ayers and John N. Jewett, for Illinois Cent. R. Co. John S. Miller and S. S. Gregory, for the City of Chicago. George Hunt, for the State of Illinois.

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*Mr. Justice FIELD delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a circuit court of Illinois, by an information or bill in equity filed by the attorney general of the state, in the name of its people, against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago. The United States were also named as a party defendant, but they never appeared in the suit, and it was impossible to bring them in as a party without their consent. The alleged grievances arose solely from the acts and claims of the railroad company, but the city of Chicago was made a defendant because of its interest in the subject of the litigation. The railroad company filed its answer in the state court at the first term after the commencement of the suit, and upon its petition the case was removed to the circuit court of the United States for the northern district of Illinois. In May following the city appeared to the suit and filed its answer, admitting all the allegations of fact in the bill. A subsequent motion by the complainant to remand the case to the state court was denied. 16 Fed. Rep. 881. The pleadings were afterwards altered in various particulars. An amended information or bill was filed by the

attorney general, and the city filed a cross bill for affirmative relief against the state and the company. The latter appeared to the cross bill, and answered it, as did the attorney general for the state. Each party has prosecuted a separate appeal.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago river and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers, and other structures used by the railroad company in its business, and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the *434 south line of the south pier near Chicago river, extended eastwardly, and a line* extended in the same direction from the south line of lot 21 near the company's roundhouse and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers, and docks in the harbor.

We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company; and the court, in its elaborate opinion, (33 Fed. Rep. 730,) for that purpose referred to the legislation of the United States and of the state, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed, and are satisfied with its entire accuracy. It would therefore serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the state, and of the city, remaining after the legislation and proceedings taken, we shall assume the correctness of that history.

The state of Illinois was admitted into the Union in 1818 on an equal footing with the original states, in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio river, out of which the state was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the state were prescribed by congress and accepted by the state in its original constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the mainland of the state and the middle of the lake, south of latitude 42 degrees and 30 minutes.

*435 * It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. Pollard's Lessee v. Hagan, 3 How. 212; Weber v. Commissioners, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as said in the case of The Genesee Chief, 12 How. 443, 455, "'tide water,' and 'navigable water' are synonymous terms, and 'tide water,' with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;" and writers on the subject of admiralty jurisdiction "took the ebb and flow of the tide as the test, because it was a convenient one, *436 and more easily determined* the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters."

But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide,—indeed, for hundreds of miles,—by the largest vessels used in commerce. As said in the case cited: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction,

nor anything in the absence of a tide that renders it unfit. If it is a public, navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same, and, if a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it."

The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable; "tide waters" and "navigable waters," as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment,—a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters n the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty, and proprietary right have been encroached upon by the railroad company, and how far that company had at the time the assent of the state to such encroachment, and also the validity of the claim which the company asserts, of a right to make further encroachments thereon by virtue of a grant from the state in April, 1869.

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The city of Chicago is situated upon the southwestern shore of Lake Michigan, and includes, with other territory, fractional sections 10 and 15, in township 39 N., range 14 E. of the third P. M., bordering on the lake, which forms their eastern boundary. For a long time after the organization of the city, its harbor was the Chicago river, a small, narrow stream opening into the lake near the center of the east and west line of section 10; and in it the shipping arriving from other ports of the lake and navigable waters was moored or anchored, and along it were docks and wharves. The growth of the city in subsequent years, in population, business, and commerce, required a larger and more convenient harbor, and the United States, in view of such expansion and growth, commenced the construction of a system of breakwaters and other harbor protections in the waters of the lake in front of the fractional sections mentioned. In the prosecution of this work there was constructed a line of breakwaters or cribs of wood and stone covering the front of the city between the Chicago river and Twelfth street, with openings in the piers or lines of cribs for the entrance and departure of vessels; thus inclosing a large part of the lake for the uses of shipping and commerce, and creating an outer harbor for Chicago. It comprises a space about one mile and one half in length from north to south, and is of a width from east to west varying from 1,000 to 4,000 feet. As commerce and shipping expand, the harbor will be further extended towards the south; and, as alleged by the amended bill, it is expected that the necessities of commerce will soon require its enlargement so as to include a great part of the entire lake front of the city. It is stated, and not denied, that the authorities of the United States have in a general way indicated a plan for the improvement and use of the harbor which had been inclosed as mentioned, by which a portion is devoted as a harbor of refuge, where ships may ride at anchor with security and within protecting walls, and another portion of such inclosure, nearer the shore of the lake, may be devoted to wharves and piers, alongside of which ships may load and unload, and upon which warehouses may be constructed and other structures erected for the convenience of lake commerce.

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The case proceeds upon the theory and allegation that the defendant the Illinois Central Railroad Company has, without lawful authority, encroached, and continues to encroach, upon the domain of the state, and its original ownership and control of the waters of the harbor and of the lands thereunder, upon a claim of rights acquired under a grant from the state and ordinance of the city to enter the city and appropriate land and water 200 feet wide, in order to construct a track for a railway and to erect thereon warehouses, piers, and other structures in front of the city, and upon a claim of riparian rights acquired by virtue of ownership of lands originally bordering on the lake in front of the city. It also proceeds against the claim asserted by the railroad company, of a grant by the state in 1869 of its right and title to the submerged lands constituting the bed of Lake Michigan, lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended in the same di-

rection from the south line of lot 21 south of and near the machine shops and roundhouse of the company, and of a right thereby to construct at its pleasure, in the harbor, wharves, piers, and other works for its use.

*The state prays a decree establishing and confirming its title to the bed of Lake Michigan, and exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, piers, and other improvements, against the claim of the railroad company that it has an absolute title to such submerged lands by the act of 1869, and the right, subject only to the paramount authority of the United States in the regulation of commerce, to fill all the bed of the lake within the limits above stated, for the purpose of its business, and the right, by the construction and maintenance of wharves, docks, and piers, to improve the shore of the lake for the promotion generally of commerce and navigation. And the state, insisting that the company has, without right, erected, and proposes to continue to erect, wharves and piers upon its domain, asks that such alleged unlawful structures may be ordered to be removed, and the company be enjoined from erecting further structures of any kind.

And first as to lands in the harbor of Chicago possessed and used by the railroad company under the act of congress of September 20, 1850, (9 St. p. 466, c. 61,) and the ordinance of the city of June 14, 1852. By that act congress granted to the state of Illinois a right of way, not exceeding 100 feet in width, on each side of its length, through the public lands, for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch to Chicago, and another, via the town of Galena, to a point opposite Dubuque, in the state of Iowa, with the right to take the necessary materials for its construction; and to aid in the construction of the railroad and branches, by the same act it granted to the state six alternate sections of land, designated by even numbers, on each side of the road and branches, with the usual reservation of any portion found to be sold by the United States, or to which the right of pre-emption had attached at the time the route of the road and branches was definitely fixed, in which case provision was made for the selection of equivalent lands in contiguous sections.

*The lands granted were made subject to the disposition of the legislature of the state; and it was declared that the railroad and its branches should be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of their property or troops.

The act was formally accepted by the legislature of the state, February 17, 1851, (Laws 1851, pp. 192, 193.) A few days before, and on the 10th of that month, the Illinois Central Railroad Company was incorporated. It was invested generally with the powers, privileges, immunities, and franchises of corporations, and specifically with the power of acquiring by purchase or otherwise, and of holding and conveying, real and personal estate which might be needful to carry into effect, fully, the purposes of the act.

It was also authorized to survey, locate, construct, and operate a railroad, with one or more tracks or lines of rails, between the points designated and the branches mentioned; and it was declared that the company should have a right of way upon, and might appropriate to its sole use and control, for the purposes contemplated, land not exceeding 200 feet in width throughout its entire length, and might enter upon and take possession of and use any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, engine houses, shops, and other buildings necessary for completing, maintaining, and operating the road. All such lands, waters, materials, and privileges belonging to the state were granted to the corporation for that purpose; and it was provided that when owned by or belonging to any person, company, or corporation, and they could not be obtained by voluntary grant or release, the same might be taken and paid for by proceedings for condemnation, as prescribed by law.

It was also enacted that nothing in the act should authorize the corporation to make a location of its road within any city without the consent of its common council. This consent was given by an ordinance of the common council of Chicago,* adopted June 14, 1852. By its first section it granted permission to the company to lay down, construct, and maintain within the limits of the city, and along the margin of the lake within and adjacent to the same, a railroad, with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations, with reference to speed of trains, the receipt, safe-keeping, and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as the company might from time to time establish, and to have the right of way and all powers incident to and necessary therefor, in the manner and upon the following terms and conditions, namely: That the road should enter the city at or near the intersection of its then southern boundary with Lake Michigan, and follow the shore on or near the margin of the lake northerly to the southern bounds of the open space known as "Lake Park," in front of canal section 15, and continue northerly across the open space in front of that section to such grounds as the company might acquire between the north line of Randolph street and the Chicago river, in the Ft. Dearborn addition, upon which grounds should be located the depot of the railroad company within the city, and such

other buildings, slips, or apparatus as might be necessary and convenient for its business. But it was understood that the city did not undertake to obtain for the company any right of way, or other right, privilege, or easement, not then in its power to grant, or to assume any liability or responsibility for the acts of the company. It also declared that the company might enter upon and use in perpetuity for its line of road, and other works necessary to protect the same from the lake, a width of 300 feet from the southern boundary of the public ground near Twelfth street, to the northern line of Randolph street; the inner or west line of the ground to be not less than 400 feet east from the west line of Michigan avenue, and parallel thereto; and it was authorized to extend its works and fill out into the lake to a point in the southern pier not less than 400 feet west from the then east end of the same, thence parallel with Michigan avenue to the north side of Randolph street extended; but it was stated that the common council did not grant any right or privilege beyond the limits above specified, nor beyond the line that might be actually occupied by the works of the company.

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By the ordinance the company was required to erect and maintain on the western or inner line of the ground pointed out for its main tracks on the lake shore such suitable walls, fences, or other sufficient works as would prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger, and to construct such suitable gates at proper places at the ends of the streets, which were then or might thereafter be laid out, as required by the common council, to afford safe access to the lake; and provided that, in the case of the construction of an outside harbor, streets might be laid out to approach the same in the manner provided by law. The company was also required to erect and complete within three years after it should have accepted the ordinance, and forever thereafter maintain, a continuous wall or structure of stone masonry, pier work, or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake Park, at a distance of not more than 300 feet east from and parallel with the western or inner line of the company, and continue the works to the southern boundary of the city, at such distance outside of the track of the road as might be expedient, which structure and works should be of sufficient strength and magnitude to protect the entire front of the city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan; and that that part of the structure south of Lake Park should be commenced and prosecuted with reasonable dispatch after acceptance of the ordinance. It was also enacted that the company should "not in any manner, nor for any purpose whatever, occupy, use, or intrude upon the open ground known as 'Lake Park,' belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground;" and it was declared that the company should "erect no buildings between the north line of Randolph street and the south side of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars, or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks, and protection of the same."

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The company was allowed 90 days to accept this ordinance, and it was provided that upon such acceptance a contract embodying its provisions should be executed and delivered between the city and the company, and that the rights and privileges conferred upon the company should depend upon the performance on its part of the requirements made. The ordinance was accepted and the required agreement drawn and executed on the 28th of March, 1853.

Under the authority of this ordinance the railroad company located its tracks within the corporate limits of the city. Those running northward from Twelfth street were laid upon piling in the waters of the lake. The shore line of the lake was at that time at Park Row, about 400 feet from the west line of Michigan avenue, and at Randolph street, about 112½ feet. Since then the space between the shore line and the tracks of the railroad company has been filled with earth under the direction of the city, and is now solid ground.

After the tracks were constructed the company erected a breakwater east of its roadway upon a line parallel with the west line of Michigan avenue, and afterwards filled up the space between the breakwater and its tracks with earth and stone.

We do not deem it material, for the determination of any questions presented in this case, to describe in detail the extensive works of the railroad company under the permission given to locate its road within the city by the ordinance. It is sufficient to say that, when this suit was commenced, it had reclaimed from the waters of the lake a tract 200 feet in width, for the whole distance allowed for its entry within the city, and constructed thereon the tracks needed for its railway, with all the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on

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the west. Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce,—foreign, interstate, or domestic. They were constructed under the authority of the law by the requirement of the city, as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the state as to require the interposition of the court for their removal or for any restraint in their use.

The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated,—the construction and operation of a railroad thereon, with one or more tracks and works in connection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials, and privileges belonging to the state were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed. While the grant to it included waters of streams in the line of the right of way belonging to the state, it was accompanied with a declaration that it should not be so construed as to authorize the corporation to interrupt the navigation of the streams. If the waters of the lake may be deemed to be included in the designation of streams, then their use would be held equally restricted. The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry, so far at least as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety. Nor did the railroad company acquire, by the mere construction of its road and other works, any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks, and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordinance, which was simply for the construction of a railroad on a track not to exceed a specified width, and of works connected therewith.

We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, but at present we are speaking only of what rights it acquired from the reclamation of the tract upon which the railroad and the works in connection with it are built. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership, and pass with the transfer of the land; and the land must not only be contiguous to the water, but in contact with it. Proximity, without contact, is insufficient. The riparian right attaches to land on the border of navigable water, without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. See Gould, Waters, § 148, and authorities there cited.

The riparian proprietor is entitled, among other rights, as held in Yates v. Milwaukee, 10 Wall. 497, 504, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. In the case cited the court held that this riparian right was property, and valuable, and, though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired. It had been held in the previous case of Dutton v. Strong, 1 Black, 23, 33, that, whenever the water of the shore was too shoal to be navigable, there was the same necessity for wharves, piers, and landing places as in the bays and arms of the sea; that, where that necessity existed, it was difficult to see any reason for denying to the adjacent owner the right to supply it; but that the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceased.

In this case it appears that fractional section 10, which was included within the city limits bordering on the lake front, was, many years before this suit was brought, divided, under the authority of the United States, into blocks and lots, and the lots sold. The proceedings taken and the laws passed on the subject for the sale of the lots are stated with great particularity in the opinion of the court below, but for our purpose it is sufficient to mention that the lots laid out in fractional section 10 belonging to the United States were sold, and, either directly or from purchasers, the title to some of them fronting on the lake north of Randolph street became vested in the railroad company, and the company, finding the lake in front of those lots shallow, filled it in, and upon the reclaimed land constructed slips, wharves, and piers, the last three piers in 1872–73, 1880, and 1881, which it claims to own and to have the right to use in its business.

According to the law of riparian owner-

ship which we have stated, this claim is well founded, so far as the piers do not extend beyond the point of navigability in the waters of the lake. We are not fully satisfied that such is the case, from the evidence which the company has produced, and the fact is not *447 conceded. Nor does the court below find that such navigable point had been established by any public authority or judicial decision, or that it had any foundation, other than the judgment of the railroad company.

The same position may be taken as to the claim of the company to the pier and docks erected in front of Michigan avenue between the lines of Twelfth and Sixteenth streets extended. The company had previously acquired the title to certain lots fronting on the lake at that point, and, upon its claim of riparian rights from that ownership, had erected the structures in question. Its ownership of them likewise depends upon the question whether they are extended beyond or are limited to the navigable point of the waters of the lake, of which no satisfactory evidence was offered.

Upon the land reclaimed by the railroad company as riparian proprietor in front of lots into which section 10 was divided, which it had purchased, its passenger depot was erected north of Randolph street; and to facilitate its approach the common council, by ordinance adopted September 10, 1855, authorized it to curve its tracks westwardly of the line fixed by the ordinance of 1852, so as to cross that line at a point not more than 200 feet south of Randolph street, in accordance with a specified plan. This permission was given upon the condition that the company should lay out upon its own land, west of and alongside its passenger house, a street 50 feet wide, extending from Water street to Randolph street, and fill the same up its entire length, within two years from the passage of the ordinance. The company's tracks were curved as permitted, the street referred to was opened, the required filling was done, and the street has ever since been used by the public. It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago river, the city, by another ordinance, adopted September 15, 1856, granted it permission to enter and use, in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its then breakwater and a line drawn from a point thereon 700 feet south of the north line of Randolph street extended, and running *448 thence on a straight line to the southeast corner of its present breakwater, thence to the river, and the space thus indicated the railroad company occupied and continued to hold pursuant to this ordinance; and we do not perceive any valid objection to its continued holding of the same for the purposes declared,—that is, as additional means of approaching and using its station grounds.

We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks, and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the state passed on the 16th of April, 1869, the material part of which is as follows:

"Sec. 3. The right of the Illinois Central Railroad Company under the grant from the state in its charter, which said grant constitutes a part of the consideration for which the said company pays to the state at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for a distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same, and that all gross receipts from use, profits, leases, or otherwise, of said lands, or the improvements *thereon, or that may hereafter be* made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semiannually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor."

The act of which this section is a part was accepted by a resolution of the board of directors of the company at its office in the city of New York, July 6, 1870, but the acceptance was not communicated to the state until the 18th of November, 1870. A copy of the resolution was on that day forwarded to the secretary of state, and filed and re-

corded by him in the records of his office. On the 15th of April, 1873, the legislature of Illinois repealed the act. The questions presented relate to the validity of the section cited, of the act, and the effect of the repeal upon its operation.

The section in question has two objects in view: One was to confirm certain alleged rights of the railroad company under the grant from the state in its charter and under and "by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident" thereto, in and to the lands submerged or otherwise lying east of a line parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15. The other object was to grant to the railroad company submerged lands in the harbor.

The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed from its ownership of lands in sections 10 and 15 on the shore of the lake. Whether the piers or docks constructed by it after the passage of the act of 1869 extend beyond the point of navigability in the waters of the lake must be the subject of judicial inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found, on such inquiry, to extend beyond the point of such navigability, then the state will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the state and the facts established, may be authorized by law.

As to the grant of the submerged lands, the act declares that all the right and title of the state in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot 21, south of and near to the roundhouse and machine shops of the company, "are granted in fee to the railroad company, its successors and assigns." The grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell, or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor, or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor, or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations, the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period, and renew it at its pleasure; and the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is by the act converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

The circumstances attending the passage of the act through the legislature were on the hearing the subject of much criticism. As originally introduced, the purpose of the act was to enable the city of Chicago to enlarge its harbor, and to grant to it the title and interest of the state to certain lands adjacent to the shore of Lake Michigan, on the eastern front of the city, and place the harbor under its control; giving it all the necessary powers for its wise management. But during the passage of the act its purport was changed. Instead of providing for the cession of the submerged lands to the city, it provided for a cession of them to the railroad company. It was urged that the title of the act was not changed to correspond with its changed purpose, and an objection was taken to its validity on that account. But the majority of the court were of opinion that the evidence was insufficient to show that the requirement of the constitution of the state, in its passage, was not complied with.

The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.

That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdi- *453 cation of the general control of the state over * lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always *454 remains with the state the right to *revoke* those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.

The harbor of Chicago is of immense value to the people of the state of Illinois, in the facilities it affords to its vast and constantly increasing commerce: and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose,—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces something more than 1,000 acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor, but embracing adjoining submerged lands, which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly, if not quite, equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are

equal to those of New York and Boston combined. Chicago has nearly 25 per cent. of the lake carrying trade, as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to 22,096, with a tonnage of over 7,000,000; and in 1890 the tonnage of the vessels reached nearly 9,000,000. As stated by counsel, since the passage of the lake front act, in 1869, the population of the city has increased nearly 1,000,000 souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant, which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney in Martin v. Waddell, 16 Pet. 367, 410: "When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." In Arnold v. Mundy, 6 N. J. Law, 1, which is cited by this court in Martin v. Waddell, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the supreme court of New Jersey comments upon the rights of the state in the bed of navigable waters, and, after observing that the power exercised by the state over the lands and waters is nothing more than what is called the "jus regium," the right of regulating, improving, and securing them for the benefit of every individual citizen, adds: "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a state over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

In the case of Stockton v. Railroad Co., 32 Fed. Rep. 9, which involved a consideration by Mr. Justice Bradley, late of this court, of the nature of the ownership by the state of lands under the navigable waters of the United States, he said:

"It is insisted that the property of the state in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the state house at Trenton, and the surrounding grounds belonging to the state, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the state holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that prior to the Revolution the shore and lands under water of the naviga-

ble streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder."

Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the *458 state in their character as sovereign in trust for public uses for which they are adapted. Martin v. Waddell, 16 Pet. 367, 410; Pollard's Lessee v. Hagan, 3 How. 212, 220; McCready v. Virginia, 94 U. S. 391, 394.

In People v. Ferry Co., 68 N. Y. 71, 76, the court of appeals of New York said:

"The title to lands under tide waters, within the realm of England, were by the common law deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise De Jure Maris (page 22) Lord Hale says: 'The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use.' And Mr. Justice Best, in Blundell v. Catterall, 5 Barn. & Ald. 268, in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' * * *

"The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right." *459

*While the opinion of the New York court contains some expressions which may require explanation when detached from the particular facts of that case, the general observations we cite are just and pertinent.

The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state.

In Newton v. Commissioners, 100 U. S. 548, it appeared that by an act passed by the legislature of Ohio in 1846 it was provided that upon the fulfillment of certain conditions by the proprietors or citizens of the town of Canfield the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the court refused the injunction, holding that there could be no contract and no irrepealable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment,—neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

As counsel observe, if this is true doctrine

as to the location of a county seat, it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right, as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

The legislation of the state in the lake front act, purporting to grant the fee of the submerged lands mentioned to the railroad company, was considered by the court below, in view of the preceding measures taken for the improvement of the harbor, and because further improvement in the same direction was contemplated, as a mere license to the company to prosecute such further improvement as an agency of the state, and that to this end the state has placed certain of its resources at the command of the company, with such an enlargement of its powers and privileges as enabled it to accomplish the objects in view; and the court below, after observing that the act might be assumed as investing the railroad company with the power, not given in its original charter, of erecting and maintaining wharves docks, and piers in the interest of commerce, and beyond the necessities or legitimate purposes of its own business as a railroad corporation, added that it was unable to perceive why it was not competent for the state, by subsequent legislation, to repeal the act and withdraw the additional powers of the company, thereby restricting it to the business for which it was incorporated, and to resume control of the resources and property which it had placed at the command of the company for the improvement of the harbor. The court, treating the act as a license to the company, also observed that it was deemed best, when that act was passed, for the public interest, that the improvement of the harbor should be effected by the instrumentality of a railroad corporation interested to some extent in the accomplishment of that result, and said:

"But if the state subsequently determined, upon consideration of public policy, that this great work should not be intrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or state constitution forbade the general assembly of Illinois from giving effect by legislation to this change of policy. It cannot be claimed that the repeal of the act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges, for which the railroad company paid nothing, although, in consideration of the grant of such additional powers and privileges, it agreed to pay a certain per centum of the gross proceeds, receipts, and incomes which it might derive either from the lands granted by the act, or from any improvements erected thereon. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purposes contemplated by the legislature,—certainly not within any given time,—and could not have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to, because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the effect of the act of 1873 was only to remit the railroad company to the exercise of the powers, privileges, and franchises granted in its original charter, and withdraw from it the additional powers given by the act of 1869 for the accomplishment of certain public objects." If the act in question be treated as a mere license to the company to make the improvement in the harbor contemplated as an agency of the state, then we think the right to cancel the agency and revoke its power is unquestionable.

It remains to consider the claim of the city of Chicago to portions of the east water front, and how such claim, and the rights attached to it, are interfered with by the railroad company.

The claim of the city is to the ownership in fee of the streets, alleys, ways, commons, and other public grounds on the east front of the city bordering on the lake, as exhibited on the maps showing the subdivision of fractional sections 10 and 15, prepared under the supervision and direction of United States officers in the one case, and by the canal commissioners in the other, and duly recorded, and the riparian rights attached to such ownership. By a statute of Illinois the making, acknowledging, and recording of the plats operated to vest the title to the streets, alleys, ways, and commons, and other public grounds designated on such plats, in the city, in trust for the public uses to which they were appli-

cable. Trustees v. Havens, 11 Ill. 556; Chicago v. Rumsey, 87 Ill. 354.

Such property, besides other parcels, included the whole of that portion of fractional section 15 which constitutes Michigan avenue, and that part of the fractional section lying east of the west line of Michigan avenue, and that portion of fractional section 10 designated on one of the plats as "Public Ground," which was always to remain open and free from any buildings.

The estate, real and personal, held by the trustees of the town of Chicago, was vested in the city of Chicago by the act of March 4, 1837. It followed that when the lake front act of 1869 was passed the fee was in the city, subject to the public uses designated, of all the portions of sections 10 and 15 particularly described in the decree below. And we agree with the court below that the fee of the made or reclaimed ground between Randolph street and Park row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, was in the city. The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the breakwater on the shore west of it did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracts on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did.

We also agree with the court below that the city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block 23, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks, and levees, subject, however, in the execution of that power, to the authority of the state to prescribe the lines beyond which piers, docks, wharves, and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.

It follows from the views expressed, and it is so declared and adjudged, that the state of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same, is valid and effective for the purpose of restoring to the state the same control, dominion, and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

But the decree below, as it respects the pier commenced in 1872, and the piers completed in 1880 and 1881, marked 1, 2, and 3, near Chicago river, and the pier and docks between and in front of Twelfth and Sixteenth streets, is modified so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of lots formerly constituting part of section 10, extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake, and if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the state as may be authorized by law, and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the state as may be authorized by law. Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company, and it is so ordered.

The CHIEF JUSTICE, having been of counsel in the court below, and Mr. Justice BLATCHFORD, being a stockholder in the Illinois Central Railroad Company, did not take any part in the consideration or decision of these cases.

Mr. Justice SHIRAS, dissenting.

That the ownership of a state in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the state, I have supposed to be well settled.

Thus it was said in Weber v. Commissioners, 18 Wall. 57, 65, that, "upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government."

In Hoboken v. Railroad Co., 124 U. S. 657, 8 Sup. Ct. Rep. 643,—a case in many respects like the present,—it was said: "Lands below high-water mark on navigable waters are the absolute property of the state, subject only to the power conferred upon congress to regulate foreign commerce and commerce between the states, and they may be granted by the state, either to the riparian proprietors or to a stranger, as the state may see fit;" and accordingly it was held "that the grant by the state of New Jersey to the United Companies by the act of March 31, 1869, was intended to secure, and does secure, to the respective grantees, the whole beneficial interest in their respective properties, for their exclusive use for the purposes expressed in the grants."

In Stevens v. Railroad Co., 34 N. J. Law, 532, it was declared by the court of errors and appeals of New Jersey that it was competent for the state to grant to a stranger lands constituting the shore of a navigable river under tide water below the tide-water mark, to be occupied and used with structures and improvements.

Langdon v. Mayor, etc., 93 N. Y. 129, 155, was a case in which it was said by the court of appeals of New York: "From the earliest times in England the law has vested the title to, and the control over, the navigable waters therein, in the crown and parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as jus privatum, and was vested in the crown. But the right to use and control both the land and water was deemed a jus publicum, and was vested in parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by parliament. In this country the state has succeeded to all the rights of both crown and parliament in the navigable waters and the soil under them, and here the jus privatum and the jus publicum are both vested in the state."

These citations might be indefinitely multiplied from authorities both federal and state.

The state of Illinois, by her information or bill of complaint in this case, alleges that "the claims of the defendants are a great and irreparable injury to the state of Illinois as a proprietor and owner of the bed of the lake, throwing doubts and clouds upon its title thereto, and preventing an advantageous sale or other disposition thereof;" and in the prayer for relief the state asks that "its title may be established and confirmed; that the claims made by the railroad company may be declared to be unfounded; and that the state of Illinois may be declared to have the sole and exclusive right to develop the harbor of Chicago by the construction of docks, wharves, etc., and to dispose of such rights at its pleasure."

Indeed, the logic of the state's case, as well as her pleadings, attributes to the state entire power to hold and dispose of, by grant or lease, the lands in question; and her case is put upon the alleged invalidity of the title of the railroad company, arising out of the asserted unconstitutionality of the act of 1869, which act made the grant, by reason of certain irregularities in its passage and title, or, that ground failing, upon the right of the state to arbitrarily revoke the grant, as a mere license, and which right she claims to have duly exercised by the passage of the act of 1873.

The opinion of the majority, if I rightly apprehend it, likewise concedes that a state does possess the power to grant the rights of property and possession in such lands to private parties, but the power is stated to be in some way restricted to "small parcels, or where such parcels can be disposed of without detriment to the public interests in the lands and waters remaining." But it is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable. It is matter of common knowledge that a great railroad system, like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities.

It would seem to be plain that, if the state of Illinois has the power, by her legislature, to grant private rights and interests in parcels of soil under her navigable waters, the extent of such a grant, and its effect upon the public interests in the lands and waters remaining, are matters of legislative discretion.

Assuming, then, that the state of Illinois possesses the power to confer by grant, upon the Illinois Central Railroad Company, private rights and property in the lands of the

state underlying the waters of the lake, we come to inquire whether she has exercised that power by a valid enactment, and, if so, whether the grant so made has been legally revoked.

It was contended, on behalf of the state, that the act of 1869, purporting to confer upon the railroad company certain rights in the lands in question, did not really so operate, because the record of proceedings in the senate does not show that the bill was read three times during its passage, and because the title of the bill does not sufficiently express the purpose of the bill, both of which are constitutional requisites to valid legislation.

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It is unnecessary to discuss these objections in this opinion, because the court below held them untenable, and because the opinion of the majority in this court adopts the reasoning and conclusion of the court below in this regard.

It was further contended, on behalf of the state, that, even if the act of 1869 were a valid exercise of legislative power, yet the grant thereby made did not vest in the railroad company rights and franchises in the nature of private property, but merely conferred upon the company certain powers for public purposes, which were taken and held by the company as an agency of the state, and which accordingly could be recalled by the state whenever, in her wisdom, she deemed it for the public interest to do so, without thereby infringing a contract existing between her and the railroad company.

This is a question that must be decided by the terms of the grant, read in the light of the nature of the power exercised, of the character of the railroad company as a corporation created to carry out public purposes, and of the facts and circumstances disclosed by the record.

It must be conceded, in limine, that in construing this grant the state is entitled to the benefit of certain well-settled canons of construction that pertain to grants by the state to private persons or corporations, as, for instance, that, if there is any ambiguity or uncertainty in the act, that interpretation must be put upon it which is most favorable to the state; that the words of the grant, being attributable to the party procuring the legislation, are to receive a strict construction as against the grantee; and that, as the state acts for the public good, we should expect to find the grant consistent with good morals and the general welfare of the state at large, and of the particular community to be affected.

These are large concessions, and of course, in order to defeat the grant, they ought not to be pushed beyond the bounds of reason, so as to result in a strained and improbable construction. Reasonable effect must be given to the language employed, and the manifest intent of the enactment must prevail.

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*By an act of congress approved September 20, 1850, (9 St. p. 466,) the right of way not exceeding 200 feet in width through the public lands was granted to the state of Illinois for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal in that state (at La Salle) to Cairo, at the confluence of the Ohio and Mississippi rivers, with a branch from that line to Chicago, and another, via the city of Galena, to Dubuque, in the state of Iowa. A grant of public lands was also made to the state to aid in the construction of the railroad and branches, which by the terms of the act were to "be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." It was also provided that the United States mail should at all times be transported on the said railroad, under the direction of the post-office department, at such price as the congress might by law direct.

This act of congress was formally accepted by the legislature of the state February 17, 1851. Laws 1851, pp. 192, 193. Seven days before the acceptance—February 10, 1851—the Illinois Central Railroad Company was incorporated for the purpose of constructing, maintaining, and operating the railroad and branches contemplated in the act of congress.

By the second section of its charter the company was authorized and empowered "to survey, locate, construct, complete, alter, maintain, and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois & Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa."

It was provided in the third section that "the said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use, all and singular, any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company, or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,'

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approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises, and immunities in said act contemplated and provided."

The eighth section had the following provision: "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

By the fifteenth section the right of way and all the lands granted to the state by the act of congress before mentioned, and also the right of way over and through lands owned by the state, were ceded and granted to the corporation for the "purpose of surveying, locating, constructing, completing, altering, maintaining, and operating said road and branches." There was a requirement in this section (clause 3) that the railroad should be built into the city of Chicago.

By the eighteenth section the company was required, in consideration of the grants, privileges, and franchises conferred, to pay into the treasury of the state, on the first Monday of December and June of each year, 5 per centum of the gross receipts of the road and branches for the six months then next preceding.

The twenty-second section provided for the assessment of an annual tax for state purposes upon all the property and assets of the corporation; and if this tax and the 5 per cent. charge upon the gross receipts should not amount to 7 per cent. of the total proceeds, receipts, or income of the company, it was required to pay the difference into the state treasury, "so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation." Exemption was granted in that section from "all taxation of every kind, except as herein provided for."

The act of November 5, 1849, referred to in the third section of the charter, provided a mode for condemning land required for railroad uses, and contained an express provision that upon the entry of judgment the corporation "shall become seised in fee of all the lands and real estate described during the continuance of the corporation." 2 Laws 1849, p. 27.

The consent of the common council to the location of the railroad within the city of Chicago was given by an ordinance passed June 14, 1852.

On the 16th of April, 1869, an act was passed by the legislature of Illinois, entitled "An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago." The third section of this act provided as follows:

"Sec. 3. The right of the Illinois Central Railroad Company, under the grant from the state in its charter, which said grant constitutes a part of the consideration for which the said company pays to the state at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen, (15,) township and range as aforesaid, is hereby confirmed; and all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same, and that all gross receipts from use, profits, leases, or otherwise of said land, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semiannually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly, which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor: and provided, further, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation." Laws 1869, pp. 245–248.

By this act the right of the railroad company to all the lands it had appropriated and occupied, lying east of a line drawn parallel to and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15, was confirmed; and a further grant was made to the company of the submerged lands lying east of its tracks and breakwater, with-

in the distance of one mile therefrom, between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot 21.

*What is the fair and natural import of the language used?

So long as the act stands in force, there seems to me to exist a contract whereby the Illinois Central Company is to have and enjoy perpetual possession and control of the lands in question, with the right to improve the same and take the rents, issues, and profits thereof, provided always that the company shall not have the power to sell or alien such lands, nor shall the company be authorized to maintain obstructions to the Chicago harbor, or to impair the public right of navigation; nor shall the company, its lessees or assigns, be exempted from any act of the general assembly which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor, and whereby, in consideration of the grant of these rights and privileges, it shall be the duty of the company to pay, and the right of the state to receive, 7 per cent. of the gross receipts of the railroad company from "use, profits, leases, or otherwise, of said land, or the improvements thereon, or that may be hereafter made thereon."

Should the railroad company attempt to disregard the restraint on alienating the said lands, the state can, by judicial proceeding, enjoin such an act, or can treat it as a legal ground of forfeiting the grant; or, if the railroad company fails or refuses to pay the per centum provided for, the state can enforce such payment by suit at law, and possibly by proceedings to forfeit the grant. But, so long as the railroad company shall fulfill its part of the agreement, so long is the state of Illinois inhibited by the constitution of the United States from passing any act impairing the obligation of the contract.

Doubtless there are limitations, both express and implied, on the title to and control over these lands by the company. As we have seen, the company is expressly forbidden to obstruct Chicago harbor, or to impair the public right of navigation. So, from the nature of the railroad corporation and of its relation to the state and the public, the improvements put upon these lands by the company must be consistent with their duties as common carriers, and must be calculated to promote the efficiency of the railroad in the receipt and shipment of freight from and by the lake. But these are incidents of the grant, and do not operate to defeat it.

To prevent misapprehension, it may be well to say that it is not pretended, in this view of the case, that the state can part, or has parted, by contract, with her sovereign powers. The railroad company takes and holds these lands subject at all times to the same sovereign powers in the state as obtain in the case of other owners of property. Nor can the grant in this case be regarded as in any way hostile to the powers of the general government in the control of harbors and navigable waters.

The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the state to part with its control over them, is not dissented from. But its pertinency in the present discussion is not clearly seen. It will be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them.

Should the state of Illinois see in the great and unforeseen growth of the city of Chicago and of the lake commerce reason to doubt the prudence of her legislature in entering into the contract created by the passage and acceptance of the act of 1869, she can take the rights and property of the railroad company in these lands by a constitutional condemnation of them. So, freed from the shackles of an undesirable contract, she can make, as she expresses in her bill a desire to do, a "more advantageous sale or disposition to other parties," without offense to the law of the land.

The doctrine that a state, by making a grant to a corporation of her own creation, subjects herself to the restraints of law judicially interpreted, has been impugned by able political thinkers, who may perhaps find in the decision of the court in the present case some countenance of their views. But I am unable to suppose that there is any intention on the part of this court to depart from its doctrine so often expressed.

*"We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only durante bene placito. Such a doctrine * * * is utterly inconsistent with a great and fundamental principle of a republican government, —the right of the citizens to the free enjoyment of their property legally acquired.

"A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them, and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. * * * But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." Terrett v. Taylor, 9 Cranch, 43.

In Stone v. Mississippi, 101 U. S. 814, Chief Justice Waite, in delivering the opinion of the court, said: "It is now too late to contend that any contract which a state actually enters into, when granting a charter to a private corporation, is not within the protection of the clause in the constitution of the United States that prohibits states from passing laws impairing the obligation of contracts. The doctrines of Trustees v. Woodward, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the constitution itself."

The obvious conclusion from the foregoing view of the case is that the act of 1873, as an arbitrary act of revocation, not passed in the exercise of any reserved power, is void; that the decree of the court below should be reversed; and that that court should be directed to enter a decree dismissing the bill of the state of Illinois and the cross bill of the city of Chicago.

I am authorized to state that Mr. Justice GRAY and Mr. Justice BROWN concur in this dissent.

(146 U. S. 360)

McMULLEN v. UNITED STATES.

(December 5, 1892.)

No. 55.

UNITED STATES MARSHAL — FEES — ATTENDING COURT WHEN "IN SESSION"—APPROVAL OF ACCOUNTS—CONCLUSIVENESS.

1. A circuit or district court is "in session," within the meaning of Rev. St. § 829, fixing the marshal's compensation for attending same "while in session," only when it is open by its own order for the transaction of business, and a marshal is not entitled, under such section, to be compensated at the rate of five dollars per day for each day of the term when the court by its own action is not open for the transaction of business. 24 Ct. Cl. 394, affirmed.

2. The approval and allowance of a marshal's account by a circuit court, under Act Feb. 22, 1875, (18 St. p. 333,) when some of the items are unauthorized by law, does not preclude a revision of the same by the proper officers. 24 Ct. Cl. 394, affirmed. United States v. Jones, 10 Sup. Ct. Rep. 615, 134 U. S. 483, 488, distinguished.

Appeal from the court of claims.

Suit by Henry H. McMullen against the United States to recover fees for attending court. The court of claims gave judgment for defendant. 24 Ct. Cl. 394. Plaintiff appeals. Affirmed.

Statement by Mr. Justice HARLAN.

The appellant was United States marshal for the district of Delaware from February 1, 1880, to July 24, 1885. The terms of the district court for that district began on the second Tuesdays in January, April, June, and September in each year, and continued until the Friday or the day preceding that for opening the next succeeding term. The terms of the circuit court began on the third Tuesdays in June and October in each year, and continued until the Tuesday or the day preceding that for opening the next succeeding term.

It is found by the court of claims (finding 2) that the appellant, as marshal, "attended the circuit and district courts when in session, during the terms of said courts, nine hundred and five days;" that those days were charged by him in his account at $5 per day; that the account, being verified, was approved by the court as just, and in accordance with law, but its payment was refused at the treasury department; and that appellant's whole compensation, if the above charges were added, would not have exceeded in any one year the maximum of $6,000.

Finding 7 was in these words: "Claimant has been paid in full at the rate of $5 per day for every day whilst the circuit and district courts of the United States in the state of Delaware were sitting or in session, from and including October term, 1879, to and including June term, 1885. The 905 days referred to in finding 2 were days occurring between sessions of the courts."

C. C. Lancaster, for appellant. Asst. Atty. Gen. Cotton, for the United States.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

We are somewhat embarrassed by the obscurity of the findings of fact. The second one states that appellant attended the circuit and district courts, "when in session," during the terms of those courts, 905 days, while the seventh states that those were days occurring "between sessions of the courts." But we assume that the question intended to be presented, and which was determined below, involved the right of a marshal to compensation at the rate of five dollars per day for each day of a term, whether the court was or was not actually in session or sitting on each day so charged. We understand the words "between sessions of the courts" to imply that there were intervening days between those sessions when the court, by its own action, was not open, or did not sit, for the transaction of business.

This question depends upon the construction to be given to that clause of section 829 of the Revised Statutes, fixing the compensation to be taxed and allowed to a marshal for different kinds of service, which provides that he shall be allowed "for attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day." When the court is open, by its order, for the transaction of business, it is in session, within the meaning of this section. If the court, by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or during those days, although the current term has not expired. It is made by stat-

ute the duty of the marshal of each district "to attend the district and circuit courts when sitting therein." Rev. St. § 787. Within its meaning the court cannot be said to be sitting on any day, when it is closed, by its own order, during the whole of that day, for purposes of business.

In support of his position appellant relies upon the decision in United States v. Jones, 134 U. S. 483, 488, 10 Sup. Ct. Rep. 615, where it was held that the approval of a commissioner's account by a circuit court of the United States, under the act of February 22, 1875, (18 St. p. 333,) regulating fees and costs, was prima facie evidence of the correctness of its items, and "in the absence of clear and unequivocal proof of mistake on the part of the court it should be conclusive." That case is not decisive of the present one, because it appears that the circuit court, in approving appellant's account, allowed him, by mistake, for attending court upon days when the court was not in session. Besides, the above act, relating to the accounts of various officers, including marshals, payable out of the money of the United States, provides that nothing contained in it shall be deemed in any wise to diminish or affect the right of revision of the accounts to which it applies by the accounting officers of the treasury as exercised under the previous laws in force. So that the allowance of the appellant's account by the court did not preclude all revision of it by the proper officers, nor justify its payment where it appeared, as it does in this case, that such allowance was unauthorized by law

It results that the claim of the appellant to be compensated at the rate of five dollars per day for each day "between sessions of the court" was properly disallowed. 24 Ct. Cl. 394.

Judgment affirmed.

(146 U. S. 363)

BALLOCH v. HOOPER et al.

(December 5, 1892.)

No. 21.

EVIDENCE—ADMISSIONS—MORTGAGES—REDEMPTION.

1. The owner of certain real property borrowed money for improvements thereon from an insurance company, executing deeds of trust to the company's agent as security. Thereafter, by a deed absolute in form, he conveyed this and certain other property to the agent. In a suit by the former owner against the agent and the company, praying that they account as trustees, the agent, in his answer, alleged that the absolute deed to himself was given for the purpose of securing the company. *Held*, that this admission was conclusive as between the agent and the former owner.

2. The agent took possession under the deed absolute, and subsequently received from the company advances sufficient to complete the improvements and pay off all the incumbrances, including the debt of the former owner to itself. The company in good faith and without negligence believed that the agent, as holder of the legal title, was authorized to so raise and secure such loans. *Held*, that the company had a valid lien for its advances, and that the former owner's only equity was an accounting between the company and its agent, and the right to redeem on payment of the balance found due the company.

Appeal from the supreme court of the District of Columbia.

Bill by Robert A. Balloch against Franklin H. Hooper and the Massachusetts Mutual Life Insurance Company for injunction, the appointment of a receiver, and an accounting. The cause was heard on exceptions to the auditor's report, which exceptions were overruled, and a decree passed granting part of the relief asked. Complainant appealed to the general term, which affirmed the decree, (6 Mackey, 421,) and he thereupon appealed to this court. Affirmed.

S. S. Henkle, for appellant. Job Barnard and Jas. S. Edwards, for appellees.

Mr. Justice HARLAN delivered the opinion of the court.

The appellant, Balloch, became the owner, by purchase in 1878, from J. Bradley Adams, of certain lots on Sixteenth and S streets, in the city of Washington, giving his notes for the purchase money, and securing their payment by a deed of trust covering the whole property. He placed upon record a subdivision of part of the property, making 14 lots on the west side of Sixteenth street, 7 lots (with a small strip) on the south side of Swan street, and 6 lots on the north side of S street.

In order to obtain money for the construction of houses upon some of those lots,—14 *304 on Sixteenth street and 6 on S street,—he borrowed from the Massachusetts Mutual Life Insurance Company the sum of $16,000, executing therefor his eight promissory notes of $2,000 each, bearing interest at 8 per cent. until paid. Subsequently, he borrowed other sums from the company, namely, $10,200, for which he made his six promissory notes of $1,700 each, bearing like interest, and $9,000, for which he gave his four notes, bearing like interest,—three for $2,000 each, and one for $1,000 each. To secure those respective loans Balloch executed a deed of trust upon particular lots in the above subdivision. These deeds of trust were severally executed June 4, 1879, October 11, 1879, and February 17, 1880. William R. Hooper was the general agent of the company in the city of Washington for the purpose of "placing" life insurance and collecting premiums, and Balloch's negotiations with it were through him. He was named in each of the deeds as trustee.

It was agreed that one half of the sum loaned should be paid to Balloch at the time the notes and deed of trust were delivered; that the company should pay off the amount due on the purchase from Adams, which was secured by prior recorded deed of trust; and that the balance should be paid to Balloch as he might need it in the work of constructing the houses on the lots.

In connection with these loans, Balloch purchased from the company other houses, under an agreement that the cash payments thereon might be retained by the company out of the loans, and that he would give for the balance of the price his promissory notes, payable to the company's order, and secured by deeds of trust to Hooper as trustee. It should also be stated that, when the above loans were made, Balloch was indebted to the company on other loans, secured by deeds of trust on property on the corner of Q and Thirteenth streets.

By deed absolute in form, dated February 25, 1880, and recorded February 27, 1880, Balloch conveyed to Hooper all the property purchased from Adams, except two lots on Sixteenth street, and all the property purchased by him from the company at the time the above three loans were effected, the consideration recited in the deed being "the sum of five thousand dollars, previously advanced, and one dollar in lawful money of the United States." It is stated by the company that at the time this deed was executed the houses proposed to be erected by Balloch on Sixteenth and S streets were in an incomplete condition; that the taxes due when he purchased from Adams, as well as the taxes on the property purchased by him from the company, were unpaid; that more than $5,000 was still due Adams; that the principal of the notes given to the company was unpaid; and that the property included in the deed to Hooper was burdened with mechanics' liens, and otherwise.

Hooper took possession of the property so conveyed to him, and undertook the completion of the houses on Sixteenth and S streets. But, with the means at his command, he found it impossible to proceed without obtaining financial assistance. Accordingly, in October, 1881, he informed the company of Balloch's deed to him of February 25, 1880, and of the exact condition of affairs with respect to the property. But it appears that the company was not, in fact, notified until October, 1881, of the transfer by deed from Balloch to Hooper. It made an arrangement with Hooper to advance to him a sum sufficient to complete the proposed improvements on the property, to pay off all incumbrances, including Balloch's notes and indebtedness to it, and to discharge the liens held by it; Hooper to give his note for the amount so to be advanced, and to secure its payment by a deed of trust upon the property. This arrangement was carried out. Hooper gave his note to the company for $71,000, secured by a deed of trust running to Frank H. Smith, as trustee, and the company canceled Balloch's notes, discharged his indebtedness to it, and released the liens created by the above deeds of trust executed in its favor. Under the above arrangement, the houses were to be completed, rented, and sold, under the direction of Smith, who was to receive and disburse the sums which the company might advance to Hooper.

The present suit against Hooper and the company was brought by Balloch on the 7th of December, 1882. The theory of the bill is that the company did not pay to Balloch, at the times agreed upon, the one half of the several loans of $16,000, $10,200, and $9,000, nor the claim of Adams, nor the remainder of the loans, but fraudulently withheld the money, or a great portion of it, whereby Balloch was seriously injured and embarrassed, rendering it impossible for him to complete the improvements of his lots. The bill charges that the defendants paid upon the loans only $14,725.15; that, when the deed of February 25, 1880, was made, the defendants had in their possession, of his money, $20,474.85, which they refused to pay him; that defendants, knowing well the plaintiff's embarrassment, on account of their failure to pay the amount due him, proposed to him that, if he would convey to Hooper the property covered by the deed to the latter, the company would finish all the houses out of the funds remaining in their hands belonging to the plaintiff, sell them for the highest and best price attainable, and, after reimbursing themselves, divide the remainder, upon the basis of three fourths to the plaintiff and one fourth to the company; that the plaintiff's embarrassed condition, the result of corrupt and fraudulent conduct of the defendants, compelled him to accept this proposition, and that, accordingly, he made to Hooper the absolute deed of 1880. The bill also charges that the defendants did not proceed immediately to complete the houses according to their agreement, but allowed them to stand for two years; that most, if not all, the houses had been sold, but the defendants had failed and refused to give any account thereof; and that, upon a proper accounting, there was due to the plaintiff as much as $40,000. The relief asked was an injunction restraining the defendants from selling the property or from collecting rents therefrom; that a receiver be appointed to take possession of the unsold property and to collect rents; that the defendants be required to account as trustees; and that the plaintiff have a decree for the amount found to be due him. The defendants severally answered, putting in issue all the material allegations of the bill. The cause was referred to the auditor to take and report an account of all the transactions. A report was made, covering every possible view of the case. Among the schedules submitted by the auditor was one stating the account of Hooper with the company. In this account Hooper was charged with the amount of the notes of Balloch, secured by the several deeds of trust on the property which the latter gave, (excluding a note for $1,800 secured on a lot named,) with other disbursements for the completion of the houses, for payment of taxes, insurance, costs, and repairs, discharge of liens, and other expenses, with interest on those respective amounts, and he was credited by the amounts received on sales of property, rents, etc., with interest thereon; showing

on that basis, a balance in favor of the company of $52,097.37, as of September 1, 1886.

The exceptions were overruled, and a decree was passed declaring the above sum to be a first and prior lien and incumbrance in favor of the company, as against the claims of all the other parties to the cause, on certain lots and the improvements thereon, being the unsold property mentioned in the deed from Hooper to Smith, subject to future accounting as to interest accruing to the company on account thereof, and as to the receipts and disbursements on the property subsequent to September 1, 1886, and to a credit thereon of $2,029.82, paid by the company to Smith for services rendered in disbursing moneys expended in the construction of buildings. The decree also allowed to Hooper $1,550.43, found by the auditor to be due to him from Balloch, and made it a second and subordinate lien and incumbrance upon the property, and declared the deed of February 25, 1880, as between Balloch and Hooper, to be null and void.

Upon appeal by Balloch to the general term this decree was affirmed.

The court below correctly held that, so far as Hooper was concerned, the absolute deed from Balloch of February 25, 1880, must be held to have been taken for the purpose of better securing the indebtedness of the latter to the company. This is placed beyond doubt by the statement in Hooper's answer, to the effect that, shortly after the execution of the deed of trust for the loan of $9,000, "to wit, February 25, 1880, the complainant, [Balloch,] of his own volition, voluntarily transferred and conveyed to this defendant all the said property before included in the said several deeds of trust, together with certain other lots described in the conveyance then made, which property was taken by this defendant for the purpose of better securing the said company in the ultimate realization and collection of the moneys so as aforesaid loaned to the complainant." This admission is conclusive as between Hooper and Balloch, and is not at all weakened by the somewhat contradictory statements subsequently made by the former in his deposition in the cause.

But, as we have seen, the company had no knowledge of this absolute deed to Hooper until October, 1881, when it was informed by him of the condition of the property upon which the three loans of $16,000, $10,200, and $9,000 had been made. By the act of Balloch in making and putting that deed upon record, Hooper was enabled to represent himself as the owner of the property, and to make arrangements with the company for money with which to complete its improvement. According to the weight of the evidence, the company in good faith believed, and was not negligent in believing, that Hooper was authorized, as the holder of the legal title of record, to raise money upon the property, and secure its payment by deed of trust. Balloch, therefore, has no right to complain of the arrangement made by Hooper with the company. Indeed, that arrangement was for the interest of Balloch, provided the moneys advanced by the company to Hooper were fairly used to liquidate the existing indebtedness of Balloch, and to complete the construction of the houses according to his original plan.

Balloch insists that the relations that subsisted between Hooper and Balloch forbade the former from taking title to the property. If that were true, as between them, it would not follow that the company, acting in good faith, might not loan money to Hooper, and take a lien upon the property to secure its repayment. As, upon the evidence, the company is not chargeable with bad faith in making the arrangement it did with Hooper, all that Balloch could equitably demand was that which was awarded to him in the court below, namely, an accounting with reference to the moneys advanced and expended under the arrangement it made with Hooper, and a recognition of his right to redeem upon paying the balance found to be due, upon such accounting, to the company. It is a mistake to suppose that in so holding we disregard the rule that, "whenever the trustee had been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has the full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser for a valuable consideration, without notice." Oliver v. Piatt, 3 How. 333, 401. When Balloch put the absolute title in Hooper he knew that the contemplated improvements could not be made without borrowing more money on the property, and he must have expected that Hooper would obtain in that way the required funds; and there is not the slightest ground in the evidence for the charge that the company and Hooper fraudulently combined for the purpose of injuring Balloch. The company had no reason to suppose that the arrangement made with Hooper was in violation of any agreement or understanding that Balloch had with him at the time of the conveyance of February 25, 1880. The company, upon every principle of equity, is entitled to a lien upon such of the property embraced in the deed of trust to Smith as remained unsold, to secure the payment of the balance due for the sums advanced by it. After a careful scrutiny of the evidence, we find no ground for questioning the accuracy of the accounting below, or of the balance adjudged to be due the company. The contention that more was expended upon improvements than ought, in fairness, to have been expended, is not sustained by such proof as would justify a reversal of the decree, in whatever light the case is viewed. While there is some slight justification for this contention, we are of opinion that the conclusion reached by the auditor is sustained by the preponderance of evidence. It is certain that the company advanced the moneys which are charged

in the accounting against the property; and it is equally certain that these moneys were, in fact, expended upon the property, or for the benefit of Balloch. Even if it were assumed that the company was bound to see that the moneys advanced under its agreement with Hooper were properly and reasonably expended, the evidence does not show that an extensive amount has been charged in its favor or in favor of Hooper against the property in question.

We perceive no error in the decree, and it is affirmed.

(146 U. S. 630)

LLOYD et al. v. PRESTON et al.

(December 19, 1892.)

No. 59.

STOCKHOLDERS' LIABILITY FOR CORPORATE DEBTS —PAYMENT OF STOCK SUBSCRIPTIONS —ASSIGNMENT FOR BENEFIT OF CREDITORS —ESTOPPEL— GAMBLING TRANSACTIONS —REVIEW ON APPEAL —HARMLESS ERROR.

1. Defendant H. agreed with complainants, his creditors, to extend and improve a railroad owned by him; to organize a railway company, and transfer to it such railroad; to cause the company so formed to issue bonds, and to deliver a certain amount thereof to complainants in payment of their respective claims against him. In pursuance of such agreement, H., with others, organized a railway corporation; he subscribing for a large number of shares, and the others, persons in his employ, and acting under his direction and control, subscribing for one share each. At a meeting held by them immediately thereafter, a board of directors, consisting of all of them except H. and another, was elected, and at the same meeting H. proposed to sell his said railroad to the corporation for a sum grossly in excess of its value, payable in the bonds and stock of the company, including the subscriptions previously made. The proposition was unanimously accepted by the directors, and their action was subsequently ratified by the stockholders. After the issue of such bonds and stock to him, H. transferred the stipulated amount of bonds to complainants, who were ignorant of the facts relating to such organization and sale. Complainants thereafter recovered judgments on the bonds against the corporation, executions thereon were returned unsatisfied, and the company became insolvent, and abandoned action under its charter. *Held*, that the overvaluation of the property so transferred by H. in pretended payment of the subscriptions to stock, taken in connection with the other facts, clearly established such a case of fraud as entitled complainants to enforce, from the estate assigned by H. for benefit of his creditors, actual payment for the stock issued to him, and also for that issued to another person for his use and benefit.

2. The estate assigned by H. for benefit of his creditors was properly subjected to liability on account of the stock held for the benefit of H. by another; H. being the equitable owner of such stock, within the state statute applicable to railway companies, providing that the term "stockholders" shall apply to an equitable owner, although the stock appears on the books in the name of another.

3. The decree was not objectionable in being for the full amount claimed, as against both H. and the person in whose name such stock stood, the recovery being restricted to the aggregate amount of complainants' judgments.

4. Nor was the decree objectionable because allowing interest after the date of the assignment by H., in the absence of anything showing that the assigned estate was insufficient to pay his debts in full.

5. Complainants did not agree or understand that the subscriptions to the stock were to be paid by the transfer of the property, but understood that the stockholders were to be liable, as the law of the state provided, for full payment in money or its equivalent, and, in addition, for an equal amount individually; and they had no knowledge of or complicity in the illegal organization. *Held*, that they were not estopped from alleging, as judgment creditors of the company, that its capital stock was not adequately and actually paid up.

6. Defendant H. testified, in regard to his original indebtedness to complainants, that they claimed, "after absorbing some $400,000 in cash of margins on wheat," that he owed them a balance of over $200,000, which he disputed, but finally compromised; and he proposed to show that such claims arose out of dealings between the parties on the Chicago board of trade. *Held*, that this did not establish that the claims arose from a gambling transaction.

7. A defendant is not injured by striking certain allegations from his answer, and sustaining a demurrer to his cross bill founded upon similar allegations, where it appeared that the court treated those allegations as before it, applied the evidence to them, and held that they were not sustained.

Appeal from the circuit court of the United States for the southern district of Ohio.

In equity. Bill by Emma C. Preston, as executrix of Josiah W. Preston, and others, against Harlan P. Lloyd, trustee of Edward L. Harper, the said Edward L. Harper, and others, to compel the payment of stockholders' subscriptions, and for application of the same to judgments recovered against the Cincinnati, Columbus & Hocking Valley Railway Company. Decree for complainants. 36 Fed. Rep. 54. Defendants Lloyd and Harper appeal. Affirmed.

Statement by Mr. Justice SHIRAS:

*631 On October 12, 1881, Edward L. Harper was the owner of what was then known as the Columbus, Washington & Cincinnati Railroad, a narrow-gauge road extending from Allentown to New Burlington in the state of Ohio. Prior to that time Harper had been engaged in the purchase and sale of grain in the city of Chicago, Ill., through J. W. Preston & Co., W. E. McHenry, Preston & McHenry, and H. Eckert & Co., agents for W. E. McHenry and Preston & McHenry, and on account of such grain transactions the said persons made claims against Harper, which he disputed. By way of settlement and compromise of these claims, Harper entered into an agreement, October 12, 1881, with the said Preston & McHenry, and their agents, which agreement, after naming the parties thereto, and setting out Harper's ownership of the said railroad, proceeds as follows:

*632 "First. That the said Harper shall cause the gauge of said road to be changed to the standard gauge, and shall extend the same from its present terminus at Allentown, Ohio, on the Dayton and Southwestern Railroad, to the town of Jeffersonville, on the Southern Ohio R. R., and make the connection with the last-named road; also shall ex-

tend it from its present western terminus at New Burlington to the present line of the Little Miami Railroad, at or near the town of Corwin, and make connection therewith.

"Second. And the said Harper agrees to make said gauge and said extensions and connections with said roads within four months from the date of this contract.

"Third. And the said Harper further agrees within the same period of four months to cause to be organized under the laws of Ohio a railway company, to be named the Cincinnati, Columbus and Hocking Valley Railway Company, and to convey, or cause to be conveyed and transferred, to said company said railroad and extensions, and all the privileges, appurtenances, and plant thereunto belonging, an unincumbered title therefor, except the mortgage bonds herein provided for.

"Fourth. And the said Harper further agrees to cause said company to issue its coupon bonds of one hundred, five hundred, and one thousand dollars each, payable in forty years, with interest at six per cent. per annum, payable semiannually, which shall be secured by a first mortgage upon the said railroad and its extensions and the real and personal property and franchises of said company then owned or thereafter acquired by it, said first mortgage bonds not to exceed in the aggregate an amount equal to the rate of twenty thousand dollars per mile of the length of said road and extensions; and said Harper likewise agrees to cause said company to issue income bonds of one hundred, five hundred, and one thousand dollars each, payable in forty years, properly secured, which shall not exceed in the aggregate twenty thousand dollars per mile, interest and principal of said bonds to be made payable in New York city.

"Fifth. And the said Harper further agrees to deliver to the said other parties hereto, in payment of their respective claims, said first mortgage bonds at the par value thereof, as follows: *To the said J. W. Preston & Co., seventy-five thousand five hundred and thirty-four dollars. To the said W. E. McHenry, twelve hundred and fifty dollars. To the said Preston & McHenry, one hundred and thirty-seven thousand and six hundred and twenty-two dollars. To the said H. Eckert & Co., agents for W. E. McHenry and Preston & McHenry, five hundred dollars, and likewise to deliver as a bonus at the par value thereof fifty per centum of the above amount respectively in said income bonds. Said deliveries to be made within four months from the date hereof, at the Third National Bank of Cincinnati.

"And the said Howard Eckert & Co., J. W. Preston & Co., W. E. McHenry, and Preston & McHenry, each for himself and themselves, agree to accept said first mortgage and income bonds in full payment of the indebtedness of said Harper to each of them respectively."

On November 7, 1881, a corporation was organized under the laws of the state of Ohio, under the name of the Cincinnati, Columbus & Hocking Valley Railway Company, the said Harper and five other persons being the incorporators, and the capital stock being fixed at $2,500,000, divided into 25,000 shares of the par value of $100 each. Of this stock Harper subscribed for 2,500 shares, at the par value, and John L. Pfau, E. Snowden, J. H. Matthews, W. H. Harper, J. F. Gimperling, D. P. Hyatt, and William C. Herron, of the state of Ohio, and George E. Clymer, of the state of Kentucky, subscribed for one share each. After the subscriptions were made, the stockholders met and elected a board of seven directors, composed of all the stockholders of the company, except E. L. Harper and W. C. Herron. Immediately upon their election, on December 13, 1881, the board of directors met, all the members being present, and chose officers and adopted by-laws. At this meeting the following proposition was made to the directors by the said Harper:

"I hereby propose to broaden the gauge of the road now owned by me to a standard gauge, and extend the same on the west to near Corwin, on the Little Miami road, and also to extend the east end to Jeffersonville, on the Springfield Southern road, say about thirty miles of railroad, and hereby agree to sell the same to your company for eighteen hundred thousand dollars of the par value of the securities of your company, as follows, viz.: Six hundred thousand dollars of the first mortgage, forty years, six per cent. bonds, issued at the rate of twenty thousand dollars per mile of constructed road; six hundred thousand dollars of the income bonds, issued at the rate of twenty thousand dollars per mile of constructed road; and six hundred thousand dollars of the capital stock, including subscriptions already subscribed."

A motion to accept this proposition was carried by a unanimous vote of the directors.

At a meeting of the stockholders of the company, held on January 2, 1881, all the stockholders being present either in person or by proxy, the action of the directors in accepting the above proposition was ratified.

On June 20, 1882, a called meeting of the board of directors was held at the office of the company, in Cincinnati, Ohio, at which the following motion was unanimously carried:

"Whereas, the president, Mr. Gimperling, reports that E. L. Harper has complied with his contract made with the company for the construction of twenty-eight miles of railroad from Claysville Junction to Jeffersonville, Ohio, and that the chief engineer, H. Phillips, has certified to the Union Trust Co., of New York, that the twenty-eight miles have been constructed in accordance with the terms of the contract: Therefore, resolved, that the road be accepted from said E. L. Harper, and he be paid any balance in bonds, stock, or money which may be due him on said contract, taking his receipt for the same."

There appears to have been no other meet-

ing of the directors or stockholders, except a meeting of the directors, held on February 20, 1883, when B. D. Hyatt was elected president and general manager, and W. C. Herron was elected a director, to fill vacancies caused by the resignation of J. E. Gimperling.

On February 11, 1882, Preston & McHenry and their agents gave to the said Harper a receipt for $214,000 in first mortgage bonds and $107,200 in income bonds of the said Cincinnati, Columbus & Hocking Valley Railway Company, in full satisfaction of their claims against him under the above agreement of October 12, 1881.

On June 5, 1885, Josiah W. Preston, Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, William T. Baker, Murray Nelson, Abram Poole, Almore A. Kent, Selah Young, Jr., and James S. Sherman, of the state of Illinois, filed their bill in equity in the circuit court of the United States for the southern district of Ohio, western division, against the Cincinnati, Columbus & Hocking Valley Railroad Company, E. L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, Lewis Seasongood, W. D. Lee, and John E. Gimperling, of the state of Ohio, and George E. Clymer, of the state of Kentucky, alleging that in a previous action in the same court certain of the individual complainants, or certain of the complainants jointly, had recovered judgments for divers amounts respectively against the said railway company; that thereupon writs of fieri facias had been issued against the property of the company and returned unsatisfied; and that, the company having become insolvent, and having abandoned all action under its charter, nothing could be accomplished through it or its officers by way of collecting unpaid stock subscriptions, or other credits due to said corporation.

The bill also alleges that no part of said subscriptions for the capital stock of the company by E. L. Harper and others has been paid; that the company was duly organized and incorporated under and by virtue of the laws of the state of Ohio, and that the capital stock of $2,500,000 was subscribed for as stated above. Also, that W. D. Lee, of the state of Ohio, became and is the holder of certain certificates representing 3,000 shares, of the par value of $100 each, of the stock of the corporation; that said certificates were issued and delivered by the said company to the said W. D. Lee on or about June 1, 1882, at the special instance and request and for the use and benefit of the said E. L. Harper; that nothing has been paid to the said company for the said stock, and that all of the amount due for the same is necessary to discharge the indebtedness of the corporation upon the said several judgment claims in the bill described.

The answer states the said Harper's ownership of the said narrow-gauge railroad; that some claim was made by the said Preston & McHenry and their agents against Harper, which he disputed; and that a settlement and compromise of this claim was effected by the article of agreement of October 12, 1881, above recited. The answer also sets out the incorporation and organization of the said company, and alleges that a proposition was made to the company by Harper to convey to it the narrow-gauge railroad property, upon the terms specified in the said agreement, and that the said proposition was accepted by the company, and bonds upon the property issued to Harper; that at the time Harper agreed to convey, and did convey, said road to the company, and it agreed to issue to him said bonds and stock in full satisfaction therefor, said company had not incurred any debt or obligation whatever, and that the obligation to issue said bonds was not incurred until said agreement was made by which Harper subscribed and paid for stock as above stated, and as part of the same transaction; and that the company did not issue nor become liable on said bonds on which said judgments were taken until June 2, 1882. Further answering, the defendant alleges that, pursuant to said agreement, he caused the company to execute and issue said bonds to the Union Trust Company, of New York, and made said bonds payable to bearer, and thereupon caused to be delivered to Preston & Co. and others said bonds called for in the above-stated contract, and that they, with full knowledge of the history of the said transaction, as above appears, accepted said bonds, and received the same in full satisfaction of the said agreement; that said judgments were rendered on said identical bonds so issued to Preston & Co. and others; and that no other stock of the company is owned or held by any person, nor has any ever been subscribed, held, or owned by any person or persons, except the said stock paid for by Harper by the transfer of the said road to the company.

To the answer a formal replication was filed, which was afterwards withdrawn, and an amended bill filed by the complainants on July 7, 1887, alleging that at the time the said proposition was submitted to the company each one of the said directors was either in the employment and under the pay of Harper, or otherwise under his direction and control; that the pretended acceptance by the directors of the said proposition was in fact the act of Harper, and was for the sole purpose of enabling Harper and other subscribers for the stock of the company, who are defendants in this cause, to escape their liability to complainants herein, and to defraud and defeat them and others in their rights as creditors of the corporation; and that such act was done without complainants' knowledge or consent. Also that the railroad property transferred by Harper to the company was not worth one-fiftieth part of the amount of said bonds issued by the company to Harper in pretended payment therefor; that this fact was well known by Harper, and by said directors and stockholders who voted on said

proposition, and that in considering and acting on said proposition no regard whatever was paid by the directors or any stockholder voting thereon to the actual value of the property so conveyed; but that, on the contrary, the directors and stockholders acted in this behalf solely at the dictation of Harper, and in disregard of the rights and interests of the corporation, and for the purpose of shielding and protecting Harper and themselves from their liability to complainants and others on account of their subscriptions for said stock. This amended bill prays that the said agreement between Harper and the company and its directors may be set aside and declared to be void as against the rights of claimants as creditors of the corporation.

To the amended bill Harper filed an answer admitting that the said directors were either employed by or related to him, but he denies that their acceptance of his said proposition was the act of himself, and avers that it was just what it purported to be,—the action of the company. He alleges that the object of the organization of the company was well known to the complainants, and that they knew there was no money to be paid on any subscription for the stock, and that such subscription was a mere matter of form, adopted simply for the purpose of creating an organization having power to issue bonds; that Preston & Co. and others agreed with Harper, at the time of the making of the said contract, that he should become the owner of all the stock of the company, as well as the said bonds, as the consideration for the transfer to the company of the said narrow-gauge road, and that the said contract was made in pursuance of the wishes and understanding of Preston and others, and that it was not made with any fraudulent purpose. All the allegations of the amended bill not admitted are denied. A replication to this answer was filed July 30, 1887.

On March 28, 1888, a supplemental bill was filed by complainants, in which Emma C. Preston appears as executrix of the estate of J. W. Preston, deceased. This supplemental bill alleges that since the filing of the original bill and the amended bill E. L. Harper became insolvent, and made an assignment for the benefit of his creditors, under the insolvent laws of the state of Ohio, and that Harlan P. Lloyd was duly appointed and is now acting as the sole trustee of all the property so transferred. Complainants therefore pray that said Lloyd, trustee, may be made a party defendant in the case, and be required to answer the premises and show cause.

On the same day, the said Harlan P. Lloyd filed an answer and cross bill to the original bill, amended bill, and supplemental bill, and to intervening bills filed by other claimants. In this answer the said trustee alleges that the only consideration on which the said claim or claims upon which the said agreement of October 12, 1881, was based, was a gaming transaction in the form of a deal in options in wheat in the market of the city of Chicago, in which transaction there was no wheat actually owned or bought or sold, but that the transaction was only a betting on the future prices of wheat in said market, in which the said complainants won from Harper, between January 1, 1881, and October 1, 1881, an amount of money aggregating more than $600,000, of which Harper paid not less than $400,000; that the said claim was for the pretended balance of said winnings, and that said winnings formed the sole consideration for the transfer of the bonds of the said company to the complainants; and that the said judgments were founded on said bonds so transferred, and on no other consideration whatever. This answer prays that all of said petitions of complainants be dismissed. In his cross bill the said trustee asks for a decree against Emma C. Preston, executrix, William E. McHenry, and Eugene H. Lahee in the sum of $400,000, the amount alleged to have been won by said complainants as aforesaid.

Complainants excepted to this answer for its insufficiency, and moved to strike out that portion thereof referring to the character of the grain transactions of Harper with Preston & Co. and others prior to October 12, 1881. To the cross bill complainants demurred.

The court granted said exceptions and motion, and sustained said demurrer, to which action of the court the defendant Lloyd, trustee, excepted.

A final decree was entered in the cause in the said circuit court of the United States on March 15, 1889, providing for the recovery by complainants of the sum of $322,531.67 from E. L. Harper, being the aggregate amount of complainants' said judgments entered in the previous action, with interest, and for the recovery of the same amount from W. D. Lee. By this decree judgment was also entered against all the other defendants except George E. Clymer, who was not found, and Lewis Seasongood, who was not shown to have been a stockholder of the company, for the amount of their respective subscriptions.

The court further decreed that complainants are entitled to have the entire claim of said company against Harper, to wit, $300,000, with interest from January 5, 1885, allowed as against said Lloyd, trustee, for the purpose of securing to complainants their full proportion of the value of the credit of the company against Harper's estate, and to have the total sum obtainable upon said credit distributed between and paid to the complainants pro rata. 36 Fed. Rep. 54.

Exceptions were taken by the defendants E. L. Harper and H. P. Lloyd, trustee, to each and every part of the findings, order, judgment, and decree of the court, and said defendants prayed an appeal, which was granted.

Upon this appeal the case is before this court.

H. P. Lloyd, for appellants. John W. Warrington and W. F. Boyd, for appellees.

*642 *Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

This was a bill filed by judgment creditors of the Cincinnati, Columbus & Hocking Valley Railway Company to compel E. L. Harper and others to pay their respective unpaid subscriptions to the capital stock of said company, in order that the same might be applied to the payment of complainants' judgments, which remained unsatisfied after proceedings at law.

The bare statement of the facts attending the organization of the railway company fully justifies the opinion of the court below "that the entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature."

It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle bona fide creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up.

The first is set up by Harper himself, in his answer to the bill of complaint; the other by Lloyd, assignee for the benefit of creditors of Harper, and who filed an answer, and likewise a cross bill.

Harper's defense, beyond the allegation that the stock subscriptions had been fully paid up by a transfer of property to the railway company, consisted in the assertion that Preston & McHenry were estopped from alleging, as judgment creditors of the railway company, that the capital stock was not adequately and actually paid up, because they were cognizant of the proceedings by which the company was organized, and privy to the arrangement whereby the property referred to was taken in full payment of this stock; and that the other complainants claimed under and through Preston & McHenry, and were therefore affected by their knowledge and complicity in the transaction.

*643 *Issues were taken on this allegation of Harper, and it was found by the court below that Preston & McHenry did not agree or understand that the subscriptions to the capital stock of the railway company, whose bonds they agreed to take in payment of Harper's indebtedness to them, were to be paid by the simple transfer of the property to the railway company, but that they understood that the stockholders of the company were to be subject to the liabilities imposed by the law of Ohio, namely, full payment in money or its equivalent, and, in addition, 100 per cent. individual liability, and that they were in no wise chargeable with knowledge of or complicity in the company's illegal organization.

An examination of the evidence contained in the record satisfies us of the correctness of this conclusion of the court below.

This brings us to a consideration of the second ground of defense, which is the one advanced by Lloyd, the assignee. He alleges that the original indebtedness of Harper to Preston & McHenry, in payment of which they took the bonds of the railway company, arose out of gambling transactions in wheat deals at the Chicago board of trade; and he claimed, accordingly, that not only were the bonds void in their hands, but likewise the judgments obtained thereon against the railway company; and he further claimed, in his cross bill, the recovery of a large sum of money paid by Harper to Preston & McHenry, on account of these alleged gambling transactions, before the settlement between the parties which resulted in their taking the railway bonds in payment of the balance due them.

It was the opinion of the court below that there was absolutely no testimony in support of either the answer or the cross bill of the assignee.

The only evidence disclosed by the record, on this issue, appears at pages 46 and 47, and we fully concur with the court below that neither this evidence nor any offer of evidence made on behalf of the defense, if taken to be true, established the case of a gambling transaction.[1]

Complaint is made by the assignee of the *644 course of the court below in striking out of his answer, on motion, the allegations pertaining to the supposed gambling transactions, and in sustaining the demurrer to his cross bill.

This action of the court was probably based on the view urged on behalf of the complainants that Lloyd, as assignee, could not be heard, in this suit, to impeach the validity of the judgments obtained against the railway company, by going into an in-

[1] The evidence given and offered as to the nature of the original transactions between defendants Harper and Preston & McHenry is stated in the opinion of the court below as follows: "Harper testifies that the parties claimed, 'after absorbing some four hundred thousand dollars in cash of margins on wheat in Chicago,' that he owed them a balance of over two hundred thousand dollars, which he disputed, but finally settled and compromised. On the examination of Preston he was asked by Harper's counsel whether the consideration claimed to have been received by Harper for the bonds which he agreed to transfer to complainants did not grow out of dealings between Harper and complainants on the Chicago board of trade. To the question complainants' counsel objected, and instructed the witness not to answer, and he did not answer. He was not pressed, but Harper's counsel stated, as appears by the record, that he proposed to show that the contracting parties had dealings on the Chicago board of trade; that the books of the complainants would not show the amount claimed; 'that the entire transaction was disputed and repudiated by Harper as fraudulent;' that the claim was exaggerated; and that it was in settlement of this fictitious claim that he compromised with complainants. This is all that appears in testimony, or that it was proposed to show."

vestigation of the nature of the original transaction out of which had arisen the indebtedness of Harper to Preston & McHenry, and in a settlement of which the bonds had been received by the latter.

But it does not appear to be necessary to inquire into the reasons of the action of the court below in this respect, nor to consider whether the legal position implied in that action was sound, because, as we have seen, and as the court below held, there was no evidence admitted or offered which sufficed to sustain the allegation that the transactions between Harper and Preston & McHenry were of a gambling character.

Hence, if those allegations had been permitted to stand in Lloyd's answer, there was no evidence to support them, and he was not injured by the order of the court in striking them out. But it is plain that the court treated those allegations as before it, applied the evidence to them, and held that they were not sustained; so that, even if the course of the court was somewhat irregular in striking out the allegations, and in afterwards passing upon them and the evidence offered to support them, the defendants were not thereby injured.

This view of the case renders it unnecessary to consider the question whether Harper, as the owner of the capital stock of the railway company, was concluded by the judgments obtained by the complainants against the railway company, and whether he or his assignee can go behind them, to disclose the nature of the business transactions between Harper and Preston & McHenry.

There is an assignment of error to the decree wherein it subjects the estate of Harper, in the hands of his assignee, to liability on account of stock standing in the name of W. D. Lee. But the court below found from *645 the evidence that Lee* took and held this stock for the use and benefit of Harper, and, though served, he permitted the bill, with its allegations to that effect, to go unanswered. The Ohio statute applicable to railway companies provides that "the term 'stockholders' shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another."

It does not appear, therefore, that the court erred in holding the same measure of liability to apply to Harper's stock standing in the name of Lee as to that standing in his own name. Nor does the objection that the decree was for an unnecessarily large amount, thus forming a basis for an inequitable division of the proceeds of the assets of Harper's estate, appear to be well founded. The amount of the decree is not, as suggested by the assignee, the joint and aggregate amount of the Harper and Lee stock, but is restricted to the aggregate amount of the judgments owned by the complainants.

Error is likewise assigned to the allowance of interest on the judgments after the date of Harper's assignment. It is claimed that, as against the estate in the hands of the assignee, interest ceased from the date of the assignment.

There is nothing before us to show that there are not funds in the hands of the assignee sufficient to pay Harper's debts in full, with interest to the date of payment; and, as it does not appear that this matter was brought to the attention of the court below when framing the decree, or at any time, we do not feel disposed to disturb the decree.

Finding no error in the record, the decree of the court below is affirmed.

The CHIEF JUSTICE, not having heard the argument, did not take part in the decision of this case.

(146 U. S. 370)

LEWIS v. UNITED STATES.

(December 5, 1892.)

No. 1,018.

CRIMINAL LAW—SECRET CHALLENGES—PERSONAL PRESENCE OF PRISONER.

1. In the trial of a capital case it is the right of the accused to be confronted with the panel of jurors, and to be present during the challenges, and it is therefore reversible error for a federal judge to direct secret challenges to be made from separate jury lists, each side being ignorant of the challenges the other has made. Mr. Justice Brewer and Mr. Justice Brown dissenting on the ground that the inferences of fact on which the decision is based were not justified by the record.

2. An objection to certain language used by the court in instructing the jury, urged on a motion for a new trial, is not equivalent to an exception taken at the trial, and presents no questions for review.

In error to the circuit court of the United States for the western district of Arkansas. Reversed.

A. H. Garland and Hebe J. May, for plaintiff in error. Asst. Atty. Gen. Parker, for the United States.

*371 *Mr. Justice SHIRAS delivered the opinion of the court.

This was a writ of error sued out to review a judgment of the circuit court of the United States for the western district of Arkansas, imposing a sentence of death upon Alexander Lewis, plaintiff in error, for the murder of one Benjamin C. Tarver, at the Cherokee Nation, in the Indian country.

It appears by the record that on the trial of the case, and after the accused had pleaded not guilty to the indictment, the court directed two lists of 37 qualified jurymen to be made out by the clerk, one to be given to the district attorney, and one to the counsel for the defendant; and that the court further directed each side to proceed with its challenges independent of the other, and without knowledge on the part of either as to what challenges had been made by the other.

It further appears by the record that to

this method of proceeding in that regard the defendant at the time excepted, but was required to proceed to make his challenges; that he challenged 20 persons from the list of 37 persons from which he made his challenges, but in doing so he challenged 3 jurors who were also challenged by the attorney for the government.

"It further appears that the government, by its district attorney, challenged from the list of 37 persons 5 persons, 3 of whom were the same persons challenged by the defendant, and that this fact was made to appear from the lists of jurors used by the government in making its challenges and the defendant in making his challenges.

To the happening of the fact that both parties challenged the same three jurors the defendant at the time objected, but the court overruled the objection, and directed the jury to be called from the said two lists impaneled and sworn, to which the defendant at the time excepted.

The assignments of error ask us to consider the validity of the method of exercising his rights of challenge, imposed upon the defendant by the order of the court, and also the propriety of the instruction given by the court to the jury on the subject of the defense of an alibi, by giving prominence to the cautionary rules by which they should weigh this class of testimony, and particularly in saying to the jury that it was a defense often resorted to, and often attempted to be sustained and made effective by fraud, subornation, and perjury.

A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. "It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence." Prine v. Com., 18 Pa. St. 103, per Gibson, C. J. And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact. Thus in a Virginia case (Hooker v. Com., 13 Grat. 763) the court observed that the record showed that on two occasions during the trial the prisoner appeared by attorney, and that there was nothing to show that he was personally present in court on either day, and added: "This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. * * * It is the right of any one, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses; and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected." Thereupon the judgment was reversed. And in the case of Dunn v. Com., 6 Pa. St. 384, it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears. Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. Rep. 761, is to the same effect.

In Hopt v. Utah, 110 U. S., at page 578, 4 Sup. Ct. Rep., at page 204, it is said: "The argument in behalf of the government is that the trial of the indictment began after and not before the jury was sworn; consequently that the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position in decisions construing particular statutes in which the word 'trial' is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any steps being taken in the absence of the accused, and after the case is called for trial, which involve his substantial rights. The requirement is, not that he must be personally present at the trial by the jury, but 'at the trial.' The Code, we have seen, prescribes grounds for challenge by either party of jurors proposed; and provision is expressly made for the 'trial' of such challenges, some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins." And, further: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. 'The natural life,' says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Comm. 133. The public has

an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." So, too, in the case of Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. Rep. 525, this language of the court in Hopt v. Utah is cited and approved.

In the case of Dyson v. State of Mississippi, 26 Miss. 362, 383, it was said: "It is undoubtedly true that the record must affirmatively show those indispensable facts without which the judgment would be void,—such as the organization of the court; its jurisdiction of the subject-matter and of the parties; that a cause was made up for trial; that it was submitted to a jury sworn to try it, (if it be a case proper for a jury;) that a verdict was rendered, and judgment awarded. Out of abundant tenderness for the right secured to the accused by our constitution to be confronted by the witnesses against him, and to be heard by himself or counsel, our court *378 has gone a step further, and held that it must be shown by the record that the accused was present in court pending the trial. This is upon the ground of the peculiar sacredness of this high constitutional right. It is also true, as has been held by this court, 'that nothing can be presumed for or against a record, except what appears substantially upon its face.'" Continuing, the court said: "This rule has reference to those indispensable requisites necessary to the validity of the record as a judicial proceeding."

As already said, the record shows that at the trial of the case the court directed two lists of 37 qualified jurymen to be made out by the clerk, and one to be given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges, and without knowledge on the part of either as to what challenges had been made by the other. Although the record states that after the challenges the 12 jurors who remained were sworn, yet it clearly appears from the whole record, and the lists therein referred to, that after the challenges there remained, not only 12, but 15, jurors, and that by the mode adopted, which required the prisoner to challenge by list, he exhausted some of his challenges by challenging jurors at the foot of the list, and who were never reached to be sworn as jurors in the case. And the record does not disclose that at the time the challenges were made the jury had been called into the box, nor that they or the prisoner were present at the time the challenges were made. It does, indeed, appear that the clerk called the entire panel of the petit jury, but it does not appear that, when the jury answered to said call, they were present so that they could be inspected by the prisoner, and it is evident that the process of challenging did not begin until after said call had been made. We do not think that the record affirmatively discloses that the prisoner and the jury were brought face to face at the time the challenges were made, but we think that a fair reading of the record leads to the opposite conclusion, and that the prisoner was not brought face to face with the jury until after the challenges had been made and the selected jurors were brought into the box to be sworn. Thus reading the record, and holding, as we do, that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed.

The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone, and repeated by Mr. Justice Story: "In criminal cases, or at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a 'peremptory challenge;' a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons: (1) As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. (2) Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." 4 Bl. Comm. 353; U. S. v. Marchant, 4 Mason, 160, 162, and 12 Wheat. 480, 482. See, also, Co. Litt. 156b; Termes de la Ley, voc. Challenge, 2 Hawk, c. 43, § 4; Reg. v. Frost, 9 Car. & P. 129, 137; Hartzell v. Com., 40 Pa. St. 462, 466; State v. Price, 10 Rich. Law, 351, 355.

There is no statute of the United States which prescribes the method of procedure in impaneling jurors in criminal cases, and it is customary for the United States courts in such cases to conform to the methods prescribed by the statutes of the states. In the present instance the method prescribed by the statutes of Arkansas was not followed, nor does it appear that there exists any general rule on the subject in the circuit court

of the western district of Arkansas. While the court in the present instance did not exceed its jurisdiction in directing the impaneling of the jury by a method different from that prescribed by the state statute, and while we do not feel called upon to make suggestions as to the proper practice to be adopted by the circuit courts in impaneling juries in criminal cases, yet obviously all rules of practice must necessarily be adapted to secure the rights of the accused; that is, where there is no statute, the practice must not conflict with or abridge the right as it exists at common law. In the trial of Jeremiah Brandreth, 32 Howell, St. Tr. 755, 771, where a question arose as to the order of challenge of jurors in a capital case, it was said by Mr. Justice Abbott: "Having attended, I believe, more trials of this kind than any other of the judges, I would state that the uniform practice has been that the juryman was presented to the prisoner or his counsel, that they might have a view of his person. Then the officer of the court looked first to the counsel for the prisoner to know whether they wished to challenge him. He then turned to the counsel for the crown, to know whether they challenged him, and, if neither of them made any objection, the oath was administered." In Townley's Case, 18 Howell, St. Tr. 347, 348, the prisoner's counsel moved that before any juryman should be brought to the book the whole panel might be called over once in the prisoner's hearing, that he might take notice who did or who did not appear, which they said would be a considerable help to him in taking his challenges. This was done by order of the court.

In the case of Lamb v. State, 36 Wis. 424, where it did not appear affirmatively by the record that the panel of jurors in respect to which the prisoner had the right of peremptory challenge was present in the view of the prisoner, but where the members of the jury were called into the box one at a time, and either challenged or sworn, and to which method the prisoner excepted, this was held reversible error, and the court said: "We cannot but agree with the learned counsel for the plaintiff in error that this mode of impaneling the jury largely impaired the right of peremptory challenge, essential in contemplation of law to the impartiality of the trial; for it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose. The mode adopted gave no opportunity for comparison and choice between jurors, and little opportunity for observance of each juror, apparently essential to the exercise of a right so visionary and fanciful."

In the case of Hopt v. Utah, already cited, it was held that the trial by triers, appointed by the court, of challenges of proposed jurors in felony cases, must be had in the presence as well of the court as of the accused, and that such presence of the accused cannot be dispensed with. In this case the triers took the juror from the court room into a different room, and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel, and it was held by this court that it was error which vitiated the verdict and judgment to permit the trial of challenges to take place without the presence of the accused; and this, although the accused failed to object to the retirement of the triers from the court room, or to the trial of the several challenges in his absence. The record in this case discloses that the prisoner objected and took due exception to the orders of the court directing the method of taking challenges. It is true that no specific exception was taken by the prisoner, based on the stated fact that he was called upon to challenge jurors not before him, but we think that the general exception taken to the action of the court in prescribing the method of procedure was sufficient.

Another assignment averred error in the court in the selection of the jury, in that the defendant was required to make his challenges without first knowing what challenges the government's attorney had made, and thus challenged three jurors who were also challenged by the government, whereby he was deprived of three of his challenges, contrary to law. This assignment of error is based on a specific exception taken at the time by the prisoner, and in this respect it differs from the case of Alexander v. U. S., 138 U. S. 353, 11 Sup. Ct. Rep. 350, where the same error was assigned, and was not considered by this court because it had not been properly excepted to at the trial. As we have already said, we do not deem it our duty to prescribe in this opinion rules to regulate the discretion of the circuit courts in the impaneling of jurors in criminal cases. Perhaps the preferable course would be for the circuit courts to adopt the methods prescribed by the statutes of the states, because such methods are familiar to the bar and the people of the states. If, however, the circuit courts choose to deal with such matters by rules of their own, we think it essential that such rules should be adapted to secure all the rights of the accused. It does not appear in the present case that the prisoner made any demand to challenge any of the jury beyond the twenty allowed by the Revised Statutes. In fact, it does not clearly appear which side made the first challenges, or that the defendant had not exhausted his challenges before the government challenged the three jurors in question. If it were a fact that the defendant had made his twenty challenges before the government had challenged these three men, it is difficult to see how his rights were prejudiced by the action of the district attorney; but we should hesitate to affirm this judgment upon a record giving us so little information as to the history of the trial in these respects.

The only other error assigned which calls for notice is the one objecting to the language used by the court when cautioning the

jury in respect to the testimony bearing on the defense of an alibi. Whether the language of the learned judge went beyond the verge of propriety we are not called upon to consider, as no due exception was taken at the trial, and no opportunity was, therefore, given the court to modify the charge.

The objection to the language used, urged on the motion for a new trial, cannot be regarded as equivalent to an exception at the trial. Because, however, of the error into which the court fell, in directing secret challenges to be made, and not in the presence of the prisoner and the jurors, the judgment of the court below must be reversed, and the case remanded for a new trial.

Judgment reversed.

Mr. Justice BREWER, dissenting.

I dissent from the opinion and judgment of the court in this case. Where the question is as to the inferences to be drawn from a record, it is well to have its very language before us. The entire record bearing upon the matters in controversy consists of a single journal entry and a portion of the bill of exceptions. The journal entry is as follows:

"Tuesday Morning, October 20th, 1891.

"(Caption omit'ed.)

"On this day come the United States of America, by Wm. H. H. Clayton, Esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Mess. Barnes & Reed, and it appearing from the returns of the marshal that the said defendant has been served with a duly-certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the petit jury, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore, and having heretofore had hearing of said indictment, and pleaded not guilty thereto, it is, on motion of the plaintiff by its attorney, ordered that a jury come to try the issue joined, whereupon the clerk called the entire panel of the petit jury, and, after challenge by both plaintiff and defendant, the following were selected for the trial of this cause:

"Geo. A. Bryant, John W. Clayborn, Henry P. Dooly, James O. Eubanks, John A. Fisher, Henry P. Floyd, Geo. W. Hobbs, Hugh F. Mullen, Jno. D. McCleary, Obadiah C. Richmond, Joseph Stafford, Henry B. Wheeler,—twelve good and lawful men of the district aforesaid, duly selected, impaneled, and sworn to try the issue joined, and a true verdict render according to the law and the evidence; and, after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court."

The recital in the bill of exceptions is in these words:

"Be it remembered that on the trial of the above-entitled cause the court directed two lists of 37 qualified jurymen to be made out by the clerk, and one given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges independent of the other, and without knowledge on the part of either as to what challenges had been made by the other.

"To which method of proceeding in that regard defendant at the time excepted, but was required to proceed to make his challenges, and he challenged 20 persons from the list of 37 persons, from which he made his challenges, but in doing so he challenged 3 jurors who were also challenged by the attorney for the government, to wit, James H. Hamilton, Britton Upchurch, and James P. Mack. The government, by its district attorney, challenged from the list of 37 jurors 5 persons. In making its challenges the same three persons as those challenged by the defendant, to wit, James H. Hamilton, Britton Upchurch, and James P. Mack, were challenged by the government, as appears from the lists of jurors used by the government in making its challenges and the defendant in making his challenges.

"The 12 persons who were left of the panel of 37, after both sides had made their respective challenges, were the ones selected to try, and who did try, the case.

"To the happening of the fact that both parties challenged the same three jurors, the defendant at the time objected, but the court overruled the objection, and directed the jury to be called from the said two lists, impaneled and sworn, to which the defendant at the time excepted."

In addition, in the bill of exceptions are found the two lists of jurors, given the one to the government and the other to the defendant. Upon this record the case turns. We look to the journal entry for a recital of the facts necessary to constitute a legal trial. That recital may be in general terms, but still should affirmatively show everything essential to a valid criminal trial. This journal entry clearly affirms the presence of the defendant. The language is: "Come the said defendant in custody of the marshal," etc. Such presence, having been once stated, will be presumed to have continued through the entire day, unless the contrary is shown. It never has been even suggested that the journal should contain at the statement of each separate proceeding of the day a fresh recital of the personal presence of the defendant. In Jeffries v. Com., 12 Allen, 145, 154, it was said: "Nor is it necessary that the record should in direct terms state that the party was personally present at the time of the rendition of the verdict and during all the previous proceedings of the trial. However necessary it may be that such should have been the fact, it is not necessary to recite it in the record. The record shows that he was present at the arraignment, and present to receive his sentence." "When the record

shows that the defendant was in court at the opening of the session the presumption is that he continued in court during the entire day, and this presumption has been extended to the whole trial." Whart. Crim. Pl. & Pr. § 551; State v. Lewis, 69 Mo. 92; Kie v. U. S., 27 Fed. Rep. 351; Cluverius v. Com., 81 Va. 787; Folden v. State, 13 Neb. 328, 14 N. W. Rep. 412; Irvin v. State, 19 Fla. 872; People v. Sing Lum, 61 Cal. 538; People v. Jung Qung Sing, 70 Cal. 469, 11 Pac. Rep. 755; Territory v. Yarberry, 2 N. M. 391. No claim, therefore, can be successfully presented that anything transpiring on that day took place in the absence of the defendant.

The same journal entry further recites that "the clerk called the entire panel of the petit jury, and, after challenge by both plaintiff and defendant," the jury was selected. 383 Where the general term is used, as here, "challenge," it means all challenges. It is used in its comprehensive sense. It is unnecessary to subdivide, and say, after "challenge to the array," "challenges for cause," and "peremptory challenges;" the single general word is sufficient. But this journal entry does not stop with this. After naming the jurors, and describing them as good and lawful men, it adds, "duly selected, impaneled, and sworn." Such will be found the uniform formula of journal entries. In Kie v. U. S., 27 Fed. Rep. 351, 357,—a case taken on error to the circuit court,—Judge Deady observes: "The record simply states in the usual way, when the case was called for trial, a jury came, aand was duly impaneled and sworn." Potsdamer v. State, 17 Fla. 895; Rash v. State, 61 Ala. 89. In Wharton's Criminal Pleading and Practice (§ 779a) the author says: "Thus, when the record shows impaneling and swearing, it will be presumed, in error, that the swearing was in conformity with the law, and the impaneling was regular." It is hardly necessary to refer to the familiar fact that in criminal, as in civil, cases the presumption is in favor of the regularity of the proceedings in the trial court, and that error must affirmatively appear. Pow. App. Proc. p. 326, § 50; Whart. Crim. Pl. & Pr. § 779a, and cases cited in note. I take it, therefore, that it is not open to doubt that, if nothing was before us except the journal entry, there would be no error apparent in the proceedings in regard to the jury.

How does the matter stand from the bill of exceptions? A bill of exceptions is prepared by the party, and, being prepared by him, he may state, and ought to state, only those facts which present the very question he desires to raise. If the objection is to a ruling on the admission of testimony, he should state only that testimony and enough of the case to show its relevancy. It would be absurd to require him to set out all the testimony, or to state in terms that there was no objection to the balance. As was said in Lincoln v. Claflin, 7 Wall. 132, 136: "A bill of exceptions should only present the rulings of the court upon some matter of law,—as upon the admission 384 or exclusion of evidence,—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved." If he objects to a specific portion of a charge, he should state only that portion. Putting in the whole charge is clearly against rule 4 of this court, (3 Sup. Ct. Rep. v.,) and has been explicitly condemned. United States v. Rindskopf, 105 U. S. 418. Indeed, the single function of a bill of exceptions is to bring upon the record so much of the proceedings as will disclose the precise question which the party desires to have ruled upon, and when prepared by counsel and presented to the court, if it states the facts truly, the judge ought to sign it; and it is unnecessary for it to set forth affirmatively that there was no other error in the proceedings, or to state all the facts of the case, in order to disclose that there was no other error. Bearing in mind this, which is confessedly the scope and purpose of a bill of exceptions, I notice that in this bill not a word is said about the absence of the jurors from the box, the personal presence or absence of the defendant, or whether the defendant was brought face to face with the jurors. If he had any fault to find in respect to these matters, the facts in respect thereto should have been explicitly stated. That he made no claim of wrong therein is evident from the fact that he does not mention them. Examining the language of the bill of exceptions carefully, it states that two lists were given,—one to plaintiff and one to defendant; and the court directed them to proceed with their challenges, each separately of the other, and without knowledge of what challenges were being made by the other. Then follows the exception, "to which method of proceeding in that regard defendant at the time excepted." I respectfully submit that language could not be used which makes clearer the fact that the objection ran alone to the fact that each party was required to make its challenges independently of the other, and without knowledge of what the other was doing. It is not simply said, "to which method of proceeding," but, as if to limit carefully to the particular matter, it says, "to which method of proceeding in that regard;" and, 385 at the close of the recitals it is further stated, "to the happening of the fact that both parties challenged the same three jurors the defendant at the time objected." This is all which in any way tends to show that there was anything wrong in the matter of challenges, or that anything took place in the absence of the defendant.

Again, if the defendant had taken no exceptions to these proceedings, it is settled that this court would not inquire as to whether there was error in them. In Alexander v. U. S., 138 U. S. 353, 11 Sup. Ct. Rep. 350, a case coming from the same dis-

trict, the precise state of facts in respect to the impaneling of the jury appeared, but without any exceptions. The response made by the court to the assignment of error was in these words: "The decisive answer to this assignment is that the attention of the court does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and, in case of an adverse ruling, to note an exception." Of course, then, if the matters are not vital to the trial, and may be waived by failure to object, as thus decided, clearly the defendant can take advantage of nothing to which he does not except. Hence, supposing that after the foregoing recital in the bill of exceptions there had appeared further recitals showing various irregularities in respect to the challenges, sufficient of themselves, if excepted to, to compel reversal, but with no following exception, clearly, under the rule laid down in Alexander v. U. S., we should have been compelled to ignore them. Surely, then, when the exception runs to a specific matter, it cannot be broadened so as to extend to a matter which is confessedly not stated, but is only inferred as probable from what is stated. In short, when the journal entry, which is of itself a part of the record, and which is the court's statement of what took place, recites the personal presence of the defendant, and the full exercise of the right of challenge, in language which is the ordinary formula of journal entries, and which has been uniformly regarded as sufficient to infer from the bill of exceptions prepared by the defendant, whose purpose is only to present the facts bearing upon the particular error alleged by him, and which only specifies in terms a single act to which exception is taken, to wit, the fact that plaintiff and defendant were compelled to challenge peremptorily, without knowledge of the other's challenges, that any challenges took place in the absence of the defendant, to hold that an exception which is precise to a particular matter can be broadened so as to include other matters not specified, and thereupon to set aside a judgment of guilty, solemnly rendered, seems to me to overturn established rules governing appellate proceedings, to destroy confidence in courts, and to work great wrong to the public.

Further than this, in the brief of counsel for the defendant there is no claim that the jury were not present in the box, face to face with the defendant, when he was called upon to make his challenges. The only points they make in respect to the matter are that the mode of designating the jury was not recognized by the statutes of the state of Arkansas, nor in conformity with any rule prescribed by congress; and that, by reason of the fact that three jurors were challenged by both the government and defendant, the latter was really deprived of three peremptory challenges.

Now, if it should prove to be the case—as, it seems to me, is not only possible, but probable—that the defendant was in fact present in the court room during all the challenges; that the entire panel of jurors was called into the box before him; that in their presence he was allowed and received all the challenges for cause he desired to make; and that only after a full inspection of the jury, and a questioning of each one so far as was desired, were the lists placed in the hands of the respective counsel for peremptory challenges, —will not the ordinary citizen believe that substantial justice would have been done if this court had omitted to read into the record something which is not expressly stated therein, which defendant's counsel did not claim to have happened, and which did not in fact happen?

So far as respects the matter of contemporaneous challenging, at common law, and generally where no order is prescribed by statute, the defendant is required to make all his challenges before the government is called upon for any. In that aspect of the law, contemporaneous challenging works to the injury of the government, rather than to that of the defendant. Further, in the only case in which the precise question has been presented, (State v. Hays, 23 Mo. 287,) cited approvingly in Turpin v. State, 55 Md. 462, the decision was in favor of the validity of such manner of challenge. In view of the discretion which, in the absence of statute, is confessedly vested in the trial court as to the manner of challenges, there was no error in this sufficient to justify a new trial.

I am authorized to say that Mr. Justice BROWN also dissents.

(146 U. S. 483)

LA COMPANIA BILBAINA DE NAVEGACION, DE BILBAO, v. SPANISH-AMERICAN LIGHT & POWER CO., Consolidated.

(December 12, 1892.)

No. 66.

SHIPPING—CHARTER PARTY—WAIVER.

1. A charter party of a Spanish ship, containing a clause that the ship should be fitted up, at the owner's expense, with oil tanks, was signed on behalf of the owner by a broker in New York, who stated that he had no authority to agree to this clause, and proposed that, if the owner would not agree thereto, the matter should be compromised by cable. The London brokers of the owner informed the New York broker on December 31st that the owner would not agree to this clause. On January 4th the owner wrote the London broker to the same effect, and a copy of the letter was forwarded to the New York broker of the charterer. Without any further or direct communication, the owner sent the ship to Philadelphia, and delivered her to the charterer on February 18th, nothing further being said as to the disputed clause. *Held*, that the owner waived his objections to the charter party, whether he intended to do so or not, for to escape liability thereunder

he should have made known distinctly that he did not deliver the ship under the charter party as signed. 31 Fed. Rep. 492, affirmed.

2. The charter party could not be binding upon the charterer in respect to hire, and not binding on the owner as to fitting up the tanks, for if the minds of the parties failed to meet as to any part of it, it was a nullity as to all parts. 31 Fed. Rep. 492, affirmed.

3. After one or two voyages, the tanks were required for use, and the charterer notified the owner that until this was done at the owner's expense the hire would cease. The owner finally fitted up the tanks, under the supervision of an engineer appointed by the charterer, first notifying the charterer that he would be held liable for the expense. *Held*, that this was the voluntary act of the owner, and the charterer was not liable for such expense, nor for the rent of the vessel during such fitting, since she was not then in service. 31 Fed. Rep. 492, affirmed.

Appeal from the circuit court of the United States for the southern district of New York. Affirmed.

James Parker, for appellant. G. W. Wingate, for appellee.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a libel in personam, in admiralty, filed in the district court of the United States for the southern district of New York by La Compania Bilbaina de Navegacion, de Bilbao, a corporation of Spain, as owner of the Spanish steamship Marzo, against the Spanish-American Light & Power Company, Consolidated, a corporation of the state of New York, claiming to recover $5,520.97, with interest from August 4, 1886; $1.800, with interest from May 21, 1886; $3,300, with interest from June 21, 1886; and $8.14. The case is fully stated in the findings of fact hereinafter set forth.

The claim is made on a charter party, a copy of which is annexed to the libel. It is dated December 14, 1885, at the city of New York, and purports to be made by the agent of the owner of the steamship and by the Spanish-American Company, and to let the steamship to that company for 12 months. The important clauses in it are those numbered 11, 12, and 18, which are as follows: "(11) That the charterers shall have the option of continuing the charter for a further period of twelve months, on giving notice thereof to owners thirty days previous to first-named term, and to have the liberty of subletting the steamer, if required by them. (12) That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and should she, in consequence, put into any other port other than that to which she is bound, the port charges and pilotages at such port shall be borne by the steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense." "(18) Should steamer be employed in tropical waters during the term of said charter party, steamer is to be docked, and bottom cleaned and painted, if charterers think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in a proper state for the service; charterers to have the privilege of shipping petroleum in bulk in water-ballast tanks, which are to be fitted for the purpose at owners' expense, satisfactory to charterers, and have permission to appoint a supercargo at their expense, who shall accompany steamer, and be furnished free of charge with first-class accommodations, and see that voyages are made with utmost dispatch."

The respondent appeared in the action, and put in its answer, denying that the libelant was entitled to recover any part of the $5,520.97, admitting the payment of $1,500 and $3,300, and denying that it owed anything to the libelant. It alleged that the libelant never fitted up the center water-ballast tank to carry oil in bulk, its use being consequently lost to the respondent; that the capacity of that tank was about 50,000 gallons, and its loss reduced the value of the vessel to the respondent $1,100 a month from May 15, 1886, making a damage of $10,084; that from February 21, 1886, to August 27, 1886, the date of the bringing of the suit, was 188 days; that during that period the respondent was deprived of the use of the vessel 42 days, leaving only 146 days for which hire was due; that such hire, at the rate of £675 a month, amounted to $16,060; that on account of such hire the respondent had paid altogether $15,137; that it was entitled to deduct from the moneys due on the charter party $2,390 for the expense to which it was put in procuring barrels so to transport the oil, and for the charges connected therewith, and the further sum of $10,084 for the damages which it would sustain by reason of the refusal of the libelant to fit up the center tank to carry oil in bulk; and that it had filed a cross libel to recover from the libelant so much thereof as exceeded the hire of the vessel claimed in the libel.

The case was heard in the district court by Judge Brown, and a decree was entered by that court on June 21, 1887, for the recovery by the libelant of $1,800, being the balance of hire unpaid for the vessel for the month beginning May 21, 1886, and for $117, interest thereon from May 21, 1886, and $95.73, costs; the whole amounting to $2,012.73.

The opinion of Judge Brown is reported in 31 Fed. Rep. 492. He took the view that the charter party signed by the broker of the libelant did not constitute a legal contract, binding upon either of the parties, because such broker, in signing it, exceeded his authority; that that fact was communicated at the time to the broker of the respondent; that it was agreed between the brokers of

the two parties that, if the clause relating to the extension of time for 12 months, and the clause requiring the vessel to fit up the oil tanks at the expense of the owner, were objected to by the latter, the matter should be settled by negotiation; that the respondent from the first refused the charter unless the vessel should fit up the tanks at the expense of her owner; that that fact was stated to libelant's broker at the time; that the owner of the vessel subsequently refused to confirm these two clauses in the charter; that notice of such refusal was given to the respondent, and it never consented to waive those two clauses; that no agreement as to those two clauses was ever arrived at; that the subsequent conduct of each party showed that neither intended to recede from its position; that, when the vessel arrived at Philadelphia, ready for the first voyage, neither party made any inquiry as to the disputed clauses; that both parties assented to the use of the vessel on the first voyage, without any definite agreement on the disputed points, and without any settlement by negotiation; that the respondent did not object, because it was not ready to use the tanks; that, when it was ready to use them, and required that they should be fitted up by the libelant in pursuance of the terms of the charter party, the libelant refused to do so; that the cargo was then taken in barrels, under a stipulation that that might be done without prejudicing the rights of either party, the respondent claiming damages for the extra expense; and that subsequently the libelant fitted up the tanks, claiming that the expense would be at the charge of the respondent, while the latter notified the libelant that it would not pay for any such expense.

*487 *The district court also held that, although the charter party as a whole never became a contract binding upon either of the parties, it might be referred to as fixing the rights of each, in so far as it might be presumed to have been adopted by both parties in their subsequent acts; that the respondent was apprised of the verbal refusal of the owner to agree to the two disputed clauses of the charter party; that, nevertheless, the vessel came to the respondent, and was tendered to it by the owner, without any attempt to settle the disputed points; that both parties consented to the first voyage without any settlement of those differences; that as soon, however, as any question was made between the master and the respondent, after the first voyage, the original refusal of the owner was made known to the respondent, and neither party ever agreed to the demands of the other party on the subject; and that the vessel was employed without either side yielding anything to the other as to the charter party.

The court further held that, under that state of things, the terms of the charter party constituted the implied agreement of the parties in the actual use made of the vessel, in everything except as to the disputed clauses; that neither party could found any claim against the other upon the clauses which the other always refused to accept, because, in the face of such refusal, no agreement to those clauses could be implied; that the libelant, therefore, could recover nothing for its expenditure in fitting up the tanks to carry oil in bulk, nor could the respondent by its cross libel recover any damages, because the tanks were not fitted up earlier; that for the same reason the libelant could not recover for any time of the vessel lost while it was fitting up the tanks; that it lost nothing by that disallowance, because it did not appear that any more time was required to fit up the tanks, when the work was actually done, than would have been required when the vessel was brought over to the respondent; that the evidence showed that, after the employment of the vessel had begun, neither party was desirous of insisting on its legal right to discontinue all further service by reason of the failure of the parties to come to an agreement upon the disputed clauses; that the rights and liabilities of the parties were founded, not at all upon the written charter party, but wholly upon their subsequent conduct in the actual use of the vessel; that the charter party was applied by implication to those acts, so far as it presumptively indicated the intention of both parties, and no further; that there could be no implied promise or obligation in contradiction of the expressed refusal of either party; that the result was that neither had any claim upon the other for the damages set forth by them, respectively; and that the libel and the cross libel must be dismissed, except as respected the hire, if any, unpaid for the time of the actual use of the vessel by the respondent.

Both parties appealed to the circuit court. That court, held by Judge Lacombe, dismissed the cross libel of the respondent, without costs of the circuit court to either party, and decreed that the libelant recover from the respondent the amount of damages and costs decreed by the district court, viz., $2,012.73, and $185.27 interest thereon, being a total of $2,198.

Judge Lacombe, in his opinion, said that there was nothing to add to the opinion of the district judge; that the findings made by the circuit court sufficiently showed upon what theory the decision of Judge Brown was affirmed; and that, as both sides had appealed, no costs of the circuit court were allowed to either party.

The circuit court filed original findings of fact and conclusions of law on October 15, 1888, and on January 14, 1889, it filed supplemental findings of fact. The original and supplemental findings of fact are as follows, the latter being inclosed in brackets:

"First. On December 19, 1885, the Spanish-American Light & Power Company, Consolidated, by the signatures of its president

and secretary, executed a charter party of the S. S. Marzo, owned by La Compania Bilbaina de Navegacion, de Bilbao.

"Second. Said charter party contained three clauses, as follows, viz.," then setting forth clauses 11, 12, and 18.

"Third. The negotiations preliminary to the signing of said charter party were conducted by Henry P. Booth, acting as broker for the said the Spanish-American Light & Power Company, and William W. Hurlbut, acting as broker for La Compania Bilbaina de Navegacion, de Bilbao, and was signed by said Hurlbut as agent for said last-named company.

"Fourth. Prior to said signature Hurlbut stated to Booth that he had no authority from his principals, the owners of the ship, to give the option of the continuance set forth in clause 11, or to agree to the insertion in clause 18 of the words 'at owners' expense,' or to agree, upon behalf of the owners, that they would pay any part of the expense of fitting water-ballast tanks for carrying oil in bulk; [and that he would not sign the charter party containing the said clause 11 and said words 'at owners' expense' until authorized by the owners, his principals; that he, Hurlbut, would cable for authority, or he would sign the charter party with that clause and those words therein upon the condition that the said clause and words were not to be binding upon the owners of the vessel until approved by the said owners; that Booth thereupon agreed to said proposal made by Hurlbut; that thereupon said charter party, containing said clause and words 'at owners' expense,' was taken by Booth to the office of the Spanish-American Light & Power Company, and was there signed by its president and secretary and manager, and was brought back to Hurlbut's office by Booth.]

"Fifth. Thereupon said Hurlbut signed the charter party, and wrote a memorandum to the effect that the charter party was signed subject to the approval of the owners as to those two clauses. He at that time again announced to Booth his want of authority to incorporate those clauses, and that a copy of the memorandum should be sent with the copies of the charter to be furnished to Booth, as broker, for delivery to the charterers.

"Sixth. Prior to the time of the signature aforesaid Hurlbut had not in fact received from his principals any authority to bind them to a contract containing these clauses.

"Seventh. Upon being notified of the action of Hurlbut in signing a charter party containing these clauses, they refused to ratify his action in that regard.

"Eighth. The authority of Booth, the charterers' agent, was limited to securing the execution of a charter containing these clauses. [Immediately after the signature of the charter party, on December 19th, Hurlbut made a clean copy of the memorandum agreement, as follows, viz:

"'New York, December 19th, 1885.

"'Spanish-American Light & Power Company, charterers S. S. Marzo—Sirs: I have signed charter party by authority contained in the cables received. Should the two clauses, viz., 'privileges of twelve months' extension,' and the 'fitting of ballast tanks for petroleum at owners' expense,' be not accepted by owners, it is understood that the same may be arranged or compromised by mutual consent by cable.

"'Yours, truly, W. W. Hurlbut.'

"And on the following Monday inclosed three copies of the charter party, with copy of said memorandum attached, and sent same to Mr. Booth, the broker of the charterers, with the following letter, viz.:

"'New York, December 21, 1885.

"'Messrs. James E. Ward & Co.—Dear Sirs: I inclose three certified copies charter party S. S. Marzo; also letter for charterers to accept, covering the two conditions inserted in charter party as understood on signing same.

"'Yours, truly, W. W. Hurlbut.'

"These were received by Booth.

"That on the 11th January, 1886, Hurlbut sent to Booth information that he had received a letter, dated December 31, 1885, from the London brokers, as follows: 'Owners refused to give option continuation which was asked them. We cabled you this. Owners only gave liberty to carry petroleum in ballast tanks; they never agreed to "fitted at their own expense." We are really sorry you put them in charter party without authority. Owners are certain to pitch into us;' and that he had also received cable information that the steamship Marzo was about leaving Bilbao for the United States.

"That on January 4, 1886, the owners of the steamship, (La Compania Bilbaina de Navegacion, de Bilbao,) having received copies of the charter party, wrote to Messrs. Walker, Donald & Taylor, the London brokers, as follows, viz:

"'Bilbao, January 4th, 1886.

"'Dear Sirs: We are in receipt of your favor of the 23d and 31st ulto. and the 1st inst., inclosing charter party for the Marzo S. S. As we are completely ignorant of this time-charter business, being the first time that we fix any one of our boats in this way, we are not decided until we see clearly and experience what there may be left to prolong the T. C. for another twelve months. If we see, and this will be soon seen, that things go all right, etc., it is probable that we shall agree to it, and even be disposed to fix any other of our boats if you can then place her, but for the present we regret not to be able to agree to the option of twelve months more, nor can we admit that the cost for fitting the water ballast tanks for carrying oil (petroleum) should be at steamer's expense, as we only, when accepting the terms of the charter, authorized the shipper to carry petroleum in water-ballast tanks, even (? never) thinking

that besides our yielding to that condition they would ask us to spend money for it. As for the supercargo, we agree to give him a first-cabin accommodation gratis on board, but he shall have to pay to the steward of the boat the food, as we do for the officers and crew. Marzo is now here in dry dock, and loads end of this week for Baltimore.

"'Yours, truly, Aznar y Astigarraga.'

"Indorsement on margin: 'If delivery is accepted Baltimore, to whom must boat be delivered there? or whom Philadelphia or New York? Please wire before steamer leaves this port. As agreed, we suppose payment shall be made in London one month in advance.'

*402 "That on January 9, 1886, said Walker, Donald & Taylor transmitted a copy of said letter to Hurlbut at New York, and the latter, on January 18th, inclosed copy to Booth, the broker for charterers.]

"Ninth. [That the steamship Marzo sailed from Bilbao on January 15, 1886, for Philadelphia, where she duly arrived, and on the 18th of February was tendered to the charterers, who accepted her as in their service under the charter from the date of February 21, 1886.

"That the charterers, after acceptance of the vessel on February 21st, loaded and dispatched her to Cuba and return to Philadelphia, at which latter port she arrived about March 18, 1886.

"That upon her arrival at Philadelphia, Smith, the manager of the charterers, went over to Philadelphia, and for the first time stated to the master of the vessel that it was possible something would be required to be done towards fitting the tanks for petroleum on the voyage next after the one for which she was loading, to which the master replied that he must be notified in time, because the owners understood the fitting of the tanks would be at the cost of the charterers, to which Smith replied, 'That will be arranged.'

"The vessel then for the second time proceeded to Cuba, and loaded thence for Boston, arriving at the latter port early in May; that while the vessel was still in Boston the charterers wrote to the agents of the vessel at New York as follows:

"'New York, May 13th, 1886.

"'Messrs. Latasa & Co., City—Gentlemen: We learn from the captain of the Marzo that he will complete his discharge at Boston today, and that he will reach here to-morrow. We beg to again call your attention to the fact that we are now prepared to ship oil in bulk, and we shall expect the steamer to be put in proper condition to receive it this trip. We will gladly give you all the assistance we possibly can to hurry forward the work, for we do not wish the steamer to be unnecessarily detained any more than you do.

"'Yours, very truly, R. A. C. Smith,

"'Sec'y.'

*403 *"And on May 17, 1886, again wrote as follows:

"'New York, May 17th, 1886.

"'Messrs. Latasa & Co., Agents for Owners of S. S. Marzo—Dear Sirs: Please take notice that we are prepared to ship oil in bulk, in the water-ballast tanks of the steamship Marzo, and that, according to the terms of the charter party, same are to be fitted up for the purpose at owners' expense, satisfactory to us. Until said tanks are put in the condition contemplated by said charter party the payment of the hire of the vessel ceases. Yours, very truly,

"'R. A. C. Smith, Sec'y.'

"And also informed Latasa & Co. by another letter of the 'appointment of an engineer to supervise the fitting of the tanks.'

"That the letter of May 17th, above recited, was the very first intimation given to the owners, agents, brokers, or master of the steamship by the charterers that the latter had not accepted the refusal of the owners to confirm the words 'at owners' expense,' inserted in the charter party by Hurlbut without authority, as above recited.]

"Tenth. At the time of such delivery her owners supposed that the company was receiving her with the intention of fitting up the tanks at its expense, and the Spanish-American Company supposed that the owners were delivering her in accordance with the terms of the charter party which it had signed.

"Eleventh. Upon her receipt, and on or about February 21, 1886, the Spanish-American Company loaded and dispatched her on a voyage to Cuba, and returned to Philadelphia, at which latter port the vessel again arrived on or about March 18th. The Spanish Company again loaded her. She proceeded to Cuba, and thence to Boston, arriving at the latter port early in May.

"Twelfth. Thereupon the Spanish Company notified the ship's agents, Messrs. Latasa & Co., that it was prepared to ship oil in bulk, and should expect the steamer to be put in proper condition as to tanks, etc., to receive it. *404

*"Thirteenth. Discussion thereupon arose between the ship's agents and the manager (Smith) of the Spanish Company, the latter demanding that the owners should fit the tanks at their expense, and the owners expressing an entire willingness to fit the tanks, but refusing to pay the expense, which correspondence resulted in the following agreement, viz.:

"'It is hereby mutually agreed by and between the owners and the charterers of the steamship Marzo that the said vessel shall proceed to load oil and coal for Havana, Cuba, pending the settlement of matters in dispute between said owners and charterers, and that said loading shall not prejudice the claim of either party to said charter party.

[Signed] "'R. A. C. Smith, Sec'y.

"'New York, May 26, 1886.'

"And that a further arrangement was made by which $1,500 was paid by the char-

terers on account of the vessel's hire that had already fallen due.

"Fourteenth. Upon return of the vessel to Philadelphia the Spanish Company again renewed the demand that the tanks should be fitted by the owners at their expense, and refusing to pay the hire until it was done, and the owners, through the ship's agents, again refused to pay the expense, but expressing an entire willingness to fit the tanks at the expense of the Spanish Company. Much correspondence ensued, but finally the owners, after notifying the Spanish Company that they would be held for the expense, to avoid further delay, proceeded to fit the tanks under the supervision of the engineer appointed by said company. The fitting was completed on July 30th, and on that day the Spanish Company were notified that as soon as the bills for the expense thereof were received they would be presented to it for payment. They were so presented a few days later, amounting in the aggregate to the sum of $5,520.97, but the said company refused to pay the same, [or any portion of the hire remaining unpaid, which hire amounts to the further sum of $5,108.97, and have ever since refused to do so.]

*405 "Fifteenth. The sum of six hundred and seventy-five pounds, *British sterling, per calendar month, payable monthly in advance, was a fair and reasonable consideration for the use of said steamer during the time she was actually used by the said Spanish Company.

"Sixteenth. The said company has paid the owners of the Marzo for the use of said steamship at the said rate for said time during which she was so used, except the sum of eighteen hundred dollars, which was due May 21, 1886, [but has not paid any hire for the time employed in fitting the tanks, viz., from July 3 to August 3, 1886.]"

The conclusions of law accompanying the original findings of the circuit court were as follows:

"First. The charter party, signed December 18, 1885, was not a valid contract, because the agent of the owners had no authority to agree to the disputed clauses, and his action in signing a charter party with such clauses contained in it was never ratified by said owners.

"Second. The Spanish-American Company never executed a charter party with those clauses omitted, nor ever authorized any one to execute such a charter party in their behalf.

"Third. The owners of the steamer never agreed with the Spanish Company that they would fit up the tanks at their own expense.

"Fourth. The Spanish Company never agreed with the owners that they would pay for the expense which might be incurred in fitting up the tanks.

"Fifth. For the actual use of the vessel, which, with the assent of the owners, the Spanish Company has enjoyed, it should pay a fair and reasonable rent.

"Sixth. The libel and cross libel should therefore be each dismissed, except as respects the hire unpaid (eighteen hundred dollars, with interest from May 21, 1886) for the time of the actual use of the vessel by the Spanish Company.

"Seventh. The decision of the district court is affirmed, without costs of this court."

There were no further conclusions of law accompanying the supplemental findings of fact.

The libelant has appealed to this court, but the respondent has not appealed. The libelant contends in this court that it ought to recover all the items claimed in its libel, and not merely the $1,800, with interest from May 21, 1886.

*406 It is quite clear that the libelant could not, in any event, recover from the respondent any part of the expense of fitting up the tanks in the vessel to carry petroleum in bulk. There was nothing in the acts of the parties to throw on the respondent any obligation to fit up the tanks, or to pay the expense thereof, if the work should be done. The respondent never promised to make or to pay for any such alteration. On the contrary, it always refused to recognize any such liability on its part, and insisted it was the duty exclusively of the libelant to pay therefor. If the libelant chose to fit up the tanks, that was a voluntary act on its part in regard to work upon its own property, for which it has no remedy against the respondent.

It is contended, however, that, as the respondent refused to retain or use the vessel unless the tanks were fitted up by the libelant, as provided in the charter party, an implied contract arose; and that, as the libelant did such fitting up, the respondent must bear the expense. But it is found, in effect, that the respondent always and constantly refused to assume the expense, and insisted, as the ground for the making of the alterations, that under the charter party it was the duty of the libelant to make them. No duress by the respondent is alleged in the libel, or shown.

The position of the libelant is that, although the charter party is a binding instrument on the respondent, so far as relates to the hire of the vessel, it has no effect against the libelant as to the provision contained in clause 18, as to the fitting up of the water-ballast tanks at the expense of the libelant, in order to have petroleum shipped in bulk. If the libelant seeks to enforce any part of the charter party, it must rely on the instrument as a whole; and it cannot affirm the charter party for one purpose and repudiate it for another. The respondent refused at all times to enter into an express contract that it would pay for fitting up the tanks, and the charter party as executed indicated

*497 the respondent's intention not to do so. On the facts as found, no such contract can be implied. The charter party never became a binding contract.

The contention of the libelant is that the instrument became binding on the parties, with the exception of the particular clauses referred to, if the libelant should dissent from those clauses. Thus the same effect is claimed as if the charter party had been returned to the persons who had signed it, and the clauses referred to had been erased by mutual consent. But if there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses. Eliason v. Henshaw, 4 Wheat. 225; Insurance Company v. Young's Adm'r, 23 Wall. 85; Tilley v. County of Cook, 103 U. S. 155; Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co., 119 U. S. 149, 151, 7 Sup. Ct. Rep. 168.

Nor did the delivery of the vessel to the respondent, and her acceptance by the latter, constitute a hiring of her under the charter party as it would stand with the disputed clauses omitted. The proposition of Hurlbut to the respondent on December 19, 1885, was that if the libelant did not agree to the two disputed clauses, those clauses should "be arranged or compromised by mutual consent, by cable." The libelant was apprised of that proposition prior to December 31, 1885, as on that day the London brokers of the libelant, Walker, Donald & Taylor, wrote to Hurlbut, the agent of the libelant, the letter of that date. On January 4, 1886, the libelant wrote to Walker, Donald & Taylor the letter of that date, and the latter, on January 9, 1886, sent a copy of that letter to Hurlbut at New York, and he, on January 18, 1886, inclosed a copy of it to Booth, the broker for the respondent. Without any direct communication with the respondent, and without receiving any communication from it, the vessel was dispatched to Philadelphia, and tendered to the respondent on February 18, 1886, not a word being said at the time to the respondent as to the disputed clauses. On these facts, the respondent had a right to conclude that the dissent of the libelant from the two disputed clauses was not insisted upon.

*498 It was important to the respondent to know promptly if the charter party which had been signed was binding, and it was the duty of the libelant, before delivering the vessel to the respondent, to have the latter understand distinctly that the libelant did not deliver her under the charter party which had been signed. It is expressly found, in the tenth original finding of fact, that the respondent, at the time the vessel was delivered to it, supposed that the libelant was delivering her in accordance with the terms of the charter party which the respondent had signed. Under these circumstances, the delivery of the vessel to the respondent by her master was, in legal effect, the adoption by the libelant of the existing charter party, and not an acceptance of the vessel by the respondent with the omission from the charter party of the two clauses in question. Drakely v. Gregg, 8 Wall. 242, 267.

The legal effect of the transaction was that the libelant thus waived its former objections to the charter party, whether it intended to do so or not. It follows that the libelant cannot claim rent for the use of the vessel during the time she was undergoing alterations. As the libelant was bound to pay the cost of fitting up the tanks, if it did the work, it cannot recover the rent for the time during which such work was being done. The loss of the use of the vessel by the respondent during the time the alterations were being made was a part of the expense of fitting up the tanks, the eighteenth clause of the charter party meaning that the tanks were to be fitted at the expense of the libelant before the delivery of the vessel under the charter party. No interpretation of the charter party can be allowed which would permit the libelant to take its own time to fit up the tanks, and yet collect full rent from the respondent during the time that work was being done, and while the respondent was necessarily deprived of the use of the vessel.

Moreover, the respondent, insisting that the libelant should fit up at its own expense the water-ballast tanks, delivered the vessel back to the libelant, which accepted her for that purpose, and kept her for a month. This necessarily stopped the running of the rent under the charter party. The respondent *499 can be liable to pay rent for the use of the vessel only while she was in its service. The libelant recovered all that it was entitled to recover.

Decree affirmed, but without interest, and with costs.

(146 U. S. 499)

SCOTT et al. v. ARMSTRONG.

FARMERS' & MERCHANTS' STATE BANK et al. v. ARMSTRONG.

(Dec. 12, 1892.)

Nos. 53, 1,025.

NATIONAL BANKS—INSOLVENCY — PREFERENCES—FEDERAL COURTS—FOLLOWING STATE PRACTICE.

1. Rev. St. §§ 5234, 5236, 5242, which require a pro rata distribution of the assets of an insolvent national bank and forbid preferences, do not invalidate liens, equities, and rights arising prior to and not in contemplation of insolvency.

2. A promissory note was executed to a national bank in consideration of the amount being placed to the credit of the maker on the books of the bank. The maker thought, and had good reason for thinking, that the bank was solvent, but the managing officer of the bank knew it to be insolvent. Before the note matured, the charter was forfeited for insolvency and a receiver appointed. *Held*, that the undrawn balance should be allowed as an equitable set-off to the note, and such allowance is not a "preference" forbidden by the national banking law. Rev. St. §§ 5234, 5236, 5242, 36 Fed. Rep. 63, reversed.

3. Equitable defenses to an action at law

In a federal court sitting in a state where such defenses are permitted are not authorized by Rev. St. § 914, providing that federal courts shall follow state practice and procedure.

In error to the circuit court of the United States for the southern district of Ohio. Reversed.

On a certificate from the United States court of appeals for the sixth circuit.

Statement by Mr. Chief Justice FULLER:

*No. 53 was an action brought by David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, against Levi Scott and the Farmers' & Merchants' State Bank, in the circuit court of the United States for he southern district of Ohio, upon a promissory note for $10,000, dated at Cincinnati on June 6, 1887, payable 90 days after date, at said Fidelity Bank, with interest after maturity at the rate of 8 per cent. per annum, signed by Scott and indorsed by the Farmers' Bank to the order of the Fidelity Bank.

The defendant Scott was the cashier of his codefendant, and pleaded that he signed the note for the accommodation of the banks under an agreement that he should not be looked to for its payment. The Farmers' Bank made the same averments as to Scott, and pleaded a set-off to the amount of $8,809.94 as arising on certain facts, in substance as follows: That the Fidelity Bank lent the Farmers' Bank the $10,000 at a discount at the rate of 7 per cent. per annum, for 90 days, under an agreement that the money so borrowed, less the discount, should be placed to the credit of the Farmers' Bank on the books of the Fidelity Bank; that the note in suit was executed accordingly, dated and discounted on June 6, 1887, and the proceeds, $9,819.17, were placed to the credit of the Farmers' Bank upon the books of the Fidelity Bank, to meet any checks or drafts of the Farmers' Bank, and to pay the note when it became due; that afterwards, and before June 20th, the Farmers' Bank drew against the deposit the sum of $1,009.23, and the balance, $8,809.94, remained to the credit of the defendant to meet the note, and was so to its credit at the time the receiver was appointed; that upon the maturity of the note, and before suit was brought, defendant tendered to the receiver the sum of $1,190.06, the balance due on the note; and that the tender had since that time been kept good, and the money was now brought into court.

Demurrers to the pleas were sustained, and judgment was entered for the plaintiff for $10,833.33, with interest and costs. The judgment, as provided by section 5419 of the Revised Statutes of Ohio, contained a certificate that the Farmers' Bank was liable as principal and Scott as surety. *The opinion of the circuit court, by the district judge, will be found in 36 Fed. Rep. 63, and states that the circuit judge concurred in its conclusions as being in accord with his opinion in Bung Co. v. Armstrong, reported in 34 Fed. Rep. 94. The case being brought here by writ of error, it was assigned for error that the court erred in sustaining the demurrers and in rendering judgment against the defendants below.

While the writ of error was pending a bill in equity was filed in the circuit court in behalf of the Farmers' Bank and Scott against Armstrong, as receiver, praying for an injunction against the judgment and for the enforcement of the set-off. Armstrong demurred, his demurrer was sustained, the bill dismissed, and an appeal taken to the circuit court of appeals for the sixth circuit. That court certified to this court for instructions as to the proper decision seven questions, accompanied by a brief statement of the contents of the bill and proceedings thereon.

The bill, as summarized by the court, rehearsed the facts set forth in the answers in the suit at law somewhat more in detail, and among other things stated that "on the 20th day of June, 1887, said Fidelity Bank was closed by order of the bank examiner of the United States, and thereafter remained closed;" that "on June 27, 1887, the comptroller of the currency of the United States, having become satisfied that said Fidelity Bank was insolvent, appointed the appellee, David Armstrong, receiver of said bank to wind up its affairs, as provided under the authority given by the laws of the United States in such case made and provided, and said receiver qualified and entered upon the performance of his duties as such. On July 12, 1887, the charter of said Fidelity Bank was forfeited and said banking association dissolved by decree of the circuit court of the United States for the southern district of Ohio;" and that "said Fidelity Bank was in good credit at the time said discount was made, and was then thought by said Scott and said State Bank, with good reason for so thinking, to be solvent, but was in fact insolvent, and known so to be by said Harper," its managing officer, with whom the transaction had been had.

*The recovery of the judgment and pendency of the writ of error were also set forth, and it was averred "that said Scott and said State Bank were advised said circuit court sitting as a court of law had not jurisdiction to entertain and adjudge upon the set-off pleaded as aforesaid, and that relief should be sought in a court of equity." The tender was reiterated, and it was prayed, among other things, "that the collection of the judgment at law might be enjoined, and that the set-off might be established and allowed." The grounds of demurrer were:

"(1) That it appeared from the bill that the complainants were not entitled to the relief sought.

"(2) That the complainants had an adequate remedy at law for the relief sought, which had been already adjudicated."

The case on certificate is No. 1,025. The first, second, and fourth questions are as follows:

"(1) Where a national bank becomes insolvent, and its assets pass into the hands of

a receiver appointed by the comptroller of the currency, can a debtor of the bank set off against his indebtedness the amount of a claim he holds against the bank, supposing the debt due from the bank to have been payable at the time of its suspension, but that due to it to have been payable at a time subsequent thereto?

"(2) Has a circuit court of the United States sitting in Ohio as a court of law jurisdiction to entertain a defense of set-off as against an action brought by a receiver appointed by the comptroller of the currency to wind up the affairs of a national bank doing business in Ohio because of its insolvency, upon a note held by said bank, which note matured and became payable after the appointment of such receiver?"

"(4) Where a national bank doing business in Ohio in 1887 discounts a promissory note with the understanding that the proceeds of the discount are to remain on deposit with it subject to the checks of the borrower, and any balance of such deposit remaining undrawn at the maturity of the note is to be applied as a credit thereon, and where at the time such discount was made said bank was in fact insolvent, and known so to be by the officer through whom it acted in making such discount and agreement, but such bank was then in good credit, and thought by the borrower to be solvent, with good reason for so thinking, and where afterwards, the insolvency of said bank becoming known to the comptroller of the currency, that officer assumed charge of said bank, and afterwards, in June, 1887, but before the maturity of the note so discounted, appointed a receiver to close up the affairs of said bank, can such borrower, by suit in equity against such receiver, compel a set-off of the balance of said deposit account at the time of the suspension of said bank against the amount due upon such note at its maturity?"

The third, fifth, sixth, and seventh related to the effect of the judgment at law as a bar to the bill in equity.

Wm. Worthington and J. W. Warrington, for plaintiffs in error. John W. Herron, for defendant in error.

*506 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

*507 The Fidelity National Bank was closed by order of the bank examiner June 20th, the receiver was appointed June 27th, and the charter of the bank was forfeited and the bank dissolved by the decree of the circuit court, July 12, 1887. Title to its assets was necessarily thereby transferred to the receiver. Bank v. Colby, 21 Wall. 609.

The note in controversy did not mature until September 7, 1887, but the deposit to the credit of the Farmers' Bank was due for the purposes of suit upon the closing of the Fidelity Bank, as under such circumstances no demand was necessary. The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached.

The right to assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject.

In equity, relief was usually accorded, says Mr. Justice Story, (Eq. Jur. § 1435,) "where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time upon the existence of some debts due by the crediting party to the other. By 'mutual credit,' in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt, as a means of discharging it."

This definition is hardly broad enough to cover all the cases where, as the learned commentator concedes, there being a "connection between the demands, equity acts upon it, and allows a set-off under particular circumstances." Section 1434. Courts of equity frequently deviate from the strict rule of mutuality when the justice of the particular case requires it, and the ordinary rule is that, where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due upon the other. Blount v. Windley, 95 U. S. 173, 177.

*508 In Carr v. Hamilton, 129 U. S. 252, 262, 9 Sup. Ct. Rep. 295, it was decided that, when a life insurance company becomes insolvent and goes into liquidation, the amount due on an endowment policy, payable in any event at a fixed time, may, in settling the company's affairs, be set off against the amount due on the mortgage deed from the holder of the policy to the company by way of compensation; and Mr. Justice Bradley, delivering the opinion of the court, said: "We are inclined to the view that where the holder of a life insurance policy borrows money of his insurer, it will be presumed, prima facie, that he does so on the faith of the insurance and in the expectation of possibly meeting his own obligation to the company by that of the company to him, and that the case is one of mutual credits, and entitled to the privilege of compensation or set-off whenever the mutual liquidation of the demands is judicially decreed on the insolvency of the company." And the case of Scammon v. Kimball, 92 U. S. 362, was referred to, where it was held that a bank, having insurance in a company which was rendered insolvent by the Chicago fire of 1871, had a right to set off the amount of his insurance on property consumed against money of the company in his hands

on deposit, although the insurance was not a debt due at the time of the insolvency.

Indeed, natural justice would seem to require that where the transaction is such as to raise the presumption of an agreement for a set-off, it should be held that the equity that this should be done is superior to any subsequent equity not arising out of a purchase for value without notice.

In the case at bar the credits between the banks were reciprocal, and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credit, and the principle applicable to mutual credits applied. It was, therefore, the balance upon an adjustment of the accounts which was the debt, and the Farmers' Bank had the right, as against the receiver of the Fidelity Bank, although the note matured after the suspension of that bank, to set off the balance due upon its deposit account, unless the provisions of the national banking law were to the contrary. Whether this was so or not is the question on which the opinion of the district judge turned, and which was chiefly urged in argument upon our attention.

Sections 5234, 5236, and 5242 are the sections relied on. Section 5234 provides for the appointment of a receiver by the comptroller of the currency, and defines his duties as follows:

"Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

Section 5236 provides:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Section 5242 reads:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes,—shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court."

The argument is that these sections by implication forbid this set-off, because they require that after the redemption of the circulating notes has been fully provided for, the assets shall be ratably distributed among the creditors, and that no preferences given or suffered, in contemplation of or after committing the act of insolvency, shall stand. And it is insisted that the assets of the bank existing at the time of the act of insolvency include all its property, without regard to any existing liens thereon or set-offs thereto.

We do not regard this position as tenable. Undoubtedly any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges, or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank.

There is nothing new in this view of ratable distribution. As pointed out by counsel, the bankruptcy act of 13 Eliz. c. 7, contained no provision in any way directing a set-off or the striking of a balance, and by its second section commissioners in bankruptcy were to seize and appraise the lands, goods,

money, and chattels of the bankrupt, to sell the lands and chattels, "or otherwise to order the same for true satisfaction and payment of the said creditors, that is to say, to every of the said creditors a portion, rate and rate alike, according to the quantity of his or their debts." 4 Statutes of the Realm, pt. 1, 539. Yet, in the earliest reported decisions upon set-off, it was allowed under this statute. Anonymous, 1 Modern, 215, Curson v. African Co., 1 Vern. 121; Chapman v. Derby, 2 Vern. 117.

The succeeding statutes were but in recognition, in bankruptcy and otherwise, of the practice in chancery in the settlement of estates, and it may be said that in the distribution of the assets of insolvents under voluntary or statutory trusts for creditors the set-off of debts due has been universally conceded. The equity of equality among creditors is either found inapplicable to such set-offs or yields to their superior equity.

We are dealing in this case with an equitable set-off, but if on June 20th the note had matured, and each party had a cause of action capable of enforcement by suit at once, upon the argument for the receiver the legal set-off would be destroyed just as effectually as it is contended the equitable set-off is. We cannot believe congress intended such a result, or to destroy by implication any right vested at the time of the suspension of a national bank.

The state of case where the claim sought to be offset is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of these provisions. The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed. Bank v. Taylor, 56 Pa. St. 14, Colt v. Brown, 12 Gray, 233.

513 * Our conclusion is that this set-off should have been allowed, and this has heretofore been so held in well-considered cases. Snyder Sons' Co. v. Armstrong, 37 Fed. Rep. 18; Yardley v. Clothier, 49 Fed. Rep. 337; Armstrong v. Warner, 21 Wkly. Cin. Law Bul. 136; 27 Wkly. Cin. Law Bul. 100.

The Ohio Code of Civil Procedure abolishes the distinction between actions at law and suits in equity, requires all actions (with some exceptions) to be brought in the name of the real party in interest, and permits all defenses, counter-claims, and set-offs, whether formerly known as legal or equitable, to be set up therein. Rev. St. Ohio, §§ 4971, 4993, 5071.

Section 914 of the Revised Statutes, in providing that the practice, pleadings, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity as under the constitution matter of substance, as well as of form and procedure, and accordingly legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted. Bennett v. Butterworth, 11 How. 669; Thompson v. Railroad Cos., 6 Wall. 134; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. Rep. 712; Montejo v. Owen, 14 Blatchf. 324; La Mothe Manuf'g Co. v. National Tube Works Co., 15 Blatchf. 432.

We are of opinion that the circuit court had no power to grant the set-off in question in the suit at law. Judgment, however, was given in that case on the merits upon sustaining the demurrer to the defense of equitable set-off, and, as we think that the set-off should have been allowed, we do not feel called upon, having the judgment before us and under our control for affirmance, reversal, or modification, to sustain it upon a jurisdictional ground not passed upon by the circuit court.

We shall therefore reverse it without discussing the question whether, if affirmed, it would or would not be a bar to relief in the suit in equity. Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. Rep. 985; Ballard v. Searls, 130 U. S. 50, 9 Sup. Ct. Rep. 418. 513

It follows from what we have said that the first question certified from the United States circuit court of appeals for the sixth circuit must be answered in the affirmative and the second in the negative, and that the other questions propounded require no reply.

Judgment in No. 53 reversed and cause remanded to the circuit court with directions for further proceedings in conformity with this opinion.

In No. 1,025 the answers to the first and second questions above indicated will be certified.

(146 U. S. 570)

UNITED STATES v. SOUTHERN PAC. R. CO. et al., (two cases.)

(December 12, 1892.)

Nos. 921, 922.

PUBLIC LANDS—PACIFIC RAILROAD GRANTS—OVERLAPPING ROUTES—FORFEITURES.

1. By the act of July 27, 1866, § 3, (14 St. at Large, p. 292,) organizing the Atlantic & Pacific Railroad Company, congress, in the usual terms, granted lands to it to aid in the construction of a transcontinental railroad. In section 18 it authorized the Southern Pacific Railroad Company, a California corporation, to connect with such road near the California boundary, for a road to San Francisco, and to aid in the construction thereof declared that that company should have similar grants of land, subject to all the conditions and limitations of the grant to the former company. By the act of March 3, 1871, (16 St. at Large, p. 573,) the Texas Pacific Railroad was incorporated, grants of land were made to it, and in section 23 authority was also given to the

Southern Pacific Company to build a connecting road from a certain point on the Colorado river to San Francisco, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions," as were granted to it by the act incorporating the Atlantic & Pacific Company, provided that no rights of the latter company should be impaired. *Held*, that on the filing of the map of definite location by the Atlantic & Pacific Company on April 11, 1872, title to specific sections within its grant limits became vested in it by relation as of July 27, 1866, and, although the two routes crossed each other, no right in any of these sections at the point of intersection passed to the Southern Pacific Company under the act of 1871, whether its road was definitely located before or after the location of the Atlantic & Pacific road. 45 Fed. Rep. 596, and 46 Fed. Rep. 683, reversed. Mr. Justice Field and Mr. Justice Gray, dissenting.

2. The fact that the latter act, (March 3, 1871,) in terms, bestowed upon the Southern Pacific Company the same rights, grants, and privileges as it received under the act of 1866, did not operate to make the grant relate back to that date, so as to present the case of simultaneous grants of the same lands to different companies.

3. The Atlantic & Pacific Company claimed that under its charter it was authorized to build a road from the Colorado river to the Pacific ocean, and thence along the coast to San Francisco, and on April 11, 1872, it filed maps of definite location thereof in four sections. The first point where the route touched the Pacific was at San Buenaventura, but one of the sectional maps began at a point east of that place, passed through the same, and thence to San Miguel Mission, in the direction of San Francisco, so that San Buenaventura was not the terminus of any line of definite location from the Colorado westward. These maps, comprising the whole route to San Francisco, were at first approved by the interior department, but the matter was subsequently re-examined, and it was held that the company was only authorized to build to the Pacific, and the maps were thereupon approved as far as San Buenaventura. *Held*, that the filing of the maps in sections was immaterial, and that the original filing was valid as to the route between the Colorado and San Buenaventura.

4. The map filed in the office of the commissioner of the general land office by the Southern Pacific Company April 3, 1871, just one month after the grant to it, was not a map of definite location, whereby the grant would attach to specific sections, but was the map of the "general route," as appears from the fact that it is so called by the president of the company in his indorsement thereon, by the fact that the lands bordering said route were thereupon withdrawn from sale by the land office, and by the further fact that the minutes of the director's meetings show that the line of definite location through the region in question was only adopted by the company on April 10, 1874.

5. The Atlantic & Pacific Company having failed to build its road according to the conditions of the grant to it, congress, by the act of July 6, 1886, (24 St. at Large, p. 123,) declared its lands to be "forfeited and restored to the public domain." *Held*, that the Southern Pacific grant could not attach, upon this forfeiture, to the land along the overlapping routes; for the forfeiture was in terms for the benefit of the government, and it was apparently not the intention of congress, in passing the acts of 1866 and 1871, that any lands granted to the Atlantic and Pacific Company should go to the Southern Pacific Company in case the former grant failed to take effect; for in section 3 of the act of 1866, which by section 18 of that act and the act of 1871 became a condition of the Southern Pacific grant, it was provided that, if the route was found to lie upon the route of any other road whose construction was aided by a land grant from the government, "the amount of land heretofore granted shall be deducted from the amount granted by this act," and by section 9 it was declared that if any breach of the conditions was made by the Atlantic & Pacific Company, and allowed to continue for more than one year, "the United States may do any and all acts which may be needful and necessary to insure the speedy completion of the road," thus, in effect, declaring that it might use for that purpose all the lands granted. 45 Fed. Rep. 596, and 46 Fed. Rep. 683, reversed. Mr. Justice Field and Mr. Justice Gray, dissenting.

Appeals from the circuit court of the United States for the southern district of California.

Bills by the United States against the Southern Pacific Railroad Company and others to determine the adverse title to certain lands, and to restrain defendants from cutting timber thereon, or from hereafter setting up any claim of title thereto. Demurrers to the bills were overruled in the circuit court. 39 Fed. Rep. 132. A subsequent motion to modify this order was denied, and a motion for leave to file a second amended bill was granted. 40 Fed. Rep. 611. On final hearing decrees were entered for defendant, and the amended bills dismissed. 45 Fed. Rep. 596, 46 Fed. Rep. 683. The United States appealed. Reversed.

Statement by Mr. Justice BREWER:

On July 27, 1866, congress passed an act 571
granting lands to aid in the construction of a railroad from the states of Missouri and Arkansas to the Pacific coast. 14 St. p. 292. By the first section a corporation to be known as the Atlantic & Pacific Railroad Company was created, and authorized to construct and operate a road from a point near the town of Springfield, in the state of Missouri, westward through Albuquerque, "and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific." The third section making the land grant is, so far as touching any question in this case is concerned, as follows:

"Sec. 3. That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, 572
and whenever, on the line thereof, the United States have full title, *not reserved, sold,* granted, or otherwise appropriated, and free

from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, so far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

The eighteenth section was in these words:

"Sec. 18. That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad, herein provided for."

On March 3, 1871, congress passed an act (16 St. p. 573) to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, the twenty-third section of which act reads:

"That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

Under the act of July, 1866, the Atlantic & Pacific Company proceeded to construct a part of its road, but did not work west of the Colorado river, the east line of the state of California. It did, however, file maps of that which it claimed to be its line of definite location from the Colorado river to the Pacific ocean, which, on April 11, 1872, and August 15, 1872, were accepted and approved by the secretary of the interior. On July 6, 1886, congress passed this act of forfeiture:

"An act to forfeit the lands granted to the Atlantic & Pacific Railroad Company, etc. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all the lands, excepting the right of way, and the right, power, and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables, and water stations, heretofore granted to the Atlantic & Pacific Railroad Company by an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be, and the same are hereby, declared forfeited and restored to the public domain." 24 St. p. 123.

On April 3, 1871, just a month after the passage of the act of March 3d, the defendant the Southern Pacific Company filed a map of its route from Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad, and proceeded to construct its road, and finished the entire construction some time during the year 1878. Its road crossed the line, as located, of the Atlantic & Pacific Company. The lands in controversy in these cases are within the granted or place limits of both the Atlantic & Pacific and the Southern Pacific Companies at the place where these lines cross. As the Atlantic & Pacific Company did not construct its line, and as its rights were subsequently forfeited by congress, and as the Southern Pacific Company did construct its line, the latter claimed that by virtue of its grant and the construction of its road these lands became its property. It was to test this claim of title, and to restrain trespasses by the railroad company, and those claiming under it, on the lands, that these actions were brought in the circuit court of the United States for the southern district of California. In that court the decisions were in favor of the defendants, and decrees entered dismissing the bills, from which decrees the government brought its appeal to this court. See 39 Fed.

Rep. 132; 40 Fed. Rep. 611; 45 Fed. Rep. 596; 46 Fed. Rep. 683.

Asst. Atty. Gen. Maury and Jos. H. Call, for appellant. Jas. C. Carter, for appellees.

*592 *Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The question to be considered is not as to the validity of the grant to the Southern Pacific Company, but only as to its extent. It may be conceded that the company took title to lands generally along its line, from Tehachapa Pass to its junction with the Texas Pacific; and the contention of the government is here limited to those lands only which lie within the granted limits of both the Atlantic & Pacific and the Southern Pacific Companies, at the crossing of their lines, as definitely located. As it appears from the record that, at the time of the location of the former company's line, so many of the tracts within these overlapping limits had been taken up by pre-emption and homestead entries that the indemnity limits were not large enough to supply its deficiency, it is obvious that the land to be affected by this decision is of limited area in comparison with the large body of lands covered by the grant to the Southern Pacific.

The contention of the government is that these lands were not included within the grant to the Southern Pacific. Such contention implies no want of good faith on its *593 part. It is not attempting to take back or forfeit that which it has once granted. It is only seeking, a difference of opinion having arisen, an adjustment, a determination of the extent of its grant. Less than that could not be expected, more than that could not be asked of it.

The grants to both the Atlantic & Pacific and the Southern Pacific Companies were grants in præsenti. The language is, "there be, and hereby is, granted." The construction and effect of such words of grant have often been considered by this court. In the recent case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 5, 11 Sup. Ct. Rep. 389, Mr. Justice Field, speaking for the court, said: "As seen by the terms of the third section of the act, the grant is one in præsenti; that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is, 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in præsenti; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. Schulenberg v. Harriman, 21 Wall. 44, 60; Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733; Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 491; Railroad Co. v. Baldwin, 103 U. S. 426. The terms of present grant are in some cases qualified by *other* *594 portions of the granting act, as in the case of Rice v. Railroad Co., 1 Black, 358; but unless qualified they are to receive the interpretation mentioned."

In view of this late and clear declaration, it would be a waste of time to attempt a reexamination of the questions, or a restatement of the reasons which have established these as the settled rules of law in respect to land grants, and made it so that the old common-law rule as to the necessity of identification to a conveyance has not been controlling in determining the scope and effect of a congressional land grant. Yet reference may be had to the still later case of Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. Rep. 856, in which the doctrine that title passes by relation as of the date of the grant was held to exclude from a grant land which at the date of the act was held under a homestead claim, although the claim had been abandoned and the land restored to the public domain before the filing of the map of definite location. It may also not be amiss to notice the case of Schulenberg v. Harriman, 21 Wall. 44. In that case land had been granted to the state of Wisconsin to aid in the construction of a railroad. The language of the grant was like that in this: "There be, and is hereby, granted." A further provision was that if the road be not completed within 10 years "no further sales shall be made, and the lands unsold shall revert to the United States." The railroad was not completed within the time specified. Thereafter timber was cut and removed from these lands, and the question for consideration was as to the ownership of that timber. It was held that the timber was the property of the state; that by the grant title to the land passed to the state upon the location of the route; and that, though the road was not completed within the time specified, and though there was the provision that the unsold lands should revert, yet the title still remained in the state, held under a condition subsequent, and held until the government should take some steps to assert a forfeiture.

Applying these well-settled rules to the

cases at bar, there can be little difficulty in arriving at a conclusion. The grant to the *595 Atlantic & Pacific was made in 1866; to the Southern Pacific, in 1871. They were grants in præsenti. When maps of definite location were filed and approved, the grants severally took effect by relation as of the dates of the acts. The map of definite location of the Atlantic & Pacific Company's road along the lands in controversy was filed and approved on April 11, 1872. Then the specific tracts were designated, and to them the title of the Atlantic & Pacific attached as of July 27, 1866. If anything in the land laws of the United States can be considered as thoroughly settled by repeated decisions, it is this. It matters not when the map of definite location of the Southern Pacific was filed and approved,—whether before or after April 11, 1872; for when filed the grant could take effect by relation only as of March 3, 1871, and at that time, and for nearly five years theretofore, the title to these lands had been in the Atlantic & Pacific. It matters not that the act of 1871 in terms purports to bestow the same rights, grants, and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866. That merely defines the extent of the grant and the character of the rights and privileges. It does not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling contemporaneous grants, as established by St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 5 Sup. Ct. Rep. 334, and Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co., 117 U. S. 406, 6 Sup. Ct. Rep. 790. Even if congress had in terms expressed an intent to that effect in a subsequent act, it was not competent, by such legislation, to divest the rights already vested in the Atlantic & Pacific Company. So the case, in the best way of putting it for the defendant, is the case of two companies with conflicting grants, each of whose line of definite location has been approved by the land department. Unquestionably, the grant older in date takes the land.

Some stress seems to have been laid in the court below on the proviso to the act of 1871, which reads: "Provided, however, that this *596 section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." But the language of this proviso is negative and restrictive, and not affirmative and enlarging. It says, substantially, that nothing in the grant to the Southern Pacific shall affect or impair other grants. Surely the declaration that this grant does not affect some other grant does not make this grant any larger than it would have been without that declaration. It simply prevents it from having any effect which, but for the declaration, it might be supposed to have on something else. If without those words it could take nothing granted to the Atlantic & Pacific, a fortiori with them it takes nothing.

But it is urged by counsel for defendant that no map of definite location of line between the Colorado river and the Pacific ocean was ever filed by the Atlantic & Pacific or approved by the secretary of the interior. This contention is based upon these facts: The Atlantic & Pacific Company claimed that under its charter it was authorized to build a road from the Colorado river to the Pacific ocean, and thence along the coast up to San Francisco; and it filed maps thereof in four sections. San Buenaventura was the point where the westward line first touched the Pacific ocean. One of these maps was of that portion of the line extending from the western boundary of Los Angeles county, a point east of San Buenaventura, and through that place to San Miguel Mission, in the direction of San Francisco. In other words, San Buenaventura was not the terminus of any line of definite location from the Colorado river westward, whether shown by one or more maps, but only an intermediate point on one sectional map. When the four maps were filed, and in 1872, the land department, holding that the Atlantic & Pacific Company was authorized to build, not only from the Colorado river directly to the Pacific ocean, but also thence north to San Francisco, approved them as establishing the line of definite location. Subsequently, and when Mr. Justice Lamar was secretary of the interior, the matter was re-examined, and it was properly held that under the act of 1866 the grant to the Atlantic & Pacific was exhausted when its line reached the Pa- *597 cific ocean. San Buenaventura was therefore held to be the western terminus, and the location of the line approved to that point. The fact that its line was located, and maps filed thereof in sections, is immaterial. St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. Rep. 389. Indeed, all the transcontinental roads, it is believed, filed their maps of route in sections. So the question is whether the filing a map of definite location from the Colorado river through San Buenaventura to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado river to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is. Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the land department to designate the lands passing under the grant; and, when a map of such a line is filed, full information is given, and, so far as that line may legally extend, the law perfects the title. It surely cannot be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its rights to lands.

In this connection, reference may be had to the contention of the Southern Pacific Company, that it filed its map of definite location on April 3, 1871, more than a year before the filing of its map by the Atlantic & Pacific Company; that therefore its title then attached to these lands, the same as to any other lands along its line; and that, if such title was displaced by any subsequent filing of the Atlantic & Pacific Company's map, it was only conditionally displaced,—that is, displaced on condition that the Atlantic & Pacific Company should, by the final completion of its road, perfect its right thereto. But whatever title or right the Southern Pacific Company might acquire by a prior filing of its map was absolutely displaced when the Atlantic & Pacific Company's map was filed. Illy as it may accord with the common-law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of congress as laws as well as grants; that congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant; and therefore that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific. As said in the case of Missouri, K. & T. Ry. Co. v. Kansas P. Ry. Co., 97 U. S. 491, 497:

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that, where no such power exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

So now, whatever may have been the dates of filing by the respective companies, the case stands as though the lands granted to the Atlantic & Pacific had been identified in 1866, and title had then passed, and there never was a title of any kind vested in the Southern Pacific Company.

And whatever of plausibility there might be in this suggestion of counsel, based upon the old common-law rules in respect to the effect of a lack of identification upon attempted conveyances between private parties, it fails entirely because its map of definite location was not filed by the Southern Pacific Company until long after the filing by the Atlantic & Pacific Company. It is true that the bills of complaint in these cases alleged that "said Southern Pacific Railroad Company accepted said grant, and on April 3, 1871, did designate the line of its said road by a plat thereof, which it on that day filed in the office of the commissioner of the general land office, and did construct and complete said road in the manner and within the time prescribed, except that it did not connect with the Texas and Pacific Railroad, and on April 3, 1871, the odd sections of public land for thirty miles in width on each side of said route, to which the United States had full title, not reserved, sold, granted, appropriated, and free from all claims and rights, were by the department of the interior ordered withdrawn from sale and entry, and reserved."

This allegation apparently refers by its terms to the line of definite location, as provided for in section 3 of the act of July 27, 1866, inasmuch as it uses the words of that section, to wit, "at the time the line of said road is designated by a plat thereof," and, if this were a matter vital to the case, it might be necessary to require that the bill be amended to conform to the proof, though it may be remarked that the allegations in the last part of the clause quoted, in respect to the withdrawal of lands, seem to indicate that the map of general route, rather than that of definite location, was referred to.

The distinction between the line of definite location and the general route is well known. It was clearly pointed out in the case of Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100. The act under consideration in that case was that of July 2, 1864, (13 St. p. 365,) making a grant to the Northern Pacific Railroad Company. The third section of that act, as the third of this, made the grant, and provided for the line of definite location. Section 6 authorized the fixing of the general route, and its language in respect to that matter is the same as that of section 6 of the act before us. It reads: "That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry," etc. Referring to this matter, it was said in the opinion in that case, on pages 71 and 72, 119 U. S., and page 107, 7 Sup. Ct. Rep.. "The act of congress not only contemplates the filing by the company, in the office of the commissioner of the general land office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles

on each side, until the definite location is made. * * * The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the department, in such cases, to formally withdraw them."

As the act of July 27, 1866, the one before us, is in these respects exactly like that of the one before the court in that case, it must be held that here, as there, congress provided for two separate matters,—one the fixing of the general route, and the other the designation of the line of definite location; and an examination of the evidence shows that the map which was filed on April 3, 1871, was simply one of general route, and therefore did not work a designation of the tracts of land to which the Southern Pacific's grant attached. As the map was filed within one month after the grant, it might be inferred that there had not been sufficient time to fix the line of definite location, though of course it would be possible, as counsel suggests, that the company had surveyed the line in anticipation of the grant, and the matter of time would not be decisive. But turning to the map itself, a copy of which is in evidence, we find that this is the certificate made thereon by the Southern Pacific Company:

"To Hon. C. Delano, secretary of the interior, and Hon. Willis Drummond, commissioner of general land office: Please to take notice that this map is filed by the Southern Pacific Railroad Company, of California, in the office of the commissioner of the general land office, in the department of the interior, for the purpose of designating, by the heavy red line traced thereon, the general route of the line of railroad, as near as may be, from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, adopted by the said Southern Pacific Railroad Company in pursuance of the power and authority granted to said company by the 23d section of the act of congress of the United States, entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March 3, 1871, and in pursuance of the provisions of the act of July 27, 1866, referred to in said 23d section, and for the purpose of obtaining the benefit of the provisions of said acts of congress. Chas. Crocker, President Southern Pacific Railroad Company."

Not only that, but upon the filing of the map, and on April 21, 1871, the commissioner of the general land office sent to the receiver at Los Angeles a letter making a direction of withdrawal, in which he says, referring to this matter: "The company having filed a diagram designating the general route of said road, I herewith transmit a map showing thereon the line of route, as also the 20 and 30 mile limits of the grant, to the line of withdrawal for the Southern Pacific Railroad under the act of 1866, and you are hereby directed to withhold from sale or location, pre-emption, or homestead entry, all the odd-numbered sections falling within those limits."

Further, there is in evidence an exemplification of a diagram in the land office showing the limits of the grant to the Atlantic & Pacific Company, with the intersecting limits of the grant to the Southern Pacific Company, on which diagram appear two lines,—one traced in blue, and marked "Branch of the Southern Pacific Railroad," and the other in red, somewhat divergent therefrom, marked "Southern Pacific Railroad, Definite Location." Still further, on the minutes of the proceedings of meetings of the directors of the Southern Pacific road, held on April 10, September 8, and October 1, 1874, appear resolutions similar in their character, but having reference to different parts of the line between Tehachapa Pass and the Texas Pacific Railroad.

The one passed at the meeting on April 10, 1874, is in these words:

"Resolved, that the line of railroad as it has been surveyed and laid out on map marked 'AA,' and described as follows: Commencing at a point in the northwest quarter (N. W. ¼) of section, (3,) township two (2) north, range fifteen (15) west, San Bernardino base and meridian, and running thence in a southeasterly direction to the city of Los Angeles, and thence in an easterly direction to a point in the northeasterly quarter (N. E. ¼) of section twenty-seven, (27,) township one (1) south, range nine (9) west, San Bernardino base and meridian, being map and profile of section No. one, Southern Pacific Railroad and telegraph line authorized by the

twenty-third section of the Texas Pacific Railroad act, approved March 3d, 1871,—be, and the same is hereby, adopted as the route of said railroad between the points named. [Signed] J. L. Willcutt, Secty."

*So only at these late days was the line of definite location determined upon by the company. Of course, therefore, the map filed April 3, 1871, could not have been a map of that line, but it was, as it states, only of the general route, and there was then no designation of lands to which the Southern Pacific Company's title could attach.

On the other hand, the Atlantic & Pacific Company did file its maps of definite location. This appears from the certificates thereon. In the one covering the line along the lands in controversy, the chief engineer of the company certifies that E. N. Robinson was a deputy engineer, and that the latter, "as shown by his field notes, did actually survey and mark upon the ground, or cause to be surveyed and marked upon the ground, the line or route of the Atlantic & Pacific Railroad," etc., as delineated upon the map; and that his acts in the premises were duly approved and accepted on behalf of the company, by himself as chief engineer. And in the further official certificate of the company it is stated that the "map shows the line or route of the said Atlantic & Pacific Railroad in the county, * * * being a part of the line or route of said railroad, as definitely fixed in compliance with said acts of congress," etc. These maps were received and approved by the land department as maps of definite location. It follows that in fact the line of definite location of the Atlantic & Pacific was established, and maps thereof filed and approved, before any action in that respect was taken by the Southern Pacific Company. There never was a time, therefore, at which the grant of the Southern Pacific could be said to have attached to these lands; and the plausible argument based thereon, made by counsel in behalf of the Southern Pacific Company, falls to the ground.

Again, it is urged that, the grant to the Atlantic & Pacific having been forfeited, there is nothing now in the way of the Southern Pacific's grant attaching to these lands; that, in the interpretation of rights under land grants, regard has always been had by this court to the intention of congress; that it was the intention of congress that these lands should pass to some company to aid in the construction of a railroad, either the Atlantic & Pacific or the Southern Pacific; that they cannot now be applied to aid in the construction of the former company's road; and that, therefore, to carry into effect the intent of congress, they should be applied to aid in the construction of the latter company's line. We think this contention is erroneous, both as to the law and the intent of congress. It was held in the case of Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. Rep. 566, that where a homestead right had attached to a tract at the time of the definite location of the railway company's line, which homestead was afterwards abandoned, the tract was simply restored to the public domain, and did not pass to the railway company under its grant; that the grant only attached to lands which were the subject of grant at the time; and that the company had no interest in the question as to what afterwards became of a tract which was not public land at the time its grant became fixed. On page 644, 113 U. S., and page 573, 5 Sup. Ct. Rep., the court observed: "The right of the homestead having attached to the land, it was excepted out of the grant, as much as if in a deed it had been excluded from the conveyance by metes and bounds." The same doctrine was affirmed in Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. Rep. 112; Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. Rep. 362; Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. Rep. 856.

Neither can it fairly be said that it was the intent of congress that these lands should pass conditionally to the Southern Pacific Company. Good faith must be imputed to congress. It cannot be supposed that congress intended to give to the Southern Pacific Company that which it had already given to the Atlantic & Pacific Company. It knew that it had granted lands to the Atlantic & Pacific for a road to the Pacific ocean, and that that company was then engaged in constructing its road, and proceeding with as much rapidity as other Pacific companies had done. Within little over a month from the date of this grant to the Southern Pacific Company, and on April 20, 1871, it gave to the Atlantic & Pacific Company authority to issue bonds secured by a mortgage on its road, equipment, lands, franchises, privileges, etc. 17 St. p. 19. Congress, therefore, was expecting that the Atlantic & Pacific Company would construct its road, and, with this expectation, had no thought of giving to the Southern Pacific Company that which it had already given to the Atlantic & Pacific Company.

Further, as indicating the intent of congress, reference may be had to the first proviso to section 3 of the act of 1866, which, by the terms of section 18 of that act and the act of 1871, becomes one of the conditions of the grant to the Southern Pacific Company. That proviso is: "Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." That proviso may not be technically and strictly applicable to this case, in that a road crossing another may perhaps not be said to be found upon the line of such other road, or to be upon the same general line, yet the import of this proviso is clear, to the effect that congress was not only not intend-

ing to give to one company that which it had already given to another, but intended that lands previously granted should be definitely excepted from the later grant.

Not only that, but by section 9 of the original act it was provided "that if the Atlantic & Pacific make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." In other words, the intent of congress was that this road to the Pacific should be built; that if there was any delay on the part of the Atlantic & Pacific Company it might itself take all needful and necessary measures to accomplish the building, and to that end, of course, use all the lands it proposed to grant therefor. Can it be supposed that this purpose of congress was forgotten, or that its intent was changed, when it made the grant to the Southern Pacific, or that it had anything in contemplation other than that after the completion of the Atlantic & Pacific road, and the appropriation of the lands along its line to aid in that construction, the Southern Pacific Company might, if it saw fit to build a road from Tehachapa Pass to the Texas & Pacific Railroad, obtain the remainder of the lands along that line?

Indeed, the intent of congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands, and therefore grantable by congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. The question is asked, supposing the Atlantic & Pacific Company had never located its line west of the Colorado river, would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all lands along its line, and, if the grant to the Atlantic & Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company.

But that is a matter of result from the happening of something neither intended nor expected. While it may have been within the knowledge of congress, as among the possibilities, that result was not the purpose sought to be accomplished by this legislation. If any other than the general rule as to land grants had been intended, it is to be expected that such intention would have been clearly expressed. So when intent is to be considered, the question is whether congress intended, the title having once vested in the Atlantic & Pacific, that the Southern Pacific Company should stand waiting to take the lands at some future time, however distant, when the Atlantic & Pacific Company's title should fail.

Again, there can be no question, under the authorities heretofore cited, that if the act of forfeiture had not been passed by congress the Atlantic & Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific. It was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit.

Our conclusions, therefore, are that a valid and sufficient map of definite location of its route from the Colorado river to the Pacific ocean was filed by the Atlantic & Pacific Company, and approved by the secretary of the interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic & Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic & Pacific was retaken by the general government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands.

The decrees of the circuit court must be reversed, and the cases remanded, with instructions to enter decrees for the plaintiff for the relief sought.

Mr. Justice FIELD, dissenting.

I am not able to agree with the court in its judgment in these cases, or in the reasons offered in its support.

The cases were fully and elaborately considered by the circuit and district judges in the court below. 46 Fed. Rep. 683, 692. Their opinions are not only able and convincing, but lead to conclusions which seem to me consonant with justice and fair dealing. To my sense of right, there is something repugnant in any other conclusion, in view of the inducements held out by the government and the work done and the expenses incurred by the railroad company.

Congress desired to connect by a railway the states on the Mississippi with the Pacific coast, and for that purpose, by the act of July 27, 1866, created a corporation known as the Atlantic & Pacific Railroad Company, and gave it a grant of lands to aid in the construction of a railway between Springfield, in the state of Missouri, and the Pacific coast.

14 St. p. 292. The eighteenth section authorized the Southern Pacific Railroad Company, a corporation under the laws of California, to connect with the Atlantic & Pacific Railroad at such point near the boundary line of California which it should deem most suitable for a railroad line to San Francisco, and in consideration thereof, and to aid in its construction, gave it grants of lands similar to those which the Atlantic & Pacific Railroad Company had received, and subject to the same conditions and limitations.

On the 3d of March, 1871, congress passed an act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road; and, for the purpose of connecting that road with the city of San Francisco, it authorized, by its twenty-third section, the Southern Pacific Railroad Company to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, as those contained in the grant by the act of July 27, 1866, with a proviso "that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." On the 3d of April following, one month only after the passage of this act, the Southern Pacific Company designated the line of its road from Tehachapa Pass, by way of Los Angeles, to Ft. Yuma, on the Colorado river, on a map which it filed on that day in the office of the commissioner of the general land office. Afterwards the Southern Pacific was amalgamated or consolidated with other companies, the consolidated company being called the Southern Pacific Railroad Company. It then proceeded to build the railroad along the line designated from Tehachapa Pass, by way of Los Angeles, to the Colorado river, and completed the same within the time required by the act of congress. Its several sections were examined from time to time, and reported to the president of the United States, by commissioners appointed by him for that purpose; and the whole line was accepted by the president, and patents of the United States for the greater part of the lands thus earned were issued to the company. Ever since the completion and acceptance of the road the company has performed to the satisfaction of the government all the services, such as carrying the mails, transporting troops and supplies, in all respects as required by the act of congress; and the services have been accepted by the United States.

The Atlantic & Pacific Railroad Company, subsequently to this definite location of the Southern Pacific Company, and nearly a year after the construction of its road had been commenced, and on March 12, 1872, filed in the office of the secretary of the interior—not the office of the commissioner of the general land office—two maps of portions of the line of road in the state of California, and some time afterwards filed maps of other portions of its line, but it never constructed any portion of the road authorized to be constructed by it in the state of California; and for its failure in that respect congress, on July 6, 1886, passed an act declaring a forfeiture of the land in that state. The proposed line of the Atlantic & Pacific Railroad, which was never built, crosses the line of the road of the Southern Pacific Company, which was built as stated.

The present suit is brought to cancel the patents issued to the Southern Pacific Company, and, wherever there is any portion for which a patent has not been issued, to annul its alleged title.

The opinion of the majority of the court proceeds upon the ground that the grant to the Atlantic & Pacific Railroad Company, though the road in aid of which it was granted was never constructed, and the grant was subsequently forfeited by the United States, operated to divest the government of the fee of such lands so completely that the grant to the Southern Pacific Company to build its road could in no way be carried out; that its action, although taken with the approval of the officers of the government, and strictly in conformity with its grant, gave nothing whatever to that company; and that the United States are for that reason authorized to ask for the cancellation of the patents and the surrender of the lands granted, necessarily carrying with them the railroad and other works constructed by the company. And this is prayed in the face of the evident intention of congress that the Southern Pacific Company should have these identical lands, so far as the government had the right to grant them, as its reward in part for building the road.

It is not denied or doubted, as counsel well observed, that the Southern Pacific Company "promptly, completely, in good faith, and to the satisfaction of every department of the government having any concern with the matter, constructed and equipped its road, put it into operation, and placed in possession of the government every facility and advantage sought by it in making the grants, and has thus fully earned its entire reward; and yet, in the face of all this, the government, by these suits, seeks to wrest these lands from the company, not because it wishes to apply them to some purpose of its own to which they had been devoted prior to the grant, nor because it needs them in order to enable it to fulfill some prior engagement with other parties, but simply in order to restore them to the public domain, where they were at the time of the grant, in order that it may deal with them as its own absolute property, and as it pleases." The cases would thus seem to be destitute of any substantial equity.

The opinion assumes that the grant to the Atlantic & Pacific Company when its map of definite location was filed, though that was after the concession to the Southern Pacific

Company, took effect and vested an absolute title to the lands designated in the Atlantic & Pacific Company from its date, which could not be affected by any subsequent events which would make the concession to the Southern Pacific available. In support of *611 that view it cites several decisions of the court in which it has been held that similar railroad grants were grants in præsenti, and operated only upon lands at the time free from exceptions stated, such as lands to which a pre-emption or homestead right has attached, or have been reserved for special purposes, and that lands thus excepted or reserved do not fall under the operation of the grants if subsequently the cause of the original exception or reservation has ceased, but remain as public or ungranted lands.

Such grants have been treated as grants in præsenti in determining controversies between parties as to the date of their respective titles under the grants, or against conflicting grants. They are grants in præsenti, so as to cut off all intervening claims except such as are expressly named; and if the work, in aid of which the grants are made, is executed in accordance with their provisions, the title of the grantees will take effect as of their date, except as to specially reserved parcels. We do not disagree with the majority of the court on this point. It is true, also, that lands excepted or reserved from such grants at their date are not subsequently brought under their operation if the cause or purpose of their exception ceases. They remain ungranted lands. Such was the case of Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. Rep. 856. But it is evident that such exceptions and reservations of one grant do not apply and control a second grant, unless such second grant is specially stated to be within them. When the second grant in question in this case was made, all the rights which the United States had in the lands described therein passed to the Southern Pacific Company, subject only to the rights specially reserved of the first grantee, and released of all restrictions upon their use except as thus designated. Until something was done under the first grant towards its execution, it was competent for congress to give effect to other grants, and to limit the extent of their subordination.

Neither grants in præsenti nor grants with special exceptions or reservations have ever been held, that I am aware of, to prohibit a *612 second grant of the same lands, subject to the condition that it shall not affect or impair any rights under the elder grants. There can be no circumstances under which such second conditional grant may not be made. Whether it will ever become operative, and pass the title to the lands described, will depend upon circumstances which cannot be stated with certainty in advance. Many events may arise to defeat or limit the operation of the first grant. It may be forfeited, or portions of its lands may be surrendered, and new legislation, taken in execution of the reserved power to alter, amend, or repeal the act making the grant, may change the whole condition of the lands.

From these views it would seem that the questions arising in this case should not be difficult of solution. Before anything was done under the grant to the Atlantic & Pacific Railroad Company, even to indicate the route of the road it would construct, authority was issued by the government to the Southern Pacific Company to build a road north from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas & Pacific Railroad, at or near the Colorado river, with a proviso, however, that the authority thus given should not in any respect impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or of any other railroad. Congress had power to confer such authority and to make a grant for its execution. Surely congress can make a grant of lands which it owns or claims to own at any time, if it annex a condition that the grant shall not affect or impair the rights of a previous grantee. It would, as it seems to me, be an extravagant and utterly unwarranted assertion to say that congress, having made a grant for a railroad to run in one direction, is thereby prohibited from making another grant for a railroad to run in a different direction, if a condition is annexed that the second grant shall not affect or impair the rights of the first grantee. The questions, and the only questions, for consideration in such a case would be—First, what are the rights thus reserved to which the second grant is subordinate? and, second, have they been affected or impaired by the later grant? The previous grant to the Atlantic & Pacific Railroad Company, made *613 six years before, did not stand in the way of congress making the conditional concession to the Southern Pacific. If unlimited, it would have affected the extent of the grant to the first company, but a limitation upon its operation was placed by the proviso. No line of railroad had been then defined or marked by the Atlantic & Pacific Railroad Company. It might, so far as congress saw, have selected a different route from the one it did afterwards select. Congress waited six years for that company to make a selection before it made the concession to the Southern Pacific Company. The company was not bound to wait indefinitely for the years to elapse before moving in the enterprise it was to undertake, and to further which congress had afforded assistance. The condition attached to the concession was not an exception from the grant of any lands that the Atlantic & Pacific Railroad Company might claim under its grant without performing its conditions. It merely rendered the concession to the Southern Pacific Company subordinate and subject to any rights that the Atlantic & Pacific Company may then have acquired or might thereafter acquire under its grant, upon the performance of its conditions. What, then, were those

rights, present or prospective, which were reserved to the Atlantic & Pacific Company? Plainly, they were the right to construct a railroad and telegraph to the Pacific coast, from the Colorado river, by the most practicable route, with a right of way 200 feet in width, and to use certain lands granted for that purpose to aid in their construction, and, when constructed, the right to operate the road and use the telegraph line. They were permissive rights, and not compulsory. Have they been affected or impaired by the concession to the Southern Pacific Company? In no respect whatever. They were affected and impaired by the company's failure to perform the conditions annexed to its grant, and in no other way, until its forfeiture was declared. It never did anything towards a compliance with its conditions except to file, in detached parts, what it termed a map of the location of its road, six years after the date of the grant and one year after the Southern Pacific Company had located its road, under its concession, and commenced its construction. Its rights, whether present or prospective, were never invoked, and in consequence nothing was ever obtained in virtue of them. The building of another road in another direction by the Southern Pacific Company under its concession did not, therefore, affect or impair any rights of the Atlantic & Pacific, as none were ever claimed or exercised by it. Had the company performed the conditions of its grant, and exercised its rights, it would have taken the lands under the grant against any possible pretension of the Southern Pacific Company; but having abandoned all such rights, by simply refusing to do anything, the Southern Pacific Company rightly proceeded with its work and constructed its road. The grant to it was a full conveyance of all the rights of the United States, free from all restraints except as specially designated, and the rights then reserved were never subsequently affected or impaired by the Southern Pacific Company, and they were lost entirely by the forfeiture of the grant.

The case, in a nutshell, is this: The grant to the Atlantic & Pacific Railroad Company was indeed prior in point of time and of right, and the grant to the Southern Pacific Railroad Company was subordinate to the prior grant. But, when the prior grant was forfeited by the failure of the Atlantic & Pacific Railroad Company to perform its conditions, that grant fell off, and the underlying grant to the Southern Pacific Railroad Company, all the conditions of which had been performed, remained in full force and effect.

I consider the principle involved in these cases as one of great importance, more so than the value of the property, although that runs into millions of dollars expended by the company upon the encouragement of the government. But it is infinitely more important that it should be established that the government and its officers are bound by the same principles of justice in their dealings which are held to govern the conduct of individuals.

In my opinion the judgment of the court below should be affirmed, and I am authorized to state that Mr. Justice GRAY concurs with me in this dissent.

(146 U. S. 615)

UNITED STATES v. COLTON MARBLE & LIME CO. et al.

SAME v. SOUTHERN PAC. R. CO. et al.

(December 12, 1892.)

Nos. 862, 863.

PUBLIC LANDS — PACIFIC RAILROAD GRANTS — OVERLAPPING ROUTES—INDEMNITY LANDS.

The grant of lands to the Southern Pacific Railroad Company, as expressed in section 23 of the act of March 3, 1871, (16 St. at Large, p. 573,) was with the proviso that "this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other company." *Held*, that this provision excepted out of the grant to the Southern Pacific Company lands lying within its grant limits and also falling within the indemnity limits of the Atlantic & Pacific Company, at a place where the routes intersected. 39 Fed Rep. 132, and 46 Fed. Rep. 683, reversed. Mr. Justice Field and Mr. Justice Gray, dissenting.

Appeals from the circuit court of the United States for the southern district of California.

These were two suits brought by the United States,— in the one case against the Colton Marble & Lime Company, O. T. Dyer, ——— Archibald, and W. S. Wilson, and in the other against the Southern Pacific Railroad Company and others. Decrees were entered dismissing the bills, and the United States appealed. Reversed.

Statement by Mr. Justice BREWER:

These cases are similar in many respects to those of U. S. v. Railroad Co., 13 Sup. Ct. Rep. 152, just decided. The lands involved are within the granted limits of the Southern Pacific Railroad Company and the indemnity limits of the Atlantic & Pacific Railroad Company; and the contention on the part of the government is that, because they were within such indemnity limits, they were not of the lands granted, or intended to be granted, to the Southern Pacific Company. In the first, the defendants claim under the Southern Pacific Railroad Company, and are charged to be committing trespasses upon the lands, and the relief sought is, as in the two prior cases, to quiet the title of the plaintiff, and to restrain the trespasses. In the second, a patent has been issued, and the legal title conveyed to the railroad company, and the relief sought is the cancellation of that patent, and a decree establishing the title of the government. In this case there is a further contention on the part of the government, and that is that the lands were sub judice at the time of the definite location of the Southern Pacific Company's road, inasmuch as they were within the exterior boundaries of a Mexican land grant known as the "Rancho San Jose," as those boundaries were marked on the surface of the ground

by one of two official surveys, the accuracy of neither of which had then been determined. Decrees were entered below in favor of the defendants, dismissing the bills, from which decrees the government has appealed to this court. See 39 Fed. Rep. 132; 40 Fed. Rep. 611; 45 Fed. Rep. 596; 46 Fed. Rep. 683.

Asst. Atty. Gen. Maury and Jos. H. Call, for appellant. James C. Carter, G. Wiley Wells, J. A. Anderson, and Geo. W. Merrill, for appellees.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The ordinary rule with respect to lands within indemnity limits is that no title passes until selection. Where, as here, the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, it has been held, in a contest between two railroad companies, that no formal selection was necessary to give them to the one having the older grant, as against the other company, (St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. Rep. 389;) and, if the Atlantic & Pacific Company had constructed its road, it would be difficult, in the light of that decision, to avoid the conclusion that all the lands within the indemnity limits passed to that company. But this case does not rest upon that proposition. One thing which distinguishes the grant of 1871 to the Southern Pacific Railroad Company from most, if not all other, land grants is the proviso somewhat considered in the opinion in the former cases, and which reads: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

What is the significance of this proviso? Without it, certainly, the Southern Pacific, its grant being of later date, would be postponed to the Atlantic & Pacific; and, on the filing by each company of a map of definite location, the title to the lands within the granted limits would vest in the Atlantic & Pacific Company, to the total and absolute exclusion of all claims on the part of the Southern Pacific. The proviso, therefore, was without significance in respect to such lands. It in no manner strengthened the title of the Atlantic & Pacific, and took nothing away from the Southern Pacific. Yet it cannot be supposed that this proviso was meaningless, and that congress intended nothing by it. Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right. As it could have no effect upon the lands within the granted limits, it must have been intended to have some effect upon those within the indemnity limits, they being the only lands upon which it could operate.

What were the prospective rights of the Atlantic & Pacific Company? Of course, it could not be known at the time of the passage of the later act exactly where the lines of the two companies would be located, and where the point of crossing would be. Neither could it then be known that there would be any deficiency in the granted lands at the point of crossing, or that if such deficiency existed it would require all the indemnity lands to make good the loss. It might well be assumed that very likely the Atlantic & Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. That right of selection was a prospective right, and, if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits. Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless. Obviously, the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts. In fact, every withdrawal of lands from the aggregate of those from which selection could be made would more or less impair the value of the right of selection. The only way in which force can be given to this proviso is to hold that the indemnity lands of the Atlantic & Pacific were exempted from the grant to the Southern Pacific; for, if not exempted, the former company's prospective right of selection would be to that extent impaired. It must be borne in mind that these lands were in the granted limits of the Southern Pacific, and that they are not lands in respect to which that company would have a right of selection, and might defer the exercise of that right until such time as suited it. Being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time. Everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic & Pacific Company to make a selection. That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific. Hence it follows that the title to none of these indemnity lands passed, or could pass, to the Southern Pacific Company.

In this aspect of the case, it becomes unnecessary to inquire whether the lands described in the second case were sub judice or not. If they were sub judice, they could not

pass to either company; and, if they were not, the Atlantic & Pacific's prospective right of selection prevented the passing of title to the Southern Pacific.

The decrees in both cases will be reversed, and the cases remanded, with instructions to enter decrees in favor of the government for the relief sought.

Mr. Justice FIELD, dissenting.

In these cases I dissent from the judgment of the court, equally as from that in the cases just decided. 13 Sup. Ct. Rep. 152. It is now held that not only the lands within the granted limits of the Atlantic & Pacific Railroad Company passed to that company, beyond the power of congress to assign any portion of them for the construction of the Southern Pacific Company, although no work was done by the former corporation, and the grant to it was forfeited, but the indemnity lands, also. The objections urged to the judgment in the other cases just decided possess greater force in these cases, for indemnity lands do not vest in any company until they are selected. Even if the Atlantic & Pacific Railroad Company had built the road, it would have had no indemnity lands until selection was made. Much less can it be held that title vested in that company before any attempt was made to exhaust the lands within the granted limits.

I think the judgment in these cases should also be affirmed, and I am authorized to state that Mr. Justice GRAY concurs with me in this dissent.

(146 U. S. 517)

NATIONAL TUBE WORKS CO. v. BALLOU.

(December 19, 1892.)

No. 70.

CREDITOR'S BILL—FOREIGN JUDGMENT—ENFORCEMENT OF STOCKHOLDER'S LIABILITY.

A creditor's bill, founded on a judgment recovered in Connecticut against a corporation of that state cannot be maintained in a United States circuit court in New York against a citizen of that state to enforce his liability on an unpaid subscription to the stock of the corporation, when no judgment has been obtained or execution issued against the corporation within the latter state, and no allegations are made showing that it is impossible to obtain such judgment. 42 Fed. Rep. 749, affirmed.

Appeal from the circuit court of the United States for the southern district of New York.

Suit by the National Tube Works Company against George William Ballou for an accounting of the amount unpaid on a subscription by defendant to the stock of the Wiley Construction Company, and to have the same applied to a judgment recovered by plaintiff against said Wiley Construction Company. A demurrer to the bill was sustained by the circuit court. 42 Fed. Rep. 749. Plaintiff appeals. Affirmed.

W. J. Curtis, for appellant.

Thomas Thacher, for appellee.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the circuit court of the United States for the southern district of New York on November 1, 1888, by the National Tube Works Company, a Massachusetts corporation, against George William Ballou, a citizen of New York.

The bill sets forth that the Wiley Construction Company was a corporation organized in February, 1880, under the joint-stock laws of Connecticut, and located in Hartford, in that state. The bill is filed on behalf of the plaintiff and such other creditors of the Wiley Company as may come in and be made parties to the suit and contribute to the expenses thereof. It sets forth that the capital stock of the Wiley Company was fixed at $500,000, divided into 5,000 shares of $100 each; that all of the stock was subscribed for; that the defendant subscribed and agreed to pay at par for 2,499 shares; that he had never paid in anything on account of such subscription; that immediately after the organization of the company it proceeded to carry on its business, and continued to do so until about July, 1883, the defendant and the other subscribers to the stock taking an active part in the management, and acting as stockholders and directors of the company; that between May, 1880, and August, 1882, the plaintiff sold and delivered to it merchandise at the agreed price of $78,955.49; that it had paid $40,789.51 on account thereof; that on March 10, 1883, the Wiley Company, being then indebted to the plaintiff in $49,828.37, gave to the plaintiff its promissory note for that amount, with interest; that no part of the note had been paid; that in October, 1886, in the superior court for the county of Hartford, in the state of Connecticut, the plaintiff recovered a judgment on said note against the Wiley Company for $52,041.51, damages and costs, that company having been duly served with process, and having appeared in the action; that in June, 1887, the judgment was, on appeal, affirmed by the supreme court of errors of Connecticut, and is still in force; that execution was issued out of said superior court against the property of the Wiley Company to the sheriff of Hartford county, wherein the principal office of said company was situated, and had been returned unsatisfied; that the Wiley Company had no fund or assets wherewith to pay the claim of the plaintiff, and that the whole of the $52,041.51 was still due to it.

The prayer of the bill is that an accounting be had of the amount unpaid on the stock subscription of the defendant in the Wiley Company, and that he be decreed to pay so much of the balance found unpaid on his subscription as will be sufficient to pay such debts of the Wiley Company as may be proved in this suit, including the said judgment in favor of the plaintiff. The Wiley Company is not made a party to the suit.

There is not in the bill any statement that the plaintiff has recovered any judgment

against the Connecticut corporation in any court of the state of New York, or in any court of the United States within the state of New York, or issued an execution within the state of New York to collect its claim against the Wiley Company; nor does the plaintiff allege in its bill any reason why it has not done so, or why it cannot do so.

The defendant demurred to the bill, and set forth as ground of demurrer that the plaintiff did not by its bill make such a case as entitled it in a court of equity to any discovery or relief touching any of the matters contained in the bill, and also that it appeared by the bill that the plaintiff was not entitled to the discovery or relief prayed for. The case was heard before Judge Wallace in the circuit court, and a decree was entered, dismissing the bill, with costs. The plaintiff has appealed to this court.

*522 *In his opinion in the case Judge Wallace states that he sustains the demurrer on the authority of his decisions in Claflin v. McDermott, 20 Blatchf. 522, 12 Fed. Rep. 375, and Walser v. Seligman, 21 Blatchf. 130, 13 Fed. Rep. 415; that he feels free to say that he doubts whether those cases did not adopt too technical a view of the right of a creditor whose judgment has been obtained against his debtor at the place of the latter's domicile, and whose execution has been issued there and returned unsatisfied, to maintain a creditor's bill in a court of another state; and that he may be permitted to express the hope that the present case may be taken to this court for review.

In Claflin v. McDermott, supra, it was held that a creditor's bill, founded on a judgment recovered against a debtor in a state court in California, would not lie in a circuit court of the United States in New York, to set aside a fraudulent transfer of personal property made by the debtor in California, by means of collusive judgments and sales under executions issued thereon, no judgment having been obtained or execution issued in such circuit court or in any state court of New York. The case of Tarbell v. Griggs, 3 Paige, 207, was cited as authority, where the court of chancery of the state of New York refused jurisdiction of a creditor's bill filed to obtain satisfaction of a judgment rendered in the circuit court of the United States for the southern district of New York, and upon which an execution had been returned unsatisfied, the judgment being treated as a foreign judgment, and as standing on the same footing with the judgments of a court of another state. The principle invoked was that the plaintiff's remedy at law had not been exhausted by the issuing and return of an execution on a foreign judgment, and McElmoyle v. Cohen, 13 Pet. 312, was referred to as authority.

In Walser v. Seligman, supra, creditors and stockholders of a corporation organized under the laws of Missouri and Kansas brought a suit in equity in the circuit court of the United States for the southern district of New York against certain persons to enforce the liability of the latter as holders of a number of shares of unpaid capital stock of the corporation, without the corporation being made a party to the suit, and without the plaintiffs being judgment creditors elsewhere than in Missouri; and the court held that, the plaintiffs being merely creditors at large, and not having exhausted their remedy at law in New York, and the Missouri judgments not having in New York the force of domestic judgments, except for the purpose of evidence, the bill would not lie.

The bill in the present case is defective in that respect. It alleges only the recovery of a judgment against the corporation in Connecticut, and the issuing and return there of an execution unsatisfied. It does not allege any judgment in New York, or any effort to obtain one, nor does it aver that it is impossible to obtain one. It alleges merely that the corporation has no fund or assets wherewith to pay the claim of the plaintiff.

Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction. Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. Rep. 397; Webster v. Clark, 25 Me. 313; Parish v. Lewis, Freem. Ch. 299; Brinkerhoff v. Brown, 4 Johns. Ch. 671; Dunlevy v. Tallmadge, 32 N. Y. 457; Terry v. Anderson, 95 U. S. 628; Smith v. Railroad Co., 99 U. S. 398, 401; Hawkins v. Glenn, 131 U. S. 319, 334, 9 Sup. Ct. Rep. 739; McLure v. Benceni, 2 Ired. Eq. 513, 519; Farned v. Harris, 11 Smedes & M. 366, 371, 372; Patterson v. Lynde, 112 Ill. 196.

Decree affirmed.

(146 U. S. 524)

ROYER v. COUPE et al.

(December 19, 1892.)

No. 82.

PATENTS FOR INVENTIONS—EXTENT OF CLAIM—REJECTION BY PATENT OFFICE.

The claim in letters patent No. 149,954, issued April 21, 1874, to Herman Royer, is "the treatment of the prepared rawhide in the manner and for the purposes set forth." The treatment described is removing the hair by a sweating process, drying, moistening, and fulling, and other processes common in the treatment of hides, together with the application of a certain mixture of tallow, wood tar, and resin, and a second fulling process. The specification states that the patentee avoids the use of lime, acid, or alkali, and that the use of a preparation substantially like that described is necessary to make the hide useful and durable for belting. The rejection by the patent office of claims covering only the fulling operation and the use of the preserving mixture, for want of novelty, was acquiesced in by the patentee. *Held*, that the claim was to be construed as covering the whole process, and was not infringed by a process wherein the hair was removed by lime. 38 Fed. Rep. 113, affirmed.

Appeal from the circuit court of the United States for the district of Massachusetts. Affirmed.

M. A. Wheaton, for appellant.
W. H. Thurston, for appellees.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the circuit court of the United States for the district of Massachusetts, by Herman Royer against William Coupe and Edwin A. Burgess, copartners under the name of William Coupe & Co., founded on the infringement of letters patent No. 149,954, granted April 21, 1874, to the plaintiff, as inventor, for an "improvement in the modes of preparing rawhide for belting," on an application filed December 31, 1872.

The specification of the patent is as follows: "After the removal of the hair from the hide by means of sweating,—a process familiar to every tanner,—the hide is dried perfectly hard. Then it is inserted in water for ten to fifteen minutes,—long enough to lose its extreme stiffness. In this condition the process of fulling is commenced. This may be done in a machine constructed for this purpose, and patented by me May 12, 1868, under No. 77,920. Before the hide is passed into the machine the second time it is stuffed with a mixture of twenty parts tallow, two parts wood tar, and one part resin. About two pounds of this mixture is put on a steer hide in a warm liquid state with a brush. After the hide leaves the machine the second time, it is ready for the next operation. It is then moistened with water four or five times during the day. The next day it is stretched and cut into pieces suitable for belting. For purposes of lacing the thinnest hides are selected; and, after they have gone through the same mode of treatment as hides for belting, they are shaved, oiled, and hung up to get perfectly dry, when the hide is cut into strings. In order to more fully understand my mode of preparing hides, I avoid the use of lime, acid, and alkali; for, just to the amount a hide is impregnated with such substances, it suffers in its tensile strength and toughness; a slow but constant dissolution is going on with hides so impregnated. If the effects of the aforesaid substances are in some way neutralized, which must be a chemical one, the hide suffers again in this process. The power to resist abrasion, and the extreme tensile strength for which pure rawhide is noted, are irreparably lost. [I am aware that hides and skins have been prepared by a fulling or bending operation to render them pliable, but this mode alone does not answer for the preparation of machine belts and lacing. It is necessary to make use of a preparation substantially such as before described to render the rawhide fit for use and durable.] The tallow has the effect of imparting a high degree of elasticity, and keeps the moisture. The wood tar prevents dogs, cats, mice, vermin, etc., from attacking the hide, at the same time causing the tallow to enter the hide quickly and thoroughly. The resin gives the belting a certain solidity and glossy appearance, and assists also in preventing animals and vermin from attacking the belting. Belts and lacing made of such prepared hide are in all respects stronger, more lasting, and cheaper than those made from common leather."

The claim is as follows: "The treatment of the prepared rawhide in the manner and for the purposes set forth."

The bill of complaint is in the usual form. The answer sets up want of novelty and noninfringement. It also avers that the process set forth in the patent is composed of a series of steps, consisting of (1) the removal of the hair from the hide by means of sweating; (2) drying the hide perfectly hard; (3) then softening the hide slightly by soaking in water; (4) fulling the hide; (5) stuffing the hide with 20 parts of tallow, 2 parts of wood tar, and 1 part of resin; (6) fulling the hide a second time; (7) repeated moistenings with water; and (8) stretching and cutting into belting. It avers that the supposed importance of the plaintiff's alleged invention is the avoidance of the use of lime, acid, or alkali in the treatment of the hides, and the consequent avoidance of the use of any chemical agents to neutralize the action of such lime, acid, or alkali; that the process employed by the defendants is substantially different from that of the patent; that the process of removing hair by sweating the hide was known and practiced long before the supposed invention of the plaintiff; that the process of fulling hides is indispensable, and has been practiced ever since the art of tanning and curing hides was known; that the process of stuffing hides with tallow and greasy substances, and with various admixtures of resinous substances, tallow, and other materials, had been known from the earliest days of the art of manufacturing leather; and that a patent was granted to the defendant William Coupe, (No. 182,106,) September 12, 1876, for an improvement in process for the manufacture of rawhide, under which the defendants carry on their manufacture, and make a different product from that produced by the process of the plaintiff's patent. Issue was joined, proofs were taken, and the circuit court entered a decree in March, 1889, dismissing the bill, with costs. The plaintiff has appealed to this court.

The opinion of the circuit court is reported in 38 Fed. Rep. 113. It held that the process of the patent consisted of the series of eight steps above set forth in the answer. It considered the questions whether the claim was intended to cover all, or only a part, of the eight successive steps, and whether it meant the method of preparing rawhide in the manner set forth, or whether the words in the claim, "prepared rawhide," signified a hide which had had been subjected to one or more

of the eight steps, and the claim was limited to the subsequent steps of the process. The court went on to say that that inquiry was important, because, if the claim covered all of the eight steps, the defendants did not infringe it, for the reason that they did not use the first step of the process, namely, the removal of the hair from the hide by means of sweating; they making use, for that purpose, of the liming process, which the plaintiff stated in his specification must be avoided. The court held that the claim covered, and was intended to cover, the whole treatment described by the plaintiff, and not a part of that treatment; that the claim meant the same as if it read "the method of preparing rawhide in the manner set forth;" and that the words "prepared rawhide" meant the finished product, and not the hides subjected to one or more of the steps of the process described. The court then referred to the contents of the file wrapper of the case in the patent office, as throwing light upon the real scope of the patent.

The specification, as originally filed, contained, in its descriptive part, substantially the same description as the patent when issued; but the claim originally made was in these words: "The use of a mixture of wood tar, resin, and tallow, applied to hides *528 made into leather by a mechanical process, substantially as and for the purpose herein set forth." The application was rejected January 4, 1873, on the ground that the combination of ingredients set forth—that is, wood tar, resin, and tallow—had been applied to leather for similar purposes, as shown in a patent and a rejected application referred to. On June 10, 1873, the specification was amended by inserting the two sentences which are contained in brackets in the specification as hereinbefore set forth, the claim was erased, and the following two claims were inserted in its place: "First, the mode herein specified of preparing rawhides for machine belts, lacing, or ropes by the fulling or bending operation and the preserving mixture, substantially as set forth; second, a belt or rope of rawhide prepared in the manner and with the material specified, as a new article of manufacture." The application was again rejected, June 16, 1873, in a communication from the patent office, which stated that the only feature of novelty presented which was not embracad in a patent granted May 12, 1868, to Herman Royer and Louis Royer, No. 77,920, for an improved machine for treating hides, was the addition to the compound of tar and resin, as ingredients for preserving leather, and reference was made to another prior patent, granted to another person, as embracing such ingredients; and it was stated that the use of the compound claimed by the plaintiff in the manufacturing process would not leave a distinguishable feature in the article, when placed upon the market.

The patent of May 12, 1868, thus referred to, is the same patent of that date mentioned in the specification of the patent now in suit. The specification of No. 77,920 says: "The nature of our invention is to provide an improved machine for converting rawhides into leather, of that class which is used for belting, lacings, and other purposes, where it is necessary to preserve the native strength and toughness without destroying or impairing the natural fibres or grain of the leather. In order to accomplish our object, we employ a machine mounted on a suitable frame, having a vertical slotted shaft, to which is attached, at its base, a beveled wheel between two beveled pinions upon a horizontal shaft. *529 *Around the vertical shaft is placed a row of vertical pins or rollers, held in place by upper and lower rings, one of which is firmly bolted to the frame. An iron weight or press is employed for crowding the coil of hide down after it has received the forward and back action around the shaft." The specification describes the operation of the machine as being: That the end of the rawhide, after it has been deprived of the hair, is introduced into a slot in the vertical shaft, and set screws are turned against it, when motion is imparted to the machine, and the hide is wound tightly around the shaft; that when this is accomplished, and sufficient time has elapsed, the shaft is slowly reversed by throwing a second beveled pinion into gear, when the hide commences to uncoil or double back from the shaft, which, with the folding back and pressing against vertical pins or rollers, produces the desired result of stretching in one way, and compressing, corrugating, or roughing in the opposite direction. The specification further says: "The hide so operated upon is then treated with oil and tallow in the usual way." The process of the machine of patent No. 77,920 is called in the specification of No. 149,954 "the process of fulling."

In a communication from Royer's attorney to the patent office, of October 9, 1873, it is stated that the material prepared according to the plan of Royer, set forth in his application for No. 149,954, is a superior article; that the use of tallow and tar upon leather was old, but rawhide fulled was not leather; and that the materials named acted with the rawhide very differently from what they did with leather. The same communication erased the second claim introduced June 10, 1873, namely: "Second, a belt or rope of rawhide prepared in the manner and with the materials specified, as a new article of manufacture." In response to that letter, the patent office, on October 17, 1873, informed Royer that independently of the process set forth in patent No. 77,920, "for which protection has already been granted," a claim for the treatment of rawhide in the manner described in the specification then pending might receive favorable consideration, and *530 that the body of the specification should be amended with the view of presenting a claim of the character referred to. On the 29th of October, 1873, Royer amended his specifica-

tion in certain particulars, erased the remaining claim, and inserted the claim contained in the patent as issued. On the 12th of November, 1873, in compliance with the suggestion of the patent office, Royer further amended his specification, and the patent was issued: the final fee not having been paid until April 16, 1874.

The opinion of the circuit court states that on June 10, 1873, as appeared by the file wrapper and contents, the plaintiff sought to limit his claim to a method of preparing rawhide for belting by the fulling and bending operation and the preserving mixture; that that claim was rejected, and he acquiesced in the decision; that the patent office intimated that a claim for the treatment of rawhide in the mode described in this patent might be allowed; that the plaintiff accordingly amended his specification and claim in conformity with that suggestion, and the patent was consequently granted; that in view of the prior state of the art the plaintiff was not entitled to a broad claim for a process which should embrace only the fulling and bending operation, and the preserving mixture composed of tallow, tar, and resin, for both of these things, as applied to converting hides into leather, were old; that it followed that the only subject-matter of invention which the plaintiff could properly claim was the whole process described in this patent, comprising the different steps therein set forth; that the most that could be said of the plaintiff's patent was that it was for an improved process; that, in that view, it must be shown that the defendants used all the different steps of that process, or there could be no infringement; that the defendants did not use the sweating process, which was the first step in the plaintiff's treatment, and therefore did not infringe; that the patent had been construed by Judge Drummond, in the circuit court of the United States for the northern district of Illinois, in Royer v. Manufacturing Co., 20 Fed. Rep. 853, in which it was said: "If this is a valid patent for a process, it must be limited to the precise, or, certainly, substantial, description which has been given in the specifications; and in order to constitute an infringement of that process a person must be shown to have followed substantially the same process, the same mode of reaching the result as is described in the specifications;" that the court agreed with that conclusion; that, if the contention of the counsel for the plaintiff were correct, that the plaintiff had invented an entirely new process, which had revolutionized the art of preparing rawhide for belting and other purposes, it might be that the court ought to give that broad construction to the patent which was justified in the case of a foundation patent; but that when, as in this case, all the substantial steps in the process were old, the utmost that the plaintiff was entitled to was protection against those who used, in substance, his precise process.

We are of opinion that the views set forth by the circuit court are sound, and that the decree must be affirmed. The words in the claim, "prepared rawhide," refer to the completed article as prepared for final use by the treatment set forth in the specification; and the claim is one for the treatment or process by which rawhide is put into the condition resulting from the treatment it receives by the entire process applied to it. After the hair is removed from the hide by the process of sweating, and it has afterwards lost its stiffness by being inserted in water, it is subjected to "the process of fulling," with a mixture of tallow, wood tar, and resin applied to it. The specification states, in substance, that Royer's mode of "preparing hides" comprehends, as a part of such mode, the sweating of the hides, because the specification states that in such mode of "preparing hides" he avoids "the use of lime, acid, or alkali." Therefore, the sweating must necessarily be included as a part of the preparation "of the prepared rawhide" mentioned in the claim, and therefore is a part of "the treatment" claimed.

The plaintiff contends that the treatment covered by the claim consists only in subjecting rawhide to a fulling process, and at the same time, by the same mechanical action, working into it the stuffing composed of tar, resin, and tallow, and that he was the first to manufacture rawhides into a new article of commerce, called "fulled rawhide."

*If the plaintiff did make such an invention, and was entitled to claim a patent for it, he has failed to secure such a patent. On June 10, 1873, he put in a claim to the mode of preparing rawhides by the fulling operation and the preserving mixture. That claim was rejected by the patent office, and he withdrew it on October 29, 1873. Nor can he, under the present patent, claim as a new article of manufacture the rawhide thus prepared; for he made that claim on June 10, 1873; it was rejected, and he struck it out on October 9, 1873.

It is well settled, by numerous cases in this court, that under such circumstances a patentee cannot successfully contend that his patent shall be construed as if it still contained the claims which were so rejected and withdrawn. Roemer v. Peddie, 132 U. S. 313, 317, 10 Sup. Ct. Rep. 98, and cases there cited. The principle thus laid down is that where a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions, for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. See, also, Caster Co. v. Spiegel, 133 U. S. 360, 368, 10 Sup. Ct. Rep. 409; Yale Lock Co. v. Berkshire Nat. Bank, 135 U. S. 342, 379, 10 Sup. Ct. Rep. 884; Dobson v. Lees, 137 U. S. 258, 265, 11 Sup. Ct. Rep. 71.

The present patent was under consideration in Royer v. Belting Co., 40 Fed. Rep.

158, in October, 1889, in the circuit court of the United States for the eastern district of Missouri, where Judge Thayer took the same view of it that was taken by Judge Colt in the present case, and held that the claim of the patent did not cover broadly the method of making belting leather by stuffing the rawhide, by means of a fulling machine, with a mixture composed of tallow, wood tar, and resin, and that as the defendants in that case did not use the sweating process, but used the liming process, they did not infringe. Judge Thayer gave much force to the proceedings in the patent office, as showing that Royer modified his claim, which was so worded as to cover the stuffing process with the preserving mixture, and put his claim into its present form, solely in view of a communication from the patent office to the effect that the whole method described by him of making belting leather out of green hides might be patentable, thus indicating the extent of the monopoly intended to be granted.

As the defendants in the present case do not use the sweating process, but use the liming process, it follows, under the proper construction of the claim of the patent, that they do not infringe.

Decree affirmed.

(146 U. S. 536)

McGOURKEY v. TOLEDO & O. C. Ry. CO. et al.

(December 19, 1892.)

No. 35.

JUDGMENTS—FINALITY — RAILROAD MORTGAGES—PRIORITY—CAR TRUSTS—ACTS OF DIRECTORS.

1. In a suit to foreclose a railway mortgage an intervener claimed certain rolling stock in possession of the receiver, alleging that it had been leased by him to the mortgagor, and, after sale of the property on foreclosure, a decree was made on the intervention, directing delivery of such rolling stock to the intervener, and referring the case to a master to determine its rental value while used by the receiver, with other like matters, and to determine all questions between the receiver and intervener growing out of the use and restoration of said rolling stock. Thereafter, by leave of the court, and without objection, the purchaser at foreclosure answered the intervener's petitions, claiming that the title to such rolling stock had passed by the foreclosure sale. *Held*, that the decree requiring delivery of possession of the rolling stock was not a final decree, so as to preclude the court from determining at a subsequent term that the title to such rolling stock had passed to the purchaser on foreclosure.

2. Capitalists who had advanced money to purchase railroads for the purpose of organizing a railroad company, and had received in return a much larger amount in stock and bonds of the company, proceeded to raise money for the equipment of the road by the issue of certificates to subscribers to a car trust, the trustee of which made leases to the company of rolling stock, not then in existence, for a term of years, at specified rentals, on prompt payment of which the property was to belong to the railroad company. The subscribers to most, if not all, of the certificates were directors of the company, who had complete control of the purchase of the rolling stock. A large part of it was contracted for in the name of the road before the leases were made, and was paid for out of money of the railroad company, with which the money realized from the car-trust certificates was mixed The amount of the certificates was much greater than the estimated cost of the equipment, and part of their proceeds was applied to other purposes by the company. *Held* that, as against a mortgage upon the railroad and its equipment, executed by the company before such leases, and including its after-acquired property, the transaction amounted to a purchase by the company of the rolling stock, and the lien of the mortgage attached to such rolling stock; that the lien of such car-trust certificates, if any, was postponed to the lien of the mortgage; and that the leases were, at best, to be treated as subsequent mortgages.

Mr. Chief Justice Fuller and Mr. Justice Brewer dissenting.

Appeal from the circuit court of the United States for the northern district of Ohio.

In equity. Bill by the Central Trust Company against the Ohio Central Railway Company and others to foreclose a mortgage. George J. McGourkey, trustee of the Ohio Central Car Trust, intervened by petitions, claiming certain rolling stock also claimed by the Toledo & Ohio Central Railway Company, the purchaser at the foreclosure sale. The petitions were dismissed. 36 Fed. Rep. 520. Petitioner appeals. Affirmed.

Statement by Mr. Justice BROWN:

These were two intervening petitions filed by McGourkey, as trustee for the holders of certain car-trust certificates, to compel the performance by the receiver of the defendant railway company of the covenants of certain leases made by the petitioner with said company, or the delivery by the receiver to the petitioner of a large amount of rolling stock described in these leases, in order that the same might be sold, and for an account and payment of the rental value of such rolling stock while in the custody of such receiver.

On January 7, 1884, the Central Trust Company of New York filed its bill in equity in the circuit court of the United States for the northern district of Ohio for the foreclosure of a certain mortgage for $3,000,000, for nonpayment of interest, the mortgage covering not only the line of the railroad between the terminal points, but the rolling stock, "together with all the engines, cars, machinery, supplies, tools, and fixtures now or at any time hereafter held, owned, or acquired by the said party of the first part for use in connection with its line of railroad aforesaid." There was also a covenant for further assurance applicable to "all such future-acquired depots, grounds, estates, equipments, and property, as it may hereafter from time to time purchase for use in and upon said line of railroad, and intended to be hereby conveyed." Upon the filing of the bill the railroad company entered its appearance, waived a subpœna, and consented to the appointment of a receiver; and upon the same day John E. Martin was appointed receiver, with the usual powers in such cases.

On April 2, 1884, the petitioner, George J.

McGourkey, intervened by leave of the court, and filed two petitions, based upon three car-trust leases, known as "Lease A," "Lease B No. 1," and "Lease B No. 2." The first petition represented that the agreement known as "Lease A" was entered into on August 20, 1880, whereby the railroad company agreed to hire from petitioner, as trustee, 800 coal cars and 14 locomotives for a period of 10 years from the date of their delivery to the company; the company agreeing to pay as rent $100,000 on their delivery, and, in addition thereto, $40,000 per year, with interest at the rate of 8 per cent. That, in case of default in payment of rent, petitioner might, at his option, remove such locomotives and cars, sell them at public or private sale, apply the proceeds to the payment of any installment of rent and interest not theretofore paid, for the whole term, whether such installment was due or not, the surplus to be paid to the company; but, if the proceeds should not be sufficient to pay the expense of removal and sale, together with the rent and interest, the company was to pay the petitioner the difference. That, under this agreement, he delivered 14 locomotives, marked "Ohio Central Car Trust," numbered 17 to 30, inclusive; also 800 coal cars, bearing the same marks. That the company defaulted in the payment of interest; and that petitioner demanded possession of the cars and locomotives, and was placed in possession of the same, but they afterwards passed into the possession of the receiver, who refused to deliver them up without the authority of the court. There were other covenants in the lease, a copy of which was annexed to the petition as an exhibit, not necessary now to be mentioned.

The second intervening petition was based upon car-trust Leases B No. 1 and B No. 2, copies of which were attached to the petition as exhibits. Lease B No. 1 bore date March 1, 1881, and embraced 1,400 coal cars. Lease B No. 2 bore date March 1, 1882, and embraced 2,500 coal cars, including the 1,400 covered by Lease B No. 1; also 340 box cars and 13 locomotives. The two leases attached to this petition were not substantially different from Lease A in their general provisions. Both provided for the leasing of equipment not then in existence, bearing the numbers set out in the schedule thereto attached, to be delivered "as per the contract of the said McGourkey with the said makers." Leases A and B No. 1 provided that the railroad company might, for convenience, make the contract for the rolling stock directly with the makers. Lease B No. 2 also provided that the railroad company might, for convenience, "make the contracts for delivery direct with the makers of said locomotives and cars, but so as in no way to affect the title of said party of the first part to said equipment." All the leases provided that at all times the name, number, and plate, or other signs of ownership of the said trustee, viz. "'Ohio Central Car Trust,' or the initials, to wit, 'O. C. C. T.,' shall be affixed and retained upon each of the cars aforesaid, for the purpose of making the ownership known, and, in the event of any such marks or sign being destroyed, the Ohio Central Railroad Company will immediately restore the same; and that such other things shall be done as by the counsel of said trustee shall be deemed necessary and expedient for he full and complete protection of the rights of said trustee as the owner of said cars for the benefit of the holders of said obligations." Neither of these leases was ever recorded.

On December 10, 1884, a decree of foreclosure and sale was entered, describing the property mortgaged as composed of the railroad between the specific termini, together with the after-acquired property, in the language in which the same was described in the mortgage. The property was bid in by a committee of the bondholders, who, with some of the stockholders, proceeded to reorganize the road under the name of the Toledo & Ohio Central Railway Company, the real defendant in this proceeding.

On June 9, 1885, a decree was rendered upon the intervening petitions of McGourkey, purporting to be after due proof of service of notice upon the Central Trust Company, the Ohio Central Railroad, and the receiver. By this decree the receiver was ordered to deliver up to McGourkey the cars and locomotives described in said Lease A and said Leases B, at convenient points to be designated by petitioner, being in all 27 locomotives, 340 box cars, and 3,200 coal cars. The equipment was delivered to McGourkey in pursuance of this order, and was by him, after leases of portions to the Baltimore & Ohio and the Toledo & Ohio Central Railway Companies, respectively, all sold at public auction for the benefit of his fiduciaries in December, 1885.

On August 14, 1886, the Toledo & Ohio Central Railway Company, and on the 1st of October, 1886, the Central Trust Company, answered, under leave of the court, the intervening petitions of McGourkey, averring that the locomotives and cars were sold and were paid for by the Ohio Central Railway Company, and passed under and became subject to its mortgage; that they were sold under the decree of foreclosure, and duly conveyed to the purchasing trustees, and thereby the leases from McGourkey became inoperative and of no effect; that the purchasing trustees afterwards transferred all their right, title, and interest in the same to the Toledo & Ohio Central Railway Company; and that the same are now the property of such company. The answer closed with a prayer that both said leases and agreements be declared null and void; that McGourkey might be decreed to have no title or interest in said rolling stock; and that the railway company be put in possession thereof. The answer of the railway company was much more specific in its details, setting forth particularly how the same had been purchased and paid for.

On June 7, 1887, the special master filed his report, to which exceptions were filed by

McGourkey to the amount allowed; and by the Toledo & Ohio Central Railway Company and the receiver to the special findings of facts, and also to the amount allowed.

The case subsequently came before the court upon exceptions to the report of the special master. The court found against the title of McGourkey to most of the property, and that, so far as he had established any right to or lien upon the rolling stock, it appeared that he had already been paid therefor by the company and the receiver more than he was entitled to, and his exceptions were therefore overruled, and his petitions dismissed. 36 Fed. Rep. 520. McGourkey thereupon appealed to this court. The material facts are fully stated in the opinion of the court.

George Hoadly and Fisher A. Baker, for appellant. Stevenson Burke, for appellees.

*544 *Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The controversy in this case turns principally upon the title of the petitioner, McGourkey, to the rolling stock in question, and upon the relative priorities of the holders of the car-trust certificates, whom he represents, and the purchasers of the railway, who succeeded to the rights of the first mortgagees under the after-acquired property clause of the mortgage.

1. We are confronted upon the threshold of the case with the proposition that the decree of June 9, 1885, ordering this property to be turned over by the receiver to the petitioner, was a final decree, which it was not in the power of the court at a subsequent term to disturb; and hence that the court was estopped to render the decree of February 4, 1889, from which this appeal was taken, at least in so far as it assumed to upset the title of McGourkey.

*545 Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. It has usually arisen upon appeals taken from decrees claimed to be interlocutory, but it has occasionally happened that the power of the court to set aside such a decree at a subsequent term has been the subject of dispute. The cases, it must be conceded, are not altogether harmonious. Upon the one hand it is clear that a decree is final, though the case be referred to a master to execute the decree by a sale of property or otherwise, as in the case of the foreclosure of a mortgage. Ray v. Law, 3 Cranch, 179; Whiting v. Bank, 13 Pet. 6; Bronson v. Railway Co., 2 Black, 524. If, however, the decree of foreclosure and sale leaves the amount due upon the debt to be determined, and the property to be sold ascertained and defined, it is not final. Railroad Co. v. Swasey, 23 Wall. 405; Grant v. Insurance Co., 106 U. S. 429, 1 Sup. Ct. Rep. 414. A like result follows if it merely determines the validity of the mortgage, and, without ordering a sale, directs the case to stand continued for further decree upon the coming in of the master's report. Railway Co. v. Simmons, 123 U. S. 52, 8 Sup. Ct. Rep. 58; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. Rep. 1153.

It is equally well settled that a decree in admiralty determining the question of liability for a collision or other tort, (The Palmyra, 10 Wheat. 502; Chace v. Vasquez, 11 Wheat. 429; Mordecai v. Lindsey, [The Mary Eddy,] 19 How. 199,) or in equity establishing the validity of a patent and referring the case to a master to compute and report the damages, is interlocutory merely, (Barnard v. Gibson, 7 How. 650; Humiston v. Stainthorp, 2 Wall. 106.)

It may be said in general that, if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but, if it refer the case to him as a subordinate court, and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final. Craighead v. Wilson, 18 How. 199; Beebe v. Russell, 19 How. 283.

*546 *But, even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final. Craighead v. Wilson, 18 How. 199; Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. Rep. 111.

In the case under consideration the petitioner prayed for four distinct reliefs:

(1) That the receiver perform all the covenants of the lease, and pay all sums due, etc.

(2) Or that he be directed to deliver to petitioner the rolling stock, in order that the same might be sold.

(3) That he be directed to file a statement of the number of miles run, and of the sums received for the use of such rolling stock.

(4) That it be referred to an examiner, to take testimony and report the value of the use of such rolling stock while in custody of the receiver, and that the receiver be directed to pay the amount justly due, etc.

The decree followed the general terms of the petition by ordering the rolling stock claimed to be delivered to McGourkey, and referring the case to a special master to determine the rental of the same while used by the receiver; the value of the rolling stock over and above the sums paid by the receiver to the petitioner while the same was in the custody of the receiver; the number of miles run by the receiver; the money received for the use of the same by other roads; the loss, damage, and destruction to the same while in the custody of the receiver; and also to "determine and report upon all questions and matters of difference between said receiver and said McGourkey growing out of the use and restoration of said cars

and locomotives." It is claimed that, inasmuch as the court granted the prayer of the petitioner, and turned the property over to him, it was a final adjudication of his right to the same, notwithstanding the reference to a master for an accounting; and we are referred to certain cases in this court as sustaining this contention.

*547 In Forgay v. Conrad, 6 How. 201, the object of the bill was to set aside sundry deeds for lands and slaves, and for an account of the rents and profits of the property so conveyed. The court entered a decree declaring the deeds fraudulent and void, directing the property to be delivered up to the complainant, directing one of the defendants to pay him $11,000, and "that the complainant do have execution for the several matters aforesaid." The decree then directed that the master take an account of the profits. Under the peculiar circumstances of the case the decree was held to be appealable, although, said Chief Justice Taney, "undoubtedly it is not 'final,' in the strict technical sense of that term." The opinion was placed largely upon the ground that the decree not only decided the title to the property in dispute, but awarded execution.

In the very next case,—Perkins v. Fourniquet, 6 How. 206,—where the circuit court decreed that complainants were entitled to two sevenths of certain property, and referred the matter to a master to take an account of it, the decree was held not to be final. And again, in the next case,—Pulliam v. Christian, Id. 209,—a decree setting aside a deed by a bankrupt, directing the trustees under the deed to deliver up to the assignee all the property in their hands, and directing an account to be taken of the proceeds of sales previously made, was also held not to be a final decree. Indeed, the case of Forgay v. Conrad has been generally treated as an exceptional one, and, as was said in Craighead v. Wilson, 18 How. 199, 202, as made under the peculiar circumstances of that case, and to prevent a loss of the property, which would have been disposed of beyond the reach of an appellate court before a final decree adjusting the accounts could be entered. A somewhat similar criticism was made of this case in Beebe v. Russell, 19 How. 283, 287, wherein it was intimated that the fact that execution had been awarded was the only ground upon which the finality of the decree could be supported.

In Thomson v. Dean, 7 Wall. 342, the decree directed the defendant to transfer to the plaintiff certain shares of stock, and that an account be taken as to the amount paid and to be paid for the same, and as to dividends accrued. But this was held to be a final decree, upon the ground that it changed the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. In this case the court did distinctly approve of Forgay v. Conrad, although the decree was put upon the ground that it decided finally the right to the property in contest.

In Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. Rep. 111, a bill was filed to set aside as fraudulent the proceedings of a stockholders' meeting, and to have a receiver appointed. The decree adjudged that the proceedings of the meeting were fraudulent; that a certain lease, executed in accordance with the authority then given, was void; that a receiver should be appointed, with power to continue the business; and that an account be taken of profits realized from the use of the leased property, and also of royalties upon certain ores mined by the defendants. The court held the decree to be final, because the whole purpose of the suit had been accomplished, and the accounting ordered was only in aid of the execution of the decree, and was not a part of the relief prayed for in the bill, which contemplated nothing more than a rescission of the authority to execute the lease, and a transfer of the management of the company to a receiver. The language of Mr. Justice McLean in Craighead v. Wilson, 18 How. 201, was quoted to the effect that the decree was final on "all matters within the pleadings," and nothing remained to be done but to adjust accounts between the parties growing out of the operations of the defendants during the pendency of the suit. The case was distinguished from suits by patentees in the fact that in such suits the money recovery is part of the subject-matter of the suit. In this particular, too, the case is clearly distinguishable from the one now under consideration, inasmuch as here the account which the special master was directed to take was within the issue made by the pleadings, and a part of the relief prayed for in the petition, the absence of which was held by the court in the Winthrop Iron Case to establish the finality of the decree.

*549 In Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. Rep. 736, certain decrees were set aside at a subsequent term of the court of its own motion. The decrees "determined the ownership of the locomotives and the right to their possession; that they were essential to the operation of the roads by the receiver, and should be purchased by him; that certain designated amounts should be paid for the rentals and the purchase price, which amounts were made a charge upon the earnings, * * * and that the amounts should be paid by the receiver." Apparently there was no reference at all to a master for an accounting, and the decrees were held to be final. Obviously the case is not decisive here.

Upon the other hand, in Beebe v. Russell, 19 How. 283, the court decreed that the defendants should execute certain conveyances, and surrender possession, and then referred it to a master, to take an account of the rents and profits received by the defendants, with directions as to how the account should

be taken. This decree was held not to be final; Mr. Justice Wayne remarking that it might be so "if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the entire and full benefit of the previous decision of the court;" and that the decree is final when ministerial duties only are to be performed to ascertain the sum due. Practically the same ruling was made in the next case of Farrelly v. Woodfolk, Id. 288.

In the case of Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. Rep. 32, the bill was in the nature of an action of trespass for removing minerals from the plaintiff's land, and prayed for an injunction restraining the defendant from the commission of further trespasses, and for an account of the quantity and value of the ore taken. The court made a decree perpetually enjoining the defendant from entering upon or removing minerals from the land, and further ordering an account, etc. This was held to be not a final decree, from which an appeal could be taken to this court, because it did not dispose of the entire controversy between the parties. This case is directly in point, and was referred to with approval in Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. Rep. 745.

*550 *There are none of these cases which go to the extent of holding a decree of this kind final. While it directed the surrender of the rolling stock in question to the petitioner, it did not purport to pass upon his title to the same, and referred the case to a master, in accordance with the prayer of the bill, to take an account not only of the rents and profits and of damage to the rolling stock, but of "all questions and matters of difference" between the receiver and the petitioner "growing out of the use and restoration of the same." This decree could not be said to be a complete decision of the matters in controversy, or to leave ministerial duties only to be performed, or to direct an accounting merely as an incident to the relief prayed for in the bill.

But, if the finality of this decree were only a question of doubt, we think that, in view of the manner in which it was treated by the court below, that doubt should be resolved in favor of the defendant. The decree was pronounced on June 9, 1885. On August 14, 1886, the Toledo & Ohio Central Railway Company, under leave of the court, and without objection, filed an answer, averring the ownership of the rolling stock to have been in the Ohio Central Railroad Company, and setting forth in detail the manner in which it had been purchased and paid for, and, without praying in terms that the former decree be set aside, asked that the leases be rescinded and declared to be null and void; that the money and evidences of indebtedness received by the petitioner be refunded; that the ownership of the cars be decreed to be in the defendant, as purchaser under the foreclosure sale; and that it be put in possession thereof. A similar answer, adopting the allegations of the other, was filed by the Central Trust Company on October 1, 1886. If the former decree were final, these answers were impertinent, and should have been stricken from the files. The special master to whom the case was referred stated in his report that the first contention related to the title to the property; that the order of reference to him treated it as the property of the trustee, McGourkey; and that, in his opinion, the testimony failed to sustain the claims of the purchaser. Testimony upon the question of title was taken by both parties to the proceeding. In the opinion of the court, too, which was filed September 3, 1888, it is stated to have been "conceded by counsel for petitioner, McGourkey, (and, as this court thinks, properly so,) that complainant and the Toledo & Ohio Central Railway Company are not estopped by anything that has occurred during the progress of the foreclosure suit from setting up the claims they insist upon in respect to said equipment." 36 Fed. Rep. 522. In short, it was only in this court that the finality of this decree was claimed. The decree entered in pursuance of this opinion did not even assume to vacate the former decree, but treated the title to the property as distinct from the right of possession, found the issue joined in favor of the trust company and the railway company, overruled the exceptions of petitioner, set aside the report of the special master, disallowed McGourkey's claim, and dismissed his petitions. We lay no stress upon the fact that the Toledo & Ohio Central Railway Company was not made a party to the proceedings under the McGourkey petitions, since, having purchased the property while those proceedings were pending, at the foreclosure sale, it was affected with notice of the litigation.

2. Counsel for the receiver and the Toledo & Ohio Central Railway Company, the real defendant in this proceeding, take the position that the so-called "leases" of McGourkey, under which he claims title to this rolling stock, and compensation for its use, were a mere device on the part of the syndicate, which organized and controlled the road, to keep the property covered by these leases from passing, under the subsequently acquired property clause of the mortgage, to the trust company, and to reserve it for their own use and emolument, or for the holders of the car-trust certificates. Contracts by which railways, insufficiently equipped with rolling stock of their own, lease or purchase, under the form of a conditional sale, such equipment from manufacturers, are not of uncommon occurrence, and, when entered into bona fide for the benefit of the road, have been universally respected by the courts. U. S. v. New Orleans R. Co., 12 Wall. 362; Fos-

552 dick v. Schall, 99 U. S. 235; Myer v. Car Co., 102 U. S. 1. Indeed, the business of manufacturing rolling stock and loaning it to railways which have not a sufficient capital to purchase a proper equipment of their own, has become a recognized industry. If, however, such contracts are made by directors of the road with themselves, or with others with whom they stand in confidential relations, they are open to the suspicion which ordinarily attaches to transactions between a corporation and its directors; and, if they appear to have been made, directly or indirectly, for their own benefit, courts will refuse to give them effect. Drury v. Cross, 7 Wall. 299; Oil Co. v. Marbury, 91 U. S. 587; Wardell v. Railroad Co., 103 U. S. 651–658.

It is earnestly insisted by the petitioner in this case that, if there were any fraud in this transaction, it was perpetrated, not by him, but by the syndicate upon the railroad company, which they represented; and that, as the latter has made no complaint, neither the trust company, who took only the rights of the mortgagor, the railroad company, nor the Toledo & Ohio Railway Company, which succeeded only to the rights of the trust company, are in a position to take advantage of this fraud; and that the Toledo & Ohio Railway Company acquired no higher, better, or other title than that of the parties to the suit in which the foreclosure sale was made.

There is no doubt that, if this railway company entered into a bona fide contract with McGourkey to lease of him rolling stock which legally or equitably belonged to him, his title would not be divested by the delivery of the property to the railroad company. The rolling stock would continue to be his property, and he would be entitled to the stipulated compensation for its use. It is also true that the future-acquired property clause of a railway mortgage attaches only to such property as the company owns, or may thereafter acquire, subject to any liens under which it comes into the possession of the company. U. S. v. New Orleans R. Co., 12 Wall. 362. If however, the property, though nominally leased by the railway company, was acquired under an arrangement *553 which amounted in law to a purchase by it, we know of no rule of law which will estop the mortgagee or a purchaser at a foreclosure sale from insisting that the railway thereby acquired the title to the property, and that it had become subject to the lien of the mortgage; in other words, the mortgagee is not bound by the construction put upon the contract by the mortgagor. Indeed, it is not the railway so much as the mortgagee whose rights are impaired by a transaction of this kind; and, if the latter cannot take advantage of its illegality, it is probable that no one else would, since the railway is represented by directors who are charged with being parties to the scheme. It would be a strange anomaly if the very parties against whom the alleged device was directed were estopped to take advantage of it by the acts of a corporation represented and controlled by directors who were themselves parties to it. The gist of the complaint in this case is that it is their property which the petitioner is seeking to recover; that the title to it became vested in the railway company by its purchase; and that they have legally succeeded to the rights of the company.

The history of this case properly begins with a contract made on December 3, 1879, between a syndicate, known as the "$3,000,000 Pool," through its committee, composed of three prominent capitalists, and the firm of Brown, Howard & Co., who were also members of the syndicate, wherein the firm agreed to purchase two lines of railway, and to organize a new company under the name of the Ohio Central Railway Company, with a capital stock of $4,000,000, which was to be delivered to the syndicate, to proceed and complete the road, and to purchase, at the lowest cost, $560,000 worth of equipment, and place it on the line, free from liens or charges. They further agreed to procure the issue of $3,000,000 of first mortgage bonds, and also $3,000,000 of income bonds, secured by a mortgage upon the same property, inferior only to the first mortgage. These bonds were placed in the Metropolitan National Bank of New York, for delivery to the subscribers to the $3,000,000 pool represented by the syndicate, as their assessments were paid. In consideration of this, the syndicate agreed to pay the firm $3,000,000 in cash. Brown, *554 Howard & Co. proceeded to organize the company under this contract, received from the syndicate the $3,000,000, and turned over to them the $10,000,000 of stock and bonds, which were distributed among the members of the syndicate in proportion to their subscriptions to the pool. This first mortgage provided for was executed January 1, 1880, and was signed by the president and secretary of the company. Brown, Howard & Co., however, never furnished the $560,000 of equipment provided for in their contract, but, it seems, by subsequent agreement with the pool or syndicate committee, they were released from their obligation to furnish the equipment, and, instead of it, were required to make further expenditures on the railway property, which were said to have exceeded the $560,000, the firm accepting the notes of the railway company for the excess.

On July 7, 1880, the president of the Ohio Central Railroad Company, acting in his capacity as president, ordered of the Brooks Locomotive Works of Dunkirk five locomotives, to be delivered in December, 1880, and January, 1881. On July 19th he ordered five others, and on August 22d four others. These were all ordered for the railroad company. On August 20th the first lease, known as "Lease A," was executed between McGourkey and the railroad company. By this instrument the railroad company agreed to hire of the petitioner, as trustee, and he

agreed to lease, 800 coal cars and 14 locomotives, for the period of 10 years from the date of the delivery of the same to the company; the company agreeing to pay him as rent $100,000 on the delivery thereof, and, in addition thereto, $40,000 per year, with interest thereon at 8 per cent. In case of default in the payment of any installment of interest, the lessor reserved the right of entering upon the premises of the company, removing any of the locomotives and cars, selling them at public or private sale, and applying the proceeds upon any and all installments of rent or interest thereon, not theretofore paid, for such cars, for the whole of said term, whether said installments had then fallen due or not; and, if there should prove a surplus after paying such rent, interest, and expenses, the same should be paid to the company, but, if there should be any deficit, the company should be liable to pay the same upon demand. The company was to keep the property in good repair, and keep the name, number, and plate or other marks, to wit, "Ohio Central Car Trust," or "O. C. C. T.," fixed and retained upon each of the cars and locomotives for the purpose of making the ownership publicly known; also to keep all property insured against fire, loss payable to the trustee, and to replace any cars or locomotives lost by fire. Schedule A, referred to in the lease, was not actually annexed until February 23, 1881. The 14 locomotives were ordered, as above stated, by the president of the company, and marked "Ohio Central C. T.," and numbered from 17 to 30, inclusive. The 800 coal cars were also marked in the same manner.

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Mr. McGourkey, who, by this and two other similar instruments, assumed to own and to lease to the railroad company this large amount of rolling stock, was not a manufacturer or dealer in locomotives or cars. He was not a resident of Ohio, nor engaged in the railroad business, and, so far as appears, never saw the property, at least until after it went into possession of the receiver, nor knew of the contracts which were made for its purchase. He was the cashier of the Metropolitan National Bank of New York, the correspondent bank of the Commercial National Bank of Cleveland, of which the president of the railroad company was also president. He had very little knowledge as to the origin of the car trusts which he represented, and knew very little about the arrangements which were made for paying in and paying out the money. He says the understanding was that he was to have little or no trouble in regard to the details; "that B. G. Mitchell, who is present here, and who is connected with the bank, was to take charge of that part. * * * I mentioned to him [the president] that I was made trustee of this car trust, and I was sorry. He said, 'Mr. Mitchell will attend to the details, and it will not give you much trouble.'" Beyond taking the receipts for the cars from the road, signing the subscription certificates, and indorsing the payments, he appears to have had nothing to do with the transaction. In short, Mr. McGourkey was a mere figurehead. Mr. Mitchell, who attended to the details, was secretary of the railroad company, and a clerk in the Metropolitan National Bank. He had no more than Mr. McGourkey to do with ordering the cars, but attended to the finances of the trust. The names of the subscribers to the trust were given to him by three persons, who were all directors of the road. They instructed him to make a subscription certificate, which would be signed by the bank as fiscal agent, certifying that the holders would be entitled to so many thousand dollars of car-trust certificates when the several installments were indorsed as paid in full. The subscription certificates were signed by the cashier, or stamped by him as paid, for the cashier. The money received was credited to an account called the "Equipment Account of the Ohio Central Railroad" in the Metropolitan National Bank, and was paid out to the president of the road, who had charge of buying the equipment, by transferring it to the account of the Commercial National Bank of Cleveland, of which he was also president; also by paying equipment notes issued by the equipment company, so called, which were indorsed individually by the president and one of the directors. Mr. Mitchell further says: "When these installments were all paid on the subscription certificates, and a certificate from the general manager of the road with a schedule of the numbers and marks of the equipment under the several trusts which were on the road was returned to me, I turned them over to Mr. McGourkey, and he certified to the car-trust certificates. These certificates I turned over to the several subscribers, as appeared on my record, canceling their subscription certificates as they surrendered them." It appears from the testimony of the president that the men who furnished the money to purchase this equipment were most of them interested in the organization of the company; that it was all paid in New York, except $50,000, which he subscribed himself; that the contracts were all made by him, or by his authority; that the moneys were received from the Metropolitan National Bank, and credited upon the books of the Commercial National Bank to the Ohio Central Railroad Company, without distinguishing these moneys from others that were credited to the same company; and that no separate accounts were kept with the car trusts. This account was drawn upon from time to time for the general purposes of the company, as well as for the payment of the rolling stock covered by the leases in question.

Mr. Mitchell, who appears to have been more familiar with these car-trust certificates than any one, except possibly the president of the company, says that the same persons who controlled the subscriptions for

the $3,000,000 pool, also, to a certain extent, controlled the subscriptions for the equipment. "There were other subscribers, but they controlled the matter." And, again: "There were different subscribers for the equipment to what there were for the main line, although many of them were the same." Again, in answer to the question who constituted the Ohio Central Car Trust, he mentioned the names of several gentlemen, all of whom were directors, or connected with the organization, of the road. Mr. Martin, himself a director, states: "I myself held about in the neighborhood of $150,000. Mr. Lyman, A. A. Low & Bros., had I think, about the same amount, and Mr. Lyman would naturally speak for his friend A. M. White. I think he was in the pool for about $150,000." It is true that another director states: "The names of the various subscribers I do not recollect, but may say in a general way that they were a different class of persons from those who subscribed to the syndicate, or held the stock or bonds of the Ohio Central Railway Company." But he does not seem to have had that acquaintance with the details of the transaction which the other witnesses had, and his testimony is outweighed in that particular.

The car-trust associations were not corporations or partnerships, nor legal entities of any description, but were simply car-trust certificates in the hands of various persons, who were represented by the petitioner, McGourkey. The 14 locomotives included in the schedule attached to the Lease A were those which had been ordered by the president of the railroad, before the organization of the first car trust, and were all delivered between December 20, 1880, and February 10, 1881, billed to the Ohio Central Railroad Company, and paid for by drafts drawn by G. G. Hadley, general manager, upon H. G. Eells, assistant treasurer of the company, at Cleveland. Of the 800 coal cars, 606 appear to have been purchased of the Lafayette Car Works, and paid for by the railroad company. These 606 cars were mostly received by the company during the fall of 1880. The remaining 194 coal cars were constructed by the Peninsular Car Works of Detroit, under a contract made by Mr. Hadley, general superintendent, in the name of the Ohio Central Railroad Company; and they were paid for by the railroad company by drafts drawn by Mr. Andrews, the assistant treasurer at Toledo, where the cars were turned over to the company. These locomotives and cars were, by direction of Mr. Hadley, the general manager, marked in large letters, "Ohio Central," and in small letters, "Ohio Central C. T.," either placed upon a small plate, so as to be removed easily, or upon the end of the sill of the coal cars.

Lease B. No. 1 was executed March 1, 1881, and is not substantially different from Lease A in its general provisions. Both provide for the leasing of equipment not then in existence, according to a schedule subsequently attached. By this instrument, petitioner assumed to lease certain coal cars for 13 years from the date of the delivery of the cars to the company; "said coal cars to be delivered as per the contract of the said George J. McGourkey with the said makers; and it is understood that the said George J. McGourkey shall in no way be liable for any delay that may arise in the delivery of the said cars by the said makers; and the said railroad company may, for convenience, make the contract direct with said makers." There was to be paid as rental $80,000 on the 1st day of September in each year for 10 years, with interest at 8 per cent., at the Metropolitan National Bank, the said yearly installments being evidenced by 800 obligations of $1,000 each of the Ohio Central Railroad Company, maturing at different times, with interest coupons attached. There was a provision that, in a case of default in payment, McGourkey should have the right to take possession and remove all rolling stock and sell the same, "together with thirty thousand shares of $100 each of the capital stock of the Ohio Central Coal Company, pledged by said lessees as security for the performance of said contract, and the payment of the principal and interest of the said rental certificates, at public or private sale." There were other provisions similar to those contained in Lease A, concerning the payment of the surplus to the railroad company, its liability for any deficit, and its obligation to fix and retain upon each of the cars the words "Ohio Central Car Trust," or the initials, to wit, "O. C. C. T.," for the purpose of making their ownership known, etc. There was a further provision that, in case all payments were promptly made, the coal cars should become the absolute property of the railroad company, and the trustee should make conveyance thereof on demand. The schedule, which was not annexed to this lease until December 9, 1881, covered 1,400 cars, 1,000 of which were constructed under contracts made by Mr. Hadley, general manager of the Ohio Central Railroad Company, with the Peninsular Car Works of Detroit, on January 3, 1881, two months before the lease was executed. The manager of the Peninsular Car Works testified that the contracts were the result of personal conferences with some of the railroad managers, in which it was mentioned that these cars were for the car-trust association, and that directions were given to stencil the cars in such manner as to show that they belonged to the car-trust association. Ten of these cars were delivered to the company before the lease was executed, and the residue after the date of the lease. They all went into possession of the railroad company between February 26th and the early fall of 1881. They were paid for by drafts drawn by the auditor of the company upon H. P. Eells, assistant treasurer, presumably out of the moneys trans-

ferred from the equipment account in the Metropolitan National Bank of New York to the Commercial National Bank of Cleveland. Two hundred and fifty of these cars were built by the Michigan Car Company under a contract made with the railroad company by correspondence during the month of December, 1880, delivery to be made during the months of April, May, and June, 1881. On February 1, 1881, Mr. Hadley, the general manager, instructed the builders by letter to number the cars, and to letter them "Ohio Central" in large letters, and "Ohio Central C. T." in small letters on side sill. They were to be delivered after the date of the Lease B 1, and they were all paid for in the same manner as the other 1,000 cars. The remaining 150 of these cars were built under a contract of the railroad company with the Peninsular Car Works, entered into on February 11, 1881, and were delivered in November, 1881, after the execution of the lease, and were paid for in the same manner. While no instructions appear to have been given as to numbering or lettering these cars, the testimony indicates that the same policy was pursued as before.

Lease B No. 2 was executed March 1, 1882, and covered 2,500 coal cars, including the 1,400 described in Lease B No. 1, 340 box cars, and 13 locomotives, according to a schedule annexed to the lease, the date of which is not given. The railroad agreed to pay as rental therefor $180,000 on the 1st day of March in each year from 1885 to 1894, with interest thereon at 8 per cent. per annum, payable semiannually on the 1st day of March and September during each and every year during the term of 12 years, with the same right to take possession and sell as contained in the prior leases. The eighth paragraph of this lease provided that the railroad should "evidence by lithographed certificates or obligations the several annual payments for rentals hereunder due at the time of the maturity of said payments, as provided in this agreement, and having attached thereto interest coupons," etc., such certificates or obligations to be delivered to McGourkey pro rata as the rolling stock was delivered to the railroad. There was a further provision for the rolling stock becoming the absolute property of the railroad upon the payment of the installments and interest. It also recited that the Ohio Central Coal Company had executed cotemporaneously a mortgage of $1,000,000 upon its coal property, as additional security for the payment of the car-trust certificates provided for, which was accepted for a down payment upon said equipment. There was a further provision that sufficient of these car-trust certificates to take up and replace the prior car-trust certificates of the company, amounting to $600,000, were to be used by McGourkey, and the original car-trust agreements were to be canceled, and the equipment covered thereby released, under this agreement; but, if the holders of the said prior certificates failed or refused to make the change, the railroad was only to issue $1,200,000 of certificates thereunder. If a portion of the holders of the prior certificates elected to exchange them for certificates issued thereunder, then, to such extent, the company would issue certificates thereunder in addition to said $1,200,000; it being the intent to maintain the aggregate of $1,800,000 in car-trust certificates issued. The 1,100 cars mentioned in this lease, which were in addition to the 1,400 included in Lease B No. 1, were manufactured under a contract with the Peninsular Car Works of Detroit, dated October 22, 1881, and were to be delivered in Toledo during the following winter. Subsequently to the making of this contract, and on November 25th, it was modified by releasing the railroad company, and substituting the Ohio Central Car-Trust Association, Series B, in its place. Provision was also made for payment, at the option of the trust association, in cash, on delivery of lots of 100 cars each, or in the paper of the association, indorsed by two directors of the road. This modification of the agreement was signed by the railroad company, by its president, and also by McGourkey, as trustee, by D. P. Eells. These cars were paid for by notes of the Ohio Central Car-Trust Association, Series B, signed by G. G. Hadley, general manager, and indorsed by the same two directors. All of these 1,100 cars were delivered before the 1st of March, 1882,—the date of the lease,—except 110, which were delivered afterwards; and 40 of the 340 box cars were delivered on January 26, 1882. These cars were thus contracted to be built by the car-trust association, and there seems to be no reason for supposing that the railroad company paid anything for their purchase.

Of the 13 engines, 8 were built by the Brooks Locomotive Works of Dunkirk, N. Y., under like contracts as were made with the Michigan Car Company and the Peninsular Car Company. The locomotive works were instructed to mark five of them, "Ohio Central Car Trust, Series B." Three more were ordered on December 15, 1881, and on the following day the president of the railroad wrote the secretary of the company that he had inadvertently given the order as president of the Ohio Central Railroad Company; that the engines were for the Car Trust, Ohio Central Railroad, Series B. The remaining 5 of the 13, and the locomotive "Bucyrus," were built by the Ohio Central Railroad Company in its shops at Bucyrus, for the Ohio Central Car Trust, Series B, and were paid for by moneys furnished by Mitchell, and charged to the equipment fund of the Ohio Central Railroad Company upon the books of the Metropolitan National Bank. The evidence sufficiently indicates that these engines were built under the agreement with the Ohio Central Car-Trust Association, No. 2, represented by McGourkey as trustee, by

which the railroad company was to build them at its shops, and to identify them as belonging to the car trust by proper labels, and were paid for out of money furnished by the car-trust certificates, represented by McGourkey.

The 340 box cars were delivered to the railroad prior to June 7, 1882. Forty of them appear to have been in the possession of the company before the date of the lease of March 1st. It does not appear from the testimony how or from whom they were acquired by the railroad company, nor how, nor out of what fund, they were to be paid for.

In relation to this rolling stock, the president testifies that the understanding was that the railroad company expected to own this equipment, when all the car-trust certificates were paid as the company had agreed to pay; that they had, therefore, a large interest in getting the best contracts they could for the purchase of the equipment; that he made all the contracts himself for such equipment, or authorized Mr. Hadley to make them, under the stipulation in the leases that the railroad company might make the contracts direct with the makers. It is somewhat difficult to see how the president could have acted as the agent of the car-trust *503 certificate holders, or of McGourkey in making the contracts for this *rolling stock, inasmuch as the greater portion of these contracts were entered into before the associations were formed, the leases executed, or the certificates issued.

The facts of this case, then, briefly stated are as follows: A syndicate of capitalists known as the "$3,000,000 Pool" contracted with Brown, Howard & Co. for the purchase of certain lines of railroad for the purpose of organizing the Ohio Central Railroad Company. They raised $3,000,000 in cash, paid it to Brown, Howard & Co., and in return received $4,000,000 in stock and $3,000,000 in first mortgage bonds and $3,000,000 of income bonds, a total of $10,000,000 in stock and securities, which were distributed among the members of the syndicate according to their subscriptions. In further consideration of the $3,000,000 in cash, Brown, Howard & Co. agreed to complete and organize the road and furnish it with $560,000 of rolling stock. The latter provision was never complied with, though it is said they expended that amount for the benefit of the road. It does not satisfactorily appear what the actual value was of the $10,000,000 in stock and securities turned over to the syndicate, although, in the opinion of the court below, it is said that they were "at the date of issuance, or very soon thereafter, worth in the market largely more by several millions than the sum of $3,000,000 paid out therefor." If the law were complied with, the $4,000,000 of stock should have been represented by money or property to that amount, and, if the market value of this stock were merely nominal, it is probably because little, if anything, was ever paid upon it, and it was used merely as a method of retaining control of the corporation. It is safe to say that, if the stock had been actually paid up in money or property, and the money raised by the bonds had been applied to the construction and equipment of the road, these securities would have been worth far more than the $3,000,000 that were paid for them, and the device of borrowing money upon car-trust certificates might not have been necessary. Evidently the syndicate took this stock without recognition of any obligation imposed upon them by their sub- *504 scriptions to the same, but *looked upon it simply as a voting power in stockholders' meetings, and as a means of retaining control of the corporation. Finding that the road was in need of further equipment, and assuming that there was no other way of providing the money for that purpose, they proceeded to purchase rolling stock in the name of the road, and to raise money by certificates issued to subscribers of an equipment fund. Had the directors of the road made a bona fide arrangement with the manufacturers to lease a certain amount of rolling stock for their equipment of this road, there could be no doubt of the propriety of their action, though the arrangement had contemplated an ultimate purchase by the railroad.

The vice of this arrangement, however, consisted in the fact that the directors were, so far as it appears, the subscribers to most, if not all, these certificates, and had complete control of the purchase of the stock; and the money realized from them, though kept in a separate account in the Metropolitan Bank, was mixed with the other moneys of the railroad company on the books of the Commercial Bank at Cleveland; that the rolling stock in question was purchased in the name of the road largely before the leases were made, and was paid for out of the money of the road thus deposited with the Commercial Bank; that, so far from it appearing that the money raised upon these certificates went solely to the purchase of this rolling stock, it appears affirmatively by the minutes of a directors' meeting held at New York, March 1, 1882, that the company was indebted to the bank in the sum of $400,000, for a portion of which the president and one director were indorsers,—an indebtedness created for the purpose of raising money for equipment and other purposes; that $1,200,000 of car-trust certificates were pledged to the bank as security for this indebtedness, and that the president and treasurer were authorized to liquidate the same out of the said certificates and their proceeds. How much of this indebtedness was incurred for equipment purposes was left entirely uncertain.

It also appears that the testimony of one of the directors that the estimated cost of the equipment for which these $1,200,000 of

*565 certificates were issued was but $350,000, and that the remaining $350,000 was to be expended by the company at its pleasure.

The directors of this road were evidently acting in two inconsistent capacities. As directors, they were bound to watch and protect the interests of the road, and obtain the rolling stock upon the most advantageous terms. As holders of the car-trust certificates, or representatives of such holders, it was to their interest to lease the same at the best possible rate, and to make sure that, as directors, this rolling stock should never become their property, except at the highest price. In other words, they were both buyers and sellers or lessors and lessees of the same property.

No principle of law is better settled than that any arrangement by which directors of a corporation become interested adversely to such corporation in contracts with it, or organize to take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transactions to which the corporation is also a party, will be looked upon with suspicion. A leading case upon this subject is that of Wardell v. Railway Co., 103 U. S. 651, wherein a committee of the board of directors of a railway company entered into a contract with a coal company, the stock of which was largely owned by directors of the railway company. The contract was held to be a fraud upon the latter. It was said by the court in this case that "all arrangements, by directors of a railway company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration." A somewhat similar case *566 was that of Railroad Co. v. Kelly, 77 Ill. 426, in which it was held to be unlawful for directors of a railroad company to become members of a company with which they have made a contract to build and equip the road, and that, in such case, the stockholders might, at their election, ratify the act, and insist upon the profits of the contract, or disaffirm it in toto. See, also, Whelpdale v. Cookson, 1 Ves. Sr. 8; Drury v. Cross, 7 Wall. 299; York Buildings Co. v. Mackenzie, 3 Paton, 378; Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Railway Co. v. Blakie, 1 Macq. 461; People v. Township Board, 11 Mich. 222; Railway Co. v. Dewey, 14 Mich. 477.

A contract of this kind is clearly voidable at the election of the corporation; and, when such corporation is represented by the directors against whom the imputation is made, and the scheme was in reality directed against the mortgagees, and had for its very object the impairment of their security by the withdrawal of the property purchased from the lien of their mortgage, it would be manifestly unjust to deny their competency to impeach the transaction. The principle itself would be of no value if the very party whose rights were sacrificed were denied the benefit of it.

In fine, we are of opinion that this transaction should be adjudged to be in law what it appeared to be in fact,—a purchase by the railway of the rolling stock in question,—and that the device of the car-trust certificates was inoperative either to vest the legal title in McGourkey, or to prevent the lien of the mortgage from attaching to it upon its delivery to the road. At the same time the holders of these certificates, who stand in the position of having advanced money towards the equipment of the road, and particularly those who purchased them for value before maturity, are entitled to certain rights with respect to the same which must be gauged in a measure by a consideration of the so-called "leases" themselves. The title to this property being, as we hold, in the railroad company, obviously the petitioner is not entitled to rent. His position is that of one who has advanced money to a railroad company for the purchase of equipment, with the under- *567 standing, which, though not raised directly from the instruments themselves, may perhaps be implied from the nature of the transaction, that he was to have a lien upon certain rolling stock, to be thereafter designated upon a schedule to be furnished by the railway company. As the lien upon this property, evidenced by these leases, was acquired after the purchase of the property by the railway, and the property to which it was to attach was not designated until after it had passed into the possession of the company, and after the lien of the future-acquired property clause of the mortgage had attached to it, the lien of these certificates, if any there be, should be postponed to that of the bondholders.

If transactions such as this is claimed to be could be sustained, there is nothing to prevent any syndicate of men, who obtain the capital stock of a railway, from organizing car-trust associations, and equipping the road with their own property, regardless of the capital which they may have at their disposal, and holding it as against the mortgagees. Persons investing their money in the bonds of railways in active operation do so upon the theory that their security consists largely in the rolling stock of the road, and hence any arrangement by which the road is equipped with rolling stock belonging to another corporation should be distinct, un-

equivocal, and above suspicion. Much reliance is placed in this connection upon the fact that the leases provided that the railway company might contract for the delivery of this stock directly with the makers; that the property should be marked or stenciled in such manner as to indicate that it belonged to the car-trust associations, and that the mortgagees and the public were thereby duly apprised of the fact that it was no proper part of the equipment of the railway. Did the vice of these contracts lie in an attempted concealment of the actual facts, as is frequently the case where preferences are secretly reserved in assignments, there would be much force in this suggestion; but if it inheres in the very nature of the contract, if there be a thread of covin running through the web and woof of the entire transaction,— in other words, if the purpose be unlawful,— it is not perceived that an *open avowal of such purpose makes it the less unlawful. We do not wish to be understood as saying that the transaction in question necessarily involved actual fraud on the part of those participating in it. As before observed, contracts of this description, for the purpose of leasing rolling stock, are by no means uncommon, and it is not improbable that this syndicate may have taken it for granted that the raising of money by car-trust certificates, issued to themselves, or to those in confidential relations with them, was but another mode of accomplishing the same result. The law, however, characterizes the transaction as a constructive fraud upon the mortgagee.

We think the court below was correct in holding that these leases, so far as they are a security at all, must be treated as mortgages. Reading between the lines of these instruments, it is quite evident that no ordinary letting of property for a fixed rental was contemplated, but that the retention of title by the lessor was intended as a mere security for the payment of the purchase money. Thus, by Lease A, there was to be a payment of a gross sum of $100,000 upon the delivery of the property, and an annual rental of $40,000, with interest at 8 per cent., with a further provision that, if such payments were promptly made for the 10 years specified, the property should belong to the railroad company without further conveyance. In case of default, however, the lessor made no provision for resuming his title to the property, but merely for the resumption of possession for the purpose of sale, as in an ordinary foreclosure of a mortgage. All these provisions are inconsistent with the idea of an ordinary lease of personal property.

Lease B No. 1 contained similar provisions, with a further stipulation that, in case of default in payment, the petitioner should have the right to sell the property, together with 30,000 shares of $100 each of the capital stock of the Ohio Central Coal Company, pledged by such lease as security for the performance of the contract. The inconsistency of these contracts with an ordinary lease becomes the more apparent in the case of Lease B No. 2, which covered 1,400 coal cars included in the former leases, and provided for the *taking up and replacing of the prior car-trust certificates to the amount of $600,000, and, in case of refusal to make the exchange, for the issue of $1,200,000 of certificates, which were to be used to pay a debt to the bank to the amount of $400,000, and also to pay a contemplated loan of $350,000 to aid the railroad in developing its coal property and in its general business, leaving only the remainder to be applied to the purchase of the equipment. Instructive cases upon the relative rank of railway mortgages and instruments of this description are Hervey v. Locomotive Works, 93 U. S. 664; Murch v. Wright, 46 Ill. 488; Heryford v. Davis, 102 U. S. 235; Frank v. Railway Co., 23 Fed. Rep. 123.

The court below held that the petitioner had shown a superior right to three engines included in the schedule to Lease B No. 2, and, as no appeal was taken by the defendant from this decree, of course it is not entitled to complain of this finding in this court. The court further found that, so far as the petitioner had established any right to or lien upon the property in controversy, regarding him as a mortgagee, it appeared that he had already been paid by the company and the receiver more than he was entitled to, and his claims for further payments and additional compensation were disallowed. We see no reason to question this finding, and, as we are of opinion that the court was correct in holding the rights of petitioner subordinate to those of the first mortgage bondholders, its decree dismissing the petition is therefore affirmed.

The CHIEF JUSTICE and Mr. Justice BREWER dissented.

(146 U. S. 476)

DERBY et al. v. THOMPSON et al.

(December 12, 1892.)

No. 40.

PATENTS FOR INVENTIONS—INVENTION—INFRINGEMENT — CHILD'S ADJUSTABLE CHAIR AND CARRIAGE.

1. Claim 2 of letters patent No. 224,923, issued February 24, 1880, to Joseph W. Kenna for a combined child's chair and carriage, consisting of an ordinary chair pivoted at the lower part of its front legs to the corresponding legs of a standard having four legs, and supported at the rear by a bail attached to a crosspiece by means of a spring catch, is void for want of invention, since practically all that the patentee accomplished was to take the Patten or Chichester chairs, (covered respectively by patents issued September 3, 1878, and July 9, 1879,) and apply to them the bail and catch of the prior "Pearl chair." 32 Fed. Rep. 830, reversed.

2. Assuming that the patent is valid in any respect, it is entitled only to a narrow construction, and is not infringed by a chair which is hinged instead of pivoted to the front standards, and in which the bail is held in place by

its own elasticity or by a button attached to the frame of the seat, instead of by a spring catch. 32 Fed. Rep. 830, reversed.

Appeal from the circuit court of the United States for the district of Massachusetts.

Bill by Daniel E. Thompson and others against Philander Derby and others for the infringement of a patent. The circuit court sustained the patent, found infringement, and entered a final decree for complainant. 32 Fed. Rep. 830. Defendant appeals. Reversed.

Statement by Mr. Justice BROWN.

This was a bill in equity for the infringement of letters patent No. 224,923, issued February 24, 1880, to Joseph W. Kenna for a new and useful improvement in a combined child's chair and carriage.

The invention related to an article of furniture which, by a simple adjustment of the parts, may be converted from a child's high

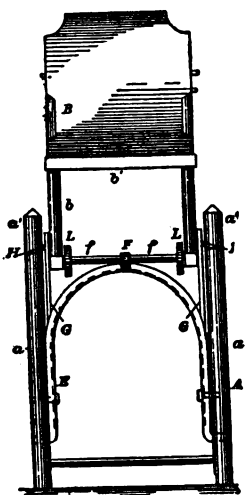

Fig. 1.

chair for use at a table to a child's carriage, and vice versa, as may be desired, and more particularly to the manner of connecting the chair to its supporting frame, and supporting it thereon. It consisted practically of an ordinary chair, B, with four legs, mounted when used as a high chair upon a *standard, A, also having four legs to correspond with those of the chair. The front legs of the chair were pivoted at their lower ends, D, upon the corresponding legs of the standard. Upon the rear legs of the standard there were pivoted at their* lower ends the arms of a bail, E, which turned up under the rear part of the chair, and supported it by the aid of a catch, F, fastened to a crosspiece or rod between the two rear legs of the chair. When used as a carriage, the bail was unfastened from its catch, which allowed the rear of the chair to fall between the rear legs, a, of the standard. The front legs, a', of the standard assumed a horizontal position. The chair then rested upon four wheels, L, attached to crosspieces connecting the front and rear legs, and the bail served as a push handle for the carriage thus formed. By this adjustment, which is shown in the annexed drawings, the chair is converted into a wheel carriage, on which the child may be pushed by the aid of the bail from place to place.

The patentee says in his specification: "In making these changes it is not necessary to remove the child from the chair, for instead of tilting the chair back, as shown in Fig. 2 of the drawings, it may be held in an upright position, and the frame, A, tilted forward on its front standard until it assumes the position shown in Fig. 3 of the drawings, and in changing from the latter position to a chair the supporting frame may be tilted upward and backward into the position shown in Fig. 2 of the drawings, while at the same time the

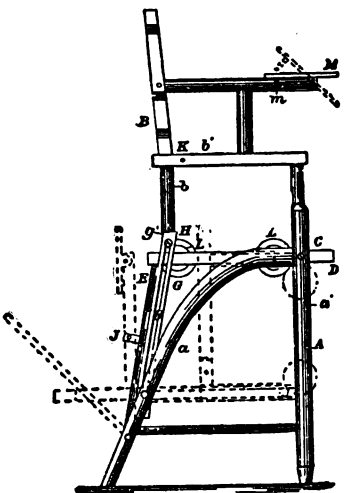

Fig. 2.

chair is held in an upright position by the attendant."

The claim relied upon in this suit was the second, which was as follows: "(2) The frame, A, in combination with the bail, E, chair frame, B, pivoted at its lower front corners to the frame, A, and the yielding rest or support, F, substantially as described." The case was defended upon the ground of want of novelty, and also of noninfringement. The court ordered a final decree for the plaintiff, (32 Fed. Rep. 830,) and the defendant was allowed an appeal to this court.

A. von Briesen, for appellants. J. E. Maynadier, for appellees.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The first assignment of error turns upon the

validity of the second claim of the patent in question, which was for "the frame, A, in combination with the bail, E, chair frame, B, pivoted at its lower front corners to the frame, A, and the yielding rest or support, F, substantially as described." This claim is practically for the combination of four elements:

(1) A low chair, having the usual frame of four legs;

(2) A supplemental frame, placed under the chair to raise it, and arranged to fold out of the way when the low chair is used;

(3) A bail, forming a part of the rear legs of the supplemental frame; and

(4) A catch or fastening device which keeps this bail in place when the chair is used as a high chair.

If Mr. Kenna had been the first to invent a high chair which, by a simple mechanical arrangement, could be converted into a rolling chair or carriage by the aid of a bail which served alternately for the support of the high chair and as a push handle for the rolling

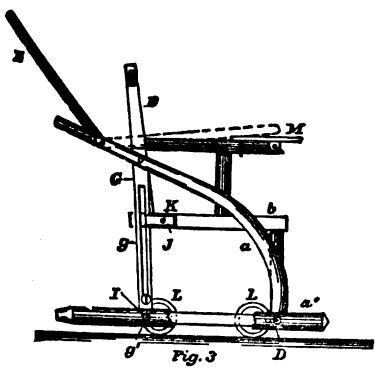

Fig. 3

chair, his patent would doubtless be entitled to a liberal construction. Such a device is at once ingenious, useful, compact, and convenient. He was not, however, the first in this field of invention. The patent to Caulier of April 23, 1878, exhibits a chair, the seat of which was hinged to the upper end of four legs, corresponding to the frame, A, of the plaintiff's patent, and provided with rollers secured to the lower part of the legs or stretchers between them, in combination with rollers secured beneath the foot rest of the chair. The rear legs were secured to the seat by spring bolts immediately beneath the seat, which bolts, when withdrawn, permitted the front legs to turn and assume a partially horizontal position, the chair falling and resting in front on casters or wheels attached to the under side of the step, and in the rear upon two corresponding wheels journaled in the bottom of the four legs. There was also a swinging push handle pivoted to the rear legs, but performing no function except when the device was used as a rolling chair. This chair contained a frame corresponding to the frame, A, of the plaintiff's patent, in combination with a push handle or bail, and a chair seat pivoted in front to the supplemental frame; but it did not contain a supporting chair frame of four legs, nor the yielding rest or support, F. While evidently a somewhat crude device, it did contain two, if not three, of the four elements of the plaintiff's patent, though combined in a different manner. *480

The Exhibit Pearl Chair, which, we agree with the court below, antedates the Kenna invention, also consisted of a chair seat hinged to the front legs of a frame, corresponding to the Kenna frame, A, immediately beneath the seat, while to the rear legs of this frame was pivoted a bail, which served to support the rear of the chair seat when used as a high chair, and as a push handle when used as a rolling chair. The wheels were pivoted, as in the Caulier chair, to the under side of the step and to the lower ends of the front legs of the frame, A. There was also a catch attached to the rear of the chair seat, into which the bail fitted when turned up for use in supporting the high chair. There are found in this chair all the elements of the Kenna chair, except that the chair is pivoted or hinged to the frame immediately beneath the seat, and hence both this and the Caulier chair are less compact, convenient, and sightly than the Kenna device. When used as a rolling chair, the chair seat was thrust forward in front of the legs, which projected in the rear and made the carriage much less convenient to handle.

In the Patten patent of September 3, 1878, however, the hinges, by means of which the legs of the supplemental frame were turned under, were placed some distance below the seat, which had the effect, when used as a rolling chair, of throwing the chair seat further backward and nearer to the bail. This peculiarity is also found in the Chichester patent of July 8, 1879, which, while differing widely from the Kenna patent in other respects, resembles it in the particular of having a complete chair instead of a mere chair seat.

Plaintiff is evidently not entitled to claim the combination of the chair frame pivoted to the supplemental frame, A, and the bail, without the yielding support or rest, since the latter is not only incorporated in his claim, but a claim which he originally made for "the supporting frame, A, in combination with the chair frame hinged thereto at its lower front corners, and the movable support, E, substantially as described," was rejected by the patent office upon reference to the Caulier patent, and Kenna acquiesced in such rejection. It is, then, only in connection with the yielding rest or support, F, that he could possibly claim the combination of the other three elements. But this rest or support is also found in connection with a chair seat, a standard of four legs, and a bail in the Pearl chair, performing the same *481

function of holding the bail in position, to support the rear of the chair seat when not in use as a rolling chair, but attached directly to the chair seat instead of to a rod connecting the two rear legs of the chair. Although the Pearl chair is referred to in one of the letters of the department, (December 12, 1879,) it was only as exhibited in the catalogue of Heywood Bros., the manufacturers wherein the catch for the support of the bail was not represented; but, appearing as it does in the Pearl chair put in evidence, it is difficult to see why this chair does not contain practically all the elements of the Kenna claim. It is true there is a difference in the manner in which the combination is put together, but the part wherein they differ most widely, namely, the pivoting of the chair frame at its lower front corners to the front legs of the supplemental frame, is found both in the Patten and prior Chichester patents. What then, has Mr. Kenna done? He has taken the Patten or Chichester chairs bodily, pivoted as they are at the lower front corners to the supplemental frame, and has applied to them the bail and catch of the Pearl chair, and has thereby made a chair more compact than the Pearl, but not more so than the Patten and Chichester chairs, but perhaps more convenient in other respects. While the question is not altogether free from doubt, the majority of the court are not disposed to accord to the changes made by Kenna the merit of invention. Though he may not in fact have known of these three chairs, but may have supposed that he was inventing something valuable, we are bound in passing upon his device, to assume that he had them all before him, and with that knowledge it seems to us that it required *483 nothing more than the skill of an ordinary mechanic to adopt the most valuable features of each in the construction of a new chair. Indeed, the result is rather an aggregation of old elements than the production of a new device. As a high chair the Kenna is not superior to the Pearl chair, and as a rolling chair it is no more compact, and apparently no more convenient, than the Patten and Chichester chairs. It is pertinent to remark in this connection, as bearing upon the merits of this patent, that the invention described in it never seems to have gone into use, perhaps owing to the fact that the chair was incumbered by a slotted bar, G, which was necessary, when used as a high chair to prevent it from tilting forward on its pivots, and throwing the child out. Plaintiff's chair, as constructed and put upon the market, not only dispenses with the catch, F, but locates the wheels upon the front legs of the supplemental frame, much as in the Caulier and Pearl chairs. As Kenna was confessedly not the inventor of the three principal elements of his chair, viz. the chair frame, the frame, A, and the bail, either separately or in combination, and as the fourth element, which is claimed to give life to his patent, viz. the catch, F, has either been abandoned altogether, or practically abandoned by substituting for it a bail having an elasticity sufficient to hold it in place without a catch, we think the introduction of this catch into the prior combination is insufficient to support the patent.

But, even conceding that the Kenna device does involve a patentable novelty, we are all of the opinion that his claim should receive a narrow construction, and that, in this aspect of the case, neither of the defendant's chairs can be said to infringe. In these devices the frame, A, is not pivoted to the chair frame, but is hinged to it in such a manner that the chair cannot tip forward, and hence the slotted bars (which, though not claimed, are an essential feature of the Kenna device) are unnecessary. Neither of the exhibits put in evidence as the defendant's chair has the yielding rest or support, F. It is true that, by a slight elasticity in the bail, it is made to catch under the frame of the chair seat in such manner as to obviate the necessity of a rest or support. But the fact that the de- *484 fendants have been able, by a skillful contrivance, to dispense with *one of the elements of the Kenna claim does not make the device an infringement. In this case the Pearl chair possessed the same feature of elasticity in the bail, which is claimed to be the mechanical equivalent of the yielding rest or support. In the other exhibit a button is used to hold the bail under the frame of the seat; but as this button is not a "yielding rest or support," or a "spring catch," the charge of infringement as to this exhibit is not sustained.

The decree of the court below is therefore reversed, and the case remanded, with directions to dismiss the bill.

(146 U. S. 533)

CAMERON v. UNITED STATES.

(December 19, 1892.)

No. 42.

APPEAL—JURISDICTIONAL AMOUNT—UNLAWFUL INCLOSURE OF PUBLIC LANDS.

1. In a proceeding brought by the United States in a territorial court to abate a wire fence under the act of February 25, 1885, (23 St. at Large, p. 321,) which forbids the inclosure of public lands by one having no "claim or color of title," etc., defendant justified under a Mexican grant; and the issue, therefore, was as to whether he had color of title. The court rendered judgment for the United States, which was affirmed by the territorial supreme court, and an appeal was taken. The only evidence as to the amount in dispute consisted of the affidavits of certain persons, and the finding of the chief justice that the property in controversy exceeded $5,000, but these evidently referred to the value of the land inclosed. *Held*, that the jurisdiction was to be determined by the value of the color of title to the property, and, as there was no evidence of its value, the appeal must be dismissed.

2. In such case the jurisdiction of the court could not be sustained under section 2 of the act of March 3, 1885, providing that the limit of $5,000 shall not apply in any case in

which is drawn in question the validity of a statute of or authority exercised under the United States, since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the case, and not to the validity of the authority exercised by the United States in removing the fence pursuant to the judgment of the court.

Appeal from the supreme court of the territory of Arizona.

Action by the United States against Colin Cameron to compel the abatement of a wire fence, whereby it is alleged that certain public lands have been inclosed without right. The trial court entered a judgment in favor of the United States, which was affirmed on appeal to the supreme court of the territory. See 21 Pac. Rep. 177. Defendant appeals. Dismissed.

Statement by Mr. Justice BROWN:

This was a proceeding by the United States to compel the defendant to abate a wire fence, by which he was alleged to have inclosed a large tract of public lands belonging to the United States, and subject to entry as agricultural lands, in violation of the act of February 25, 1885, (23 St. p. 321,) to prevent the unlawful occupancy of public lands. The first section of the act reads as follows: "All inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, * * * to any of which land included within the inclosure the person * * * making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith, with a view to entry thereof at the proper land office under the general land laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use or occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right, as above specified, as to inclosure, is likewise declared unlawful, and hereby prohibited."

The answer denied, in general terms, that the defendant had inclosed any of the public lands without any title or claim or color of title acquired in good faith thereto, or without having made application to acquire the title thereto, etc. The answer was subsequently amended by setting up a Mexican grant of the lands in question, and an application then pending before congress for the confirmation of such grant. Upon the trial the court found the issue in favor of the United States, and decreed that the inclosure was of public land, and was therefore unlawful, and rendered a special judgment, in the terms of the act, that the fence be removed by the defendant within five days from date, and, if defendant fail to remove said fence, that the same be destroyed by the United States marshal, etc.

Defendant thereupon appealed to the supreme court of the territory, by which the judgment was affirmed. 21 Pac. Rep. 177. Defendant was then allowed an appeal to this court.

Rochester Ford and Jas. C. Carter, for appellant. Sol. Gen. Aldrich and Wm. H. Barnes, for the United States.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

By the act of March 3, 1885, (23 St. p. 443,) "no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity * * * in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." The proceeding in this case was a special one to compel the abatement and destruction of a wire fence, with which the defendant was alleged to inclose 800 acres of the public lands of the United States, without title or claim or color of title thereto, acquired in good faith. Defendant's answer was a general denial of the fact, and in an amended answer he set forth the title claimed by him. The question at issue between the parties, then, was whether the defendant had color of title to the lands in question, acquired in good faith. Defendant justified under a Mexican grant of "cuatro sitios de tierra para cria de ganado mayor," (literally, four places or parcels of land for the raising of larger cattle;) and the case turned largely upon the question whether, under the laws, usages, and customs of the country, and the local construction given to these words, a grant of four square leagues or four leagues square was intended. The court found for the United States, and held that the defendant had no colorable title to the four leagues square which he had fenced.

We are of the opinion that this case must be dismissed for want of jurisdiction by this court. The only evidence that it involves the requisite jurisdictional amount consists of three affidavits of persons who swear they are acquainted with the property in dispute, and that the value of said property is more than $5,000, and the finding of the chief justice, in his allowance of an appeal, that the property in controversy in this action exceeds in value this sum. This evidently refers to the value of the land inclosed by the fence in question. It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation; and, if it were, there is no evidence of such value in this case. Had the defendant succeeded in the action, he

would not have established a title to the property, but a color of title to it; and the adjudication would have been of no value to him, except so far as to permit the fence to stand. He could not have made it the basis of an action of ejectment or other proceeding to test his actual title to the premises in question. If the proceeding be considered as one involving the value of the fence, only, it is also sufficient to say there is no evidence of such value.

*536 *Nor can our jurisdiction be sustained under the second section of the act of March 3, 1885, providing that the limit of $5,000 shall not apply to any case "in which is drawn in question the validity of a * * * statute of or an authority exercised under the United States," since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the case, and not to the validity of an authority exercised by the United States in removing the fence pursuant to the judgment of the court. If the latter were the true construction, then every case in which the court issued an injunction or an execution might be said to involve the validity of a statute or an authority exercised under the United States, since it is by virtue of such authority that the marshal executes the writ. No question is raised here as to the validity of a statute, but merely as to the application of the statute to this case.

The appeal is therefore dismissed

(146 U. S. 355)

JOY et al. v. ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY et al.

(February 6, 1892.)

No. 1014.

APPEALABLE ORDERS — REMOVAL OF CAUSES — REMAND.

An order remanding a cause to the state court from which it has been removed is not a final decree, and no appeal will lie therefrom to the supreme court. Railroad Co. v. Thouron, 10 Sup. Ct. Rep. 517, 134 U. S. 45; Gurnee v. Patrick Co., 11 Sup. Ct. Rep. 34, 137 U. S. 141; McLish v. Roff, 12 Sup. Ct. Rep. 118, 141 U. S. 661; Railroad Co. v. Roberts, 12 Sup. Ct. Rep. 123, 141 U. S. 690,—followed.

Appeal from the circuit court of the United States for the northern district of Ohio.

Bill brought in a state court of Ohio by the Adelbert College of Western Reserve University against the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis & Pacific Railway Company, and various individuals as trustees under the mortgage bonds of such companies, to have a lien declared upon the property of defendant companies, and to subject the same to payment of certain equipment bonds. The cause, having been removed to the circuit court, was remanded for want of jurisdiction, (47 Fed. Rep. 836,) and from the order of remand this appeal was taken. Motion to dismiss appeal. Appeal dismissed.

Geo. Hoadly and John C. F. Gardner, for the motion.

*357 *Mr. Chief Justice FULLER. The motion to dismiss is granted, upon the authority of Railroad Co. v. Thouron, 134 U. S. 45, 10 Sup. Ct. Rep. 517; Gurnee v. Patrick Co., 137 U. S. 141, 11 Sup. Ct. Rep. 34; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118; Railroad Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. Rep. 123.

(146 U. S. 620)

MEANS et al. v. BANK OF RANDALL.

(December 19, 1892.)

No. 63.

LIENS FOR ADVANCES — DRAFT SECURED BY BILL OF LADING — CONSIGNOR AND CONSIGNEE — REVIEW ON APPEAL — HARMLESS ERROR.

1. Advances for the purchase of certain cattle were made by a bank on the agreement by the parties to the sale that the bank should have a lien therefor on the cattle until they should be sold by consignees to whom they were to be shipped, and that a draft for the amount should be drawn on the consignees against the proceeds of the sale by them. Such draft was made and delivered to the bank, with a bill of lading for four car loads of the cattle, but no bill of lading was issued for the two remaining car loads, they being shipped in the name of a third person to enable him to procure a pass to accompany the bank's agent in charge of the shipment. The consignees, before selling the cattle, had notice of the bank's advances and of the draft and bill of lading, and no money was paid nor any right relinquished by them on account of the shipment. *Held*, that the consignees could not apply the proceeds of the sale to a prior debt of the consignor to them, as against the bank's lien, which was valid against them even as to the proceeds of the two car loads not included in the bill of lading.

2. Refusal to postpone a trial because of absence of a witness and illness of counsel is not ground for reversal where no abuse of discretion is shown, and it appears that the result was not affected thereby.

In error to the circuit court of the United States for the district of Kansas. Affirmed.

B. P. Waggener, for plaintiffs in error. Edward H. Stiles and Chas. Blood Smith, for defendant in error.

621 *Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action brought in the district court for the county of Cloud, in the state of Kansas, by the Bank of Randall, a Kansas corporation, doing business at Randall, in that state, against C. G. Means, W. W. Means, and C. H. Means, copartners as C. G. Means & Sons, to recover $6,700, $4 protest fees, and $402 damages. The suit was accompanied by an attachment, and, before answer, was removed by the defendants, who were citizens of Missouri, into the circuit court of the United States for the district of Kansas.

The amended petition filed in the circuit court of the United States set forth the fol-

lowing cause of action: On September 14, 1887, one Patterson was the owner of 98 cattle, of the value of $6,700, which he agreed to sell to one Lyons, who applied to one Bramwell, the cashier and agent of the plaintiff, for a loan of $6,700, to pay for the cattle, until he could ship them to Kansas City and sell them. It was agreed by Patterson, Lyons, and the plaintiff that, if the plaintiff would advance and pay to Patterson $6,600 and $100 for expenses, the plaintiff should have a lien upon the cattle, and retain the title to them, until the money was repaid; that the cattle should be shipped by Lyons as consignor, by way of the Missouri Pacific Railroad, to the defendants at Kansas City, Mo.; and that four car loads of the cattle were to be shipped in the name of Lyons as consignor, and two car loads in the name of one Guthrie as consignor. The defendants were engaged at the time in buying and selling live stock at Kansas City. In pursuance of that agreement, Patterson sold and delivered the 98 cattle to Lyons, and the plaintiff paid to Patterson the $6,700. Lyons delivered the cattle on board the cars of the railroad company in the town of Randall, consigned to the defendants at Kansas City, and received from the railroad company one bill of lading, for four cars, by which that company acknowledged the receipt of the cattle from Lyons, and agreed to deliver them to the defendants at Kansas City. This bill of lading Lyons indorsed and delivered to the plaintiff. No bill of lading was issued to Guthrie, but, by agreement between the agent of the railroad company, Lyons, and the plaintiff, two cars were loaded each with 16 steers, and shipped to the defendants at Kansas City, as consignees, and Guthrie as consignor. The four cars for which the bill of lading was issued in the name of Lyons contained 66 steers in all. It was agreed by the company, Lyons, and the plaintiff that the plaintiff waived no title to the steers, or to the money to be derived from their sale, by permitting them to be shipped in the name of Guthrie; and that they should be delivered to the defendants with the other steers, and the proceeds be applied to the payment of the $6,700. Thereupon Lyons drew his draft on the defendants, dated September 14, 1887, whereby he directed them to pay to his order $6,700, at sight, in Kansas City, which draft he indorsed and delivered to the plaintiff. The 98 steers were transported by the railroad company to Kansas City, and to the stock yards there, and on September 15, 1887, at 9 o'clock A. M., delivered to the defendants according to the contract set out in the bill of lading. The defendants received the steers, sold them for account of Lyons, converted the proceeds to their own use and benefit, and refused to pay the plaintiff for any of them or render to it any account of sales. At the time the steers were delivered to the defendants, the latter were advised by Lyons that the plaintiff had advanced the money to pay for the steers, and that Lyons had drawn his draft on the defendants and assigned it to the plaintiff. By those transactions the plaintiff became the owner of the steers, and entitled to their proceeds. On September 15, 1887, at 11 o'clock A. M., the draft and bill of lading were presented to the cashier of the defendants, at their office in the Kansas City stock yards, and payment demanded. The cashier, after examining the draft, directed the bank messengers who brought it to leave it at the Stock-Yards Bank, promising to pay it if they would do so. The draft was so deposited, and at 2:30 o'clock P. M. of the same day was presented by the messengers of that bank to the defendants at their office, payment was refused, and the draft was protested for nonpayment. When the draft and bill of lading were first presented to the defendants, the steers had not been disposed of by them, and were being received by them from the cars. For more than 12 months before September 14, 1887, Lyons had been engaged in shipping stock to the defendants, and accustomed to drawing drafts in favor of the plaintiff and others against such shipments, and transferring the bills of lading and cattle so shipped to the parties holding such drafts on account of the shipments. The defendants, before September 15, 1887, were accustomed to and did pay all such drafts, and had never refused payment of any of the same. The defendants had not paid to the plaintiff any part of the $6,700.

The defense set up in the answer to the amended petition was that before the shipment of the cattle the defendants advanced to Lyons more than $7,500, to be used by him to buy cattle for them, with the agreement that the cattle, when purchased, should be delivered by him to the defendants, to be sold by them on account of such advances, and that the cattle were to be delivered on board of the cars at Randall, Kan.; that the cattle in question were delivered to the defendants at Randall on board of the cars; that four cars thereof were consigned to the defendants as per the bill of lading; that no bill of lading was issued for the two cars shipped by Guthrie; that all of the cattle, at the time they were delivered to the defendants, were their property and in their possession before the bill of lading was delivered to the plaintiff; that Lyons and Guthrie accompanied the cattle from Randall to Kansas City, and remained with them while in transit; that when the cattle reached Kansas City the defendants took them from the cars with the knowledge and authority of Lyons and Guthrie, and with like knowledge and authority sold the cattle, and applied the proceeds in payment of the amount so advanced to Lyons; that the bill of lading was never indorsed to the plaintiff, and the latter had no right or authority, by virtue of its corporate power, to receive the same, or take any title to it or the property represented by it;

that the defendants had no knowledge or notice that Lyons had drawn any draft on them until the cattle had been received and sold by them, and the proceeds applied as aforesaid; that the draft was not drawn with the knowledge, consent, or authority of the defendants, or any one of them; that as to the two cars of cattle, no bill of lading was issued by the railroad company, and no delivery thereof, symbolic or otherwise, was made to the plaintiff; that the plaintiff did not have possession of any of the cattle at any time; and that the defendants had no notice that the plaintiff claimed to have any interest therein or lien thereon.

The case was tried before a jury, which was directed by the court to render a verdict for the plaintiff for $6,681.55. The defendants objected and excepted to such direction, and prayed the court to submit instructions to the jury on the pleadings and evidence, which prayer the court refused, and to such refusal the defendants excepted. The verdict was rendered accordingly, and a judgment was *625 entered thereon in favor of the plaintiff against the defendants for $6,681.55. The defendants made a motion for a new trial, which was denied; and then the court signed a bill of exceptions containing all the evidence offered or received on the trial. The defendants then sued out from this court a writ of error.

The evidence shows the following state of facts: Patterson owned the 98 head of cattle, which Lyons desired to buy, but he did not have the means. Lyons, in company with Patterson, applied to Bramwell, the cashier and agent of the plaintiff, to borrow from it $6,700 to pay for the cattle and the expense of their shipment, until they could be sold at Kansas City. The plaintiff, after its cashier had examined the cattle and become satisfied that they would be sufficient security, agreed to pay the purchase price of them to Patterson, on the express condition that the plaintiff should have a lien upon, and a pledge of, the cattle as its security for making the advance, until they were shipped to and sold by the consignee at Kansas City. To that end it was agreed that delivery of the cattle should be made by Patterson to the plaintiff, which was done, and that the plaintiff should have the title to, and right of possession of, the cattle until they were sold by the consignee and the plaintiff was reimbursed from the proceeds. Patterson, at the request and as the representative of the plaintiff, was to go with the cattle to Kansas City. The defendants' firm was selected as the consignee to receive and sell the cattle, which were shipped accordingly, on September 14, 1887, in six cars of the Missouri Pacific Railroad Company, accompanied by Patterson, Lyons, and Guthrie. Guthrie desired to get a pass to Kansas City, and Lyons had arranged with him to go with the cattle. As, under the rules of the railroad company, only two persons could get passes on account of a single shipment or billing of cattle, four of the cars were to be billed as shipped by Lyons and the other two as shipped by Guthrie. A bill of lading for the four cars was issued by the company in the name of Lyons; but as Guthrie had not yet arrived, no bill of lading was issued to him for the two cars, but they were billed to him in his absence. Lyons transacted that part of the business with the agent of the railroad company, Bramwell being then at the bank. The *626 cattle were started on September 14, 1887, and reached the Kansas City stock yards about 9 o'clock A. M. on September 15th. After they were unloaded into the chutes of the Stock-Yards Company, they were delivered to the defendants, and between 2 and 3 o'clock P. M. on September 15th were sold by them to the Armour Packing Company for $6,133.

At the time of the arrangement for the advance of the purchase money by the plaintiff, it was agreed that a draft for the amount advanced should be drawn by Lyons against the shipment on the defendants, to be accepted by them and paid out of the proceeds of the sale of the cattle. The draft was drawn and was indorsed and delivered by Lyons to the plaintiff, together with the bill of lading which had been issued for the four car loads. On September 14, 1887, the plaintiff forwarded this draft, with the bill of lading attached to it, to the Bank of Commerce, its correspondent at Kansas City, for collection. It was received by that bank early on the following morning, and was given to its messenger for presentation and collection at the office of the defendants, which was in the Live-Stock Exchange Building, at the stock yards. Between 10 and 11 o'clock A. M. of the same day, and more than three hours before the defendants sold the cattle, the draft and bill of lading were presented by the messenger at the counter of the defendants, to their agent in charge of their office, who, after examining those papers, returned them to the messenger and told him to leave them at the Stock-Yards Bank, this being the custom at the stock yards with respect to drafts which the messengers of other banks failed to collect on presentation. Between 2 and 3 o'clock P. M. of the same day the draft was presented by the collector of the Stock-Yards Bank at the office of the defendants for payment; and betwen 3 and 4 o'clock P. M. of that day it was presented by the cashier of that bank, and formally protested by him for nonpayment. The defendants converted the proceeds of the sale of the cattle to their own use, and refused to pay the draft, giving as their reason for so doing that Lyons was indebted to them on an old account, and that they had a right to apply those proceeds thereon.

*There was no dispute about the foregoing facts. In addition, Patterson and Lyons testified that on the morning of September 15, 1887, the day when the cattle reached Kansas *627

City, one of the defendants was notified personally that the plaintiff had paid for the cattle, and that a draft therefor had been drawn on the defendants and delivered to the plaintiff. No money was paid by the defendants, and the only justification attempted by them was their claim of a right to apply the proceeds of the cattle on their old account against Lyons.

It is very clear that the furnishing by the plaintiff of the purchase money for the cattle, on the faith of the agreement by Lyons that they and their proceeds would be security for the amount, and that a draft would be drawn therefor on the consignee against the cattle, with the further agreement that a bill of lading was to be obtained and turned over to the plaintiff, constituted a lien upon and a pledge of all the cattle, so far as the defendants were concerned, they having acquired no new rights, and not having changed their position in any essential respect, on account of the transaction, even though the bill of lading issued did not by its terms include the two car loads shipped in the name of Guthrie.

As to the four car loads named in the bill of lading, that instrument represented the cattle; and the transfer of the ownership as well as of the right of possession was made as effectually by the transfer of the bill as it could have been by a physical delivery of the cattle. Conard v. Insurance Co., 1 Pet. 386, 445; Dows v. Bank, 91 U. S. 618.

When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser, so far as the exercise of those rights was necessary to protect the holder. Halsey v. Warden, 25 Kan. 128; Emery v. Bank, 25 Ohio St. 360; Dows v. Bank, 91 U. S. 618; Bank v. Homeyer, 45 Mo. 145; Bank v. Dearborn, 115 Mass. 219; Bank v. Jones, 4 N. Y. 497; Holmes v. Bank, 87 Pa. St. 525.

A bank which makes advances on a bill of lading has a lien, to the extent of the advances, on the property in the hands of the consignee, and can recover from him the proceeds of the property consigned, even though the consignor be indebted to the consignee on general account; and the consignee cannot appropriate the property or its proceeds to his own use in payment of a prior debt. Conard v. Insurance Co., 1 Pet. 386; Gibson v. Stevens, 8 How. 384; 3 Pars. Cont. 487.

As to the two car loads shipped or billed in the name of Guthrie, for which no bill of lading was issued, Guthrie had no interest in them, and the shipment in his name was merely to procure for him a pass from the railroad company. What took place between Lyons and the cashier of the plaintiff, at the time when the draft and the bill of lading were delivered to the plaintiff, amounted, as to the two car loads, to a verbal mortgage or pledge of the cattle in those two cars to the plaintiff, to secure its advance, and on the faith of it the advance was made. There is no conflict of testimony on this subject. There was a verbal mortgage or pledge of all the cattle to the plaintiff as security for its advance. Patterson delivered all the cattle to the plaintiff, and, at its request and as its agent, he was placed in charge of and accompanied the shipment. Guthrie, if representing any one, represented Patterson, and, through him, the plaintiff. Patterson arranged with Guthrie that the latter should go.

As the verbal mortgage or pledge included all the cattle, and was accompanied by a delivery, it was good, at least as against the defendants, irrespective of any question of notice. The defendants were chosen as factors, they having before acted for the same parties in similar transactions, where drafts had been drawn on them against the shipments. They did not advance any money on account of this shipment, they parted with no interest, relinquished no legal right, and stood in no better position to dispute the validity of the mortgage or pledge than did Lyons himself. It was perfectly valid as against Lyons, and he could not have been heard to dispute it.

But the defendants had notice that the draft had been drawn by Lyons against the cattle, and had been indorsed to the plaintiff, and this was soon after the arrival of the cattle at Kansas City, and several hours before they were sold. The draft was presented for payment, accompanied by the bill of lading, at the counter in the office of the defendants, and to their agent in sole charge there, between 10 and 11 o'clock A. M. of the day on which the cattle arrived; and the sale of the cattle to the Armour Packing Company was not made until between 2 and 3 o'clock P. M. on that day. Therefore the defendants had legal notice of the existence and presentation of the draft and the bill of lading between three and four hours before they sold the cattle and received the proceeds. They cannot occupy the position of innocent purchasers of the cattle.

The question resulting from the facts of the case was purely a question of law, and the verdict for the plaintiff was properly directed. If the question had been submitted to the jury, and they had found a verdict for the defendants, it would have been the duty of the court to set it aside.

In addition, the evidence shows that one of the defendants had explicit notice from Patterson and Lyons, shortly after the cattle arrived at Kansas City, that the plaintiff had advanced the money to pay for them, and that the draft was out against the defendants therefor.

The foregoing views are supported by the following cases: Bank v. Porter, 73 Cal. 430, 11 Pac. Rep. 693, and 15 Pac. Rep. 53; Darlington v. Chamberlain, 120 Ill. 585, 12 N. E. Rep. 78; Bates v. Wiggin, 37 Kan. 44, 14 Pac. Rep. 442; Morrow v. Turney, 35 Ala. 131.

It is contended by the defendants that the

circuit court erred in denying their motion for a postponement of the trial of the cause, based on the absence of a witness named Wells, and the illness of Mr. Waggener, one of their counsel.

But the testimony sought to be given by Wells was immaterial and incompetent. The question of the postponement of a trial is one ordinarily addressed to the sound discretion of the trial court, and in the present case no abuse of that discretion is shown. The defendants really had no defense to the suit; and the bill of exceptions shows that all which they could, under any circumstances, make out of their attempted defense, was availed of.

*630 *The bill of exceptions shows that the only position taken by the defendants at the close of the evidence was a prayer to the court "to submit instructions to the jury upon the pleadings and evidence." No specific instructions were prayed for, and no request was made to direct a verdict for the defendants. The defendants contented themselves with objecting and excepting to the direction of a verdict for the plaintiffs, and to the refusal of the court generally to submit instructions to the jury.

Judgment affirmed.

(146 U. S. 646)

YESLER v. BOARD OF HARBOR LINE COM'RS et al.

(December 19, 1892.)

No. 912.

SUPREME COURT—JURISDICTION—APPEAL FROM STATE COURT.

1. In a proceeding to restrain the establishment of harbor lines on the shores of Elliott bay, at the city of Seattle, Wash., the petitioner averred that he was, and had been for 30 years last past, the owner of the property commonly known as "Yesler's Wharf and Dock," and the upland abutting on the shore of Elliott bay upon which said wharf and dock were constructed. At the hearing, it was stated that petitioner was the original patentee of the United States under the donation act of September 27, 1850, (9 St. at Large, p. 496,) but this fact was not averred in the petition. *Held* that, whatever might be inferred from the foregoing allegation as to the character and source of petitioner's title, the allegation did not sufficiently claim any title, right, privilege, or immunity under the constitution or a statute of or authority exercised under the United States, the denial whereof by a state supreme court would be reviewable by the supreme court of the United States.

2. The establishment of harbor lines by a state commission, even if made in violation of section 7 of the act of September 19, 1890, (26 St. at Large, pp. 426, 454,) would not be a violation of any right of a riparian owner arising under this statute, so that the refusal by a state court to prohibit the establishment of such harbor lines, at suit of the riparian owner, could be reviewed in the supreme court of the United States.

3. The constitution of Washington, art. 17, asserts the title of the state to the beds and shores of all navigable waters up to the line of ordinary high water, with a reservation of vested rights. Article 15 requires the legislature to provide for the appointment of a commission to locate harbor lines, and declares that the state shall never give, sell, or lease to any private person or corporation the lands between any harbor line and the line of ordinary high tide, and within not less than 50 feet nor more than 600 feet of such harbor line, as the commission shall determine, and that such area shall be forever reserved for landings, wharves, etc. *Held*, that the mere location of harbor lines by the state commission so as to include a long-established wharf would not deprive the owner thereof of his property without due process of law, for he would still retain whatever rights he ever had in such wharf and the land upon which it stands.

In error to the supreme court of the state of Washington.

Petition by Henry L. Yesler in a state court of Washington for a writ of prohibition to restrain the state board of harbor line commissioners, composed of W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, from locating harbor lines so as to include petitioner's wharf. The writ was granted by the trial court, but, on appeal to the supreme court of the state, the judgment was reversed. 27 Pac. Rep. 550. Petitioner appeals. Dismissed.

Statement by Mr. Chief Justice FULLER:

On October 28, 1890, the affidavit of J. D. Lowman, the attorney in fact of H. L. Yesler, was filed in the superior court of King county, state of Washington, stating:

"That said H. L. Yesler has lived in the city of Seattle upwards of thirty years; that he is now, and has been for thirty years last past, the owner of the following described property, to wit, the property commonly known as 'Yesler's Wharf and Dock' and the upland abutting on the shore upon which said wharf and dock were constructed; that said property abuts upon the shores of Elliott bay; that more than thirty years ago said Yesler, in aid of commerce and navigation, caused to be constructed in front of and to the westward of said premises, and extending into Elliott bay, a wharf and dock, at large expense, to wit, at the expense of one hundred thousand dollars; that said Yesler, at large expense, for many years prior to June 6, 1889, maintained and kept up said wharf and docks in aid of commerce and navigation; that the fire which occurred on the 6th day of June, 1889, and which destroyed the city of Seattle, destroyed said wharves and docks; that immediately thereafter said Yesler caused said wharves and docks to be rebuilt, at large expense, to wit, at the expense of fifty-six thousand dollars, and has ever since maintained said wharves and docks, and now maintains the same; that said wharves and docks are necessary aids to commerce and navigation, and are largely used and have been largely used in building up and promoting the commerce of the city of Seattle and of the state of Washington.

"That under and by virtue of the act of the legislature of the state of Washington approved March 26, 1890, and entitled 'An

act for the appraising and disposing of the tide and shore lands belonging to the state of Washington,' affiant is entitled, as affiant believes, to the privilege of purchasing the space upon which the improvements were made by him as aforesaid upon the shore in front of the upland. Affiant further says that under and by virtue of the act of the legislature of the state of Washington approved March 28, 1890, entitled 'An act to create a board of harbor line commissioners,' prescribing their duties and compensation, the governor of the state appointed as such commissioners W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey; that the members of said harbor line commission have duly qualified as such, and entered upon the discharge of their duties as such commission, and are about to take final action in the location and establishing of the harbor lines within the limits of the city of Seattle; that, as affiant is informed and believes, said commission propose and are about to locate and establish such harbor lines in such a way as to include within such harbor lines a large part of the improvements of affiant hereinbefore mentioned; that the extension of the harbor lines over said improvements is an attempt on the part of the said harbor line commission to exercise unauthorized power and to do an act which is not within the jurisdiction of the said harbor line commission; that said harbor line commission has not authority or jurisdiction under the laws of the state of Washington, as affiant is advised and believes, to embrace or include within the harbor lines to be located and established in front of the city of Seattle the wharves, docks, or other improvements made therein; that after the fire of June 6, 1889, the said Yesler rebuilt, at large expense, as aforesaid, the wharves and docks above mentioned, and did so upon the faith of protection afforded to said Yesler by the act of legislature approved March 26, 1890, above mentioned; that, if the harbor line commission aforesaid are not prevented by a writ of prohibition from this honorable court from extending the so-called 'harbor lines' over the wharves and docks of said Yesler, the said commission will so extend said lines, and thus deprive said Yesler of the use and benefit of his said wharves and docks, without compensation or due process of law, and cloud his title to the same in such a manner as greatly to embarrass and hinder the plaintiff in the legitimate use of his said property."

Deponent therefore prayed for a writ of prohibition, directed to the said harbor line commissioners, to prohibit and restrain them, and each of them, "from extending, locating, or establishing the harbor lines in front of the city of Seattle or in the harbor of the city of Seattle over the wharves and docks of the said H. L. Yesler, or any part thereof, and from filing the plat thereof in the office of the secretary of state, or the duplicate thereof in the office of the clerk of the city of Seattle."

An alternative writ having been issued, defendants appeared and moved to quash. The cause was heard upon the motion, the motion denied, and judgment rendered that the writ be made absolute, "and that this court does hereby command said respondents, and each of them, absolutely and finally, that they, and each of them, desist and refrain from any future proceedings in locating, establishing, and extending the harbor lines mentioned and referred to in the affidavit of J. D. Lowman, made and filed herein on October 28, 1890, and in said alternative writ issued thereon, over, across, and in front of the premises of said relator herein, H. L. Yesler, mentioned in said alternative writ, to wit, the premises commonly known as 'Yesler's Wharf and Dock' and the upland abutting on the shore of Elliott bay upon which said wharf and dock were constructed, and through the buildings thereon upon the shore of Elliott bay and in the harbor of the city of Seattle, in said King county, or in such a manner as to embrace and include said premises and improvements, or any part thereof, within the harbor lines of said city of Seattle, until compensation shall be ascertained and paid as required by law to said relator, H. L. Yesler, for the taking or damaging of his said property and improvements thereby."

An appeal was prosecuted to the supreme court of the state of Washington, the judgment reversed, and the petition dismissed. The court held that, as against the state, a littoral owner, simply as such owner, could assert no valuable rights below the line of ordinary high tide, (Eisenbach v. Hatfield, 26 Pac. Rep. 539;) that Yesler had no right to the land in controversy, and, at the most, the only vested right he had was in the wharf constructed thereon; that, even though he had a right to be compensated for his improvements, that would not enable him to prevent the establishment of harbor lines; that it could not be said that simply including the land under the wharf within the harbor lines was such a taking or damaging of the wharf as would entitle its owner to compensation; and that it did not follow from such including within the harbor lines that the state had interfered or ever would interfere with his ownership or possession of the wharf. The court was also of opinion that Yesler's title was not of a nature to be clouded, and, even if it were, that the proceedings complained of could constitute no cloud thereon; and, further, that, as to the legislation of congress upon the subject of navigation and harbor lines, the state legislation was not opposed thereto; and, besides, that the United States was the only party that could interfere in such case. It was also held that the writ of prohibition should only be granted in a clear case, and when no other remedy was available, and that it was not

*150 satisfied that the ordinary proceedings in law or equity would not completely protect petitioner's rights. State v. Prosser, 27 Pac. Rep. 550.

A writ of error from this court was thereupon allowed.

The state of Washington was admitted into the Union November 11, 1889, having a constitution containing the following provisions:

"Article 15. Harbors and Tide Waters. Section 1. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line, (as the commission shall determine,) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce. Sec. 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section 1 of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures. Sec. 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided."

"Article 17. Tide Lands. Section 1. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state. Sec. 2. The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: provided, the same is not impeached for fraud."

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"Article 27. Schedule. In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows: Section 1. No existing rights, * * * contracts, or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place. * * * Sec. 2. All laws now in force in the territory of Washington, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: provided, that this section shall not be so construed as to validate any act of the legislature of Washington territory granting shore or tide lands to any person, company, or any municipal or private corporation."

By a territorial law (Laws Wash. T. 1854, p. 357) it was provided that any person owning land adjoining any navigable waters or water course within or bordering upon the territory might erect upon his own land any wharf or wharves, and might extend them so far into said waters or water courses as the convenience of shipping might require; and that whenever any person should be desirous of erecting upon his own land any wharf at the terminus of any highway, or at any accustomed landing place, he might apply to the county commissioners of the proper county, who, if they should be satisfied that the public convenience required the wharf, might authorize the same to be erected and kept up for any length of time, not exceeding 20 years.

On March 26, 1890, an act of the legislature of the state for the appraising and disposal of the tide and shore lands belonging to the state was approved, the eleventh section of which provided: "The owner or owners of any lands abutting or fronting upon or bounded by the shore of the Pacific ocean, or of any bay, harbor, sound, inlet, lake, or water course, shall have the right for sixty days following the filing of the final appraisal of the tide lands to purchase all or any part of the tide lands in front of the lands so owned: provided, that if valuable improvements in actual use for commerce, trade, or business have been made upon said tide lands by any person, association, or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid." 1 Hill, St. 758.

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On March 28, 1890, an act was passed by the legislature of Washington, entitled "An act to create a board of harbor line commissioners, prescribing their duties and compensation." By the first section the board of harbor line commissioners was created, to consist of five disinterested persons, to be appointed by the governor, and the third section is as follows:

"Sec. 3. The duties of the said harbor line commissioners shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side, and to perform all other duties provided and prescribed in article fifteen of the constitution of the state of Washington, and all such other duties as the law may pre-

scribe; and wherever and whenever said board of harbor line commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays, and inlets of this state, they shall file the plat thereof in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located; and from and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this state." 1 Hill, St. 736.

*The defendants in error were duly appointed harbor line commissioners under this act, and qualified and entered upon the discharge of their duties as such. They caused a survey to be made of the harbor of the city of Seattle, and located a harbor line along the entire harbor front and in front of the area occupied by Yesler with his wharf, and caused a plat to be made of the harbor front of the city, upon which was plainly marked the harbor line so located by them, together with the location of all improvements. It is stated by counsel that they also determined the width of the strip which the constitution reserved from sale, and caused a line to be marked on the plat indicating the inner line of this area.

Thos. R. Shepard and A. H. Garland, for plaintiff in error. W. C. Jones, for defendants in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The averment in relator's petition is that "he is now, and has been for 30 years last past, the owner of the following described property, to wit, the property commonly known as 'Yesler's Wharf and Dock' and the upland abutting on the shore upon which said wharf and dock were constructed." It is said in argument that he is an original patentee of the United States, under the "Donation Act" of September 27, 1850, (9 St. p. 496, c. 76,) of a tract of about 160 acres of land, entered by him in 1852, embracing all the upland mentioned in the petition, and bounded on the west by the meander line of Elliott bay; but this is not so stated in the petition, and, whatever might be inferred as to the character and source of his ownership, it cannot reasonably be held that relator by this allegation specially set up or claimed a title, right, privilege, or immunity under the constitution, or a statute of, or authority exercised under, the United States in this behalf. In other words, the ground of our jurisdiction cannot be rested upon the denial by the state court of a right claimed by plaintiff in error, in respect to his ownership, under an act of congress. But it is contended that the contemplated action of the harbor line commissioners would be in violation of the provisions of the fourteenth amendment, as amounting to a deprivation of property without due process of law; and also that it would be in conflict with the act of congress entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890, (26 St. pp. 426, 454, c. 907.)

Section 7 of that act declares that it shall not be lawful to build any wharf, pier, dolphin, boom, dam, wier, breakwater, bulkhead, jetty, or structure of any kind outside of established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the secretary of war, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage in said waters; and by section 12 in amendment of section 12 of the river and harbor act of August 11, 1888, the secretary of war was authorized to cause harbor lines to be established when essential to the preservation and protection of harbors, beyond which no piers, wharves, bulkheads, or other works should be extended or deposits made, except under such regulations as might be prescribed from time to time by him. Penalties are denounced for the violation of either of these sections. We do not understand that any conflict of jurisdiction over the regulation of the harbor of Seattle will be precipitated by what the defendants propose to do, or that relator could sustain his invocation of judicial interference on such a theory. If the location and establishment of harbor lines by these commissioners is actually in violation of the laws of the United States, their vindication may properly be left to the general government. It is obvious that the decision of the state court in this regard was not against any title or right of relator arising under a statute of the United States.

This brings us to consider whether the contemplated proceedings would deprive Yesler of his property without due process of law. The contention seems to be that a part of his improvements are included in the strip which the constitution of Washington forbids the state from selling, or granting, or relinquishing its rights over, and that, therefore, the location and establishment of the harbor lines as proposed would amount to a taking of his property without compensation. The harbor line is the line beyond which wharves and other structures cannot be extended, and a map is exhibited by counsel which shows an inner line, delineating the inner boundary of the strip referred to. This inner line, which is 600 feet distant from the harbor line, happens to cross the outer end of relator's wharf, but the harbor line is several hundred feet away.

By the sixteenth section of article 1 of the

constitution of Washington no private property can be taken or damaged for public use without just compensation. The similar limitation upon the power of the general government, expressed in the fifth amendment, is to be read with the fourteenth amendment, prohibiting the states from depriving any person of property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. The amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights. Assuming our jurisdiction to revise the judgment of a state tribunal upholding a law authorizing the taking of private property without compensation to be unquestionable, (Kaukauna Water Power Co. v. Green Bay, etc., Co., 142 U. S. 254, 269, 12 Sup. Ct. Rep. 173,) we cannot accede to the position that the action of the harbor line commissioners in locating the harbor line and filing the plat would take any of relator's property, or so injuriously affect it as to come within the constitutional inhibition. The filing of maps of definite location, in the exercise of the power of eminent domain, furnishes no analogy. The design of the state law is to prohibit the encroachment by private individuals and corporations on navigable waters, and to secure a uniform water front; and it does not appear from relator's application that the defendants have threatened in any manner to disturb him in his possession, nor that that which is proposed to be done tends to produce that effect. Whatever his rights, they remained the same after as before, and the proceedings, as the supreme court said, could not operate to constitute a cloud upon them from the standpoint of relator himself, for, if nothing further could lawfully be done in the absence of legislation for his protection, that was apparent. The consequences which he deprecated were too remote to form the basis of decision. Whatever private rights or property he has by virtue of the territorial act of 1854 or of the state act of 1890, whatever his right of access to navigable waters or to construct a wharf from his own land, we do not see that he would be deprived of any of them by the action he has sought to prohibit. It may be true that the width of the reserved strip as delineated on the map brings the inner line across the outer end of relator's wharf, in respect of which, as if it were the harbor line, he complains that his right under the act of March 26, 1890, to purchase the ground occupied by his improvements, would be interfered with; but the construction of that act is for the state court to determine, and the averments of the affidavit and alternative writ make no issue upon it, as affected by the constitutional provision. The commissioners are to locate and establish harbor lines, whereupon the area between the harbor line and the line of ordinary high tide, within not less than 50 nor more than 600 feet of the harbor line, is reserved, under the state constitution. Whether the end of relator's wharf is within that area, and the consequent effect, the record does not call upon us to consider.

It may properly be added that the decision of the supreme court indicates that, in its opinion, relator was not entitled to the writ of prohibition, because he had other remedies of which he might have availed himself. This was a ground broad enough to sustain the judgment, irrespective of the decision of any federal question, if such arose; but we have considered the case in the other aspect, as the ruling of the supreme court in this regard is perhaps not sufficiently definite for us justly to decline jurisdiction upon that ground.

Our conclusion is that no federal question was so raised upon this record as to justify our interposition, and therefore the writ of error is dismissed.

(147 U. S. 87)

ALBUQUERQUE NAT. BANK v. PEREA, Sheriff and Ex Officio Collector, et al.

(January 3, 1893.)

No. 710.

NATIONAL BANKS — TAXATION—INJUNCTION.

1. Under the law of New Mexico, which requires property to be assessed at its cash value, property of a national bank was so assessed, but on appeal to the board of equalization the assessment was reduced to 85 per cent. of the full value. *Held*, that the mere fact that other property was assessed at 70 per cent. of its value, not through any design or systematic effort on the part of the assessors, would not justify an injunction to restrain the collection of the tax. 25 Pac. Rep. 776, affirmed.

2. Before a court of equity will grant an injunction to restrain the collection of a tax on the ground of excessive valuation and discrimination, the part of the tax which is undoubtedly due must be paid or tendered. 25 Pac. Rep. 776, affirmed.

Appeal from the supreme court of the territory of New Mexico.

In equity. Suit by the Albuquerque National Bank against Jose L. Perea, sheriff and ex officio collector of the county of Bernalillo, N. M., and Clifford L. Jackson, district attorney of said county, brought in the district court of said county, to restrain defendants from collecting certain taxes. The bill was dismissed, and the judgment thereon was affirmed by the supreme court of the territory. 25 Pac. Rep. 776. Complainant appeals. Affirmed.

Statement by Mr. Justice BREWER:

On November 3, 1888, appellant, as plaintiff, filed its bill in the district court of the second judicial district of the territory of New Mexico to restrain the defendant, sheriff and ex officio collector of Bernalillo county, from the collection of the regular territorial, county, and city taxes assessed and levied upon its property for the year 1888. The ground upon which the injunction was

sought was, generally speaking, inequality and discrimination in the assessment. The bill alleged that the plaintiff made a return of its property for taxation to the assessor, protesting at the time that its property should not be assessed at any greater rate than other property; that, disregarding the protest, the assessor assessed the property at its par and full value; that thereupon it appealed to the board of equalization, which reduced the assessment to 85 per cent.; "that all other property in the county and territory is not assessed at near so high a valuation upon its actual value;" and that the average valuation of such other property does not exceed 70 per cent. of its actual value. At first there were also allegations to the effect that the assessor and board of equalization systematically discriminated in the valuation and assessment of complainant's property and other property in the territory, but they were voluntarily stricken out by the plaintiff. It further alleged "that the amount of its taxes upon the assessment as made by the board of equalization is the sum of $2,189, and that the amount of the assessment which your orator should justly pay for its said property, if lawfully, equitably, and justly assessed, would be the sum of $1,532.30, which said sum your orator brings into court, and hereby tenders and offers to pay to the said defendant Jose L. Perea, ex officio collector of said county of Bernalillo."

Subsequently, and on November 29, 1889, it filed a supplemental bill, the purpose of which was to restrain the collection of the taxes for the year 1889. That bill, on its face, failed to allege the amount of taxes levied upon the property of the plaintiff for that year; though by reference to one of the exhibits attached,—the assessment roll for the county,—it appears that it was $3,713.76. There was an allegation that the amount admitted in the original bill to be justly due for the taxes of 1888 had been paid; and then follow these averments, which are all there are, in respect to an admission of an amount due, payment, or tender:

"And your orator further alleges that, having paid all the taxes for which it was liable for the year 1888, it now comes into court and offers to pay all the taxes which can justly and lawfully be assessed against it, and for which it may be justly and lawfully liable for the year 1889, and now tenders the same into court. * * *

"And your orator further alleges that the said assessment and said tax roll are so made out that it is impossible to separate the property upon which your orator is justly and lawfully taxed, and the taxes upon which are just and lawfully levied, from the balance of the taxes assessed against your orator; but whatever sum may be ascertained by the court to be so justly due from your orator on account of taxes for the year 1889 your orator is ready and willing and bring the same into court and is ready to pay the same."

The demurrer to these bills, original and supplemental, was sustained by the district court, and the bills dismissed, and on appeal to the supreme court of the territory this decree was affirmed. From the decision of the supreme court of the territory, complainant has brought this appeal.

W. B. Childers, for appellant. Edward L. Bartlett, for appellees.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The decree dismissing the original and supplemental bills must be sustained. As to the tax of 1888, the case stands upon the allegation that plaintiff's property was originally assessed at its full value, while other property was assessed 70 per cent. thereof; that it appealed to the board of equalization for a reduction; and that such tribunal reduced the valuation, but only to 85 instead of 70 per cent. It would seem that the mere statement of this was sufficient. The law of New Mexico requires property to be assessed at its cash value. Confessedly, this plaintiff's property was assessed at 15 per cent. below that value. Surely, upon the mere fact that other property happened to be assessed at 30 per cent. below the value, when this did not come from any design or systematic effort on the part of the county officials, and when the plaintiff has had a hearing as to the correct valuation, on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction, or have that decision of the board of equalization reviewed in this collateral way. Stanley v. Supervisors, 121 U. S. 535, 7 Sup. Ct. Rep. 1234.

With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes,—an allegation which is manifestly untrue, in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was made in a similar way, and in view of the further fact that it must have known what property it had which was subject to taxation as well as its value, and therefore the rate of taxation being fixed by law, it could, of course, have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In State Railroad Tax Cases, 92 U. S. 575, 616, it was fully considered. In that case it was said by Mr. Justice Miller, speaking for the court: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and, when in the end it is found that but a small part of the tax

should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full of all the taxes assessed." Many other cases to like effect might be cited.

The decree will be affirmed.

(146 U. S. 689)

POTTS v. WALLACE.

(December 12, 1892.)

No. 41.

CORPORATIONS — ASSIGNMENT FOR BENEFIT OF CREDITORS — STOCKHOLDER'S LIABILITY — DEFENSES.

1. An insolvent corporation, by resolution of its directors, authorized its president to make a deed of assignment of all the corporate property without preferences. A few days later a resolution was passed by the directors and stockholders, directing the president to execute a mortgage to one of the directors, and also assign to him a leasehold and other property, as security for money advanced, and then to make the assignment according to the original resolution. The president, however, afterwards made the assignment without executing these securities. Thereafter the directors passed a resolution repudiating the assignment, and declaring it a fraud upon the stockholders; but no effort was made to prevent the assignment from taking effect, and no notice was given to the assignee of this attempt of the directors to have one of their number preferred, and the assignee was allowed to proceed in the execution of his trust. *Held*, that a stockholder who was sued by the assignee for the amount due on his stock could not set up as a defense the abortive attempt to prefer the director.

2. In Pennsylvania the assignee of an insolvent corporation may maintain an action at law to recover the amount due on a stock subscription, when it appears that the debts of the concern exceed its entire assets, including the unpaid stock; and in such case no assessment is necessary to support the suit. Bank v. Gillespie, 9 Atl. Rep. 73, 115 Pa. St. 564, followed.

3. A subscriber for stock in a corporation offered, while the company was solvent, to pay for this stock, but the company refused to receive the money or to issue the stock to him. The stockholder, however, took no action to absolve himself from his subscription contract, but continued active in the company's business until it became insolvent and embarrassed. *Held*, that the offer and its refusal constituted no defense to an action by the assignee of the corporation to recover on the subscription.

4. In an action by the assignee of a corporation to recover unpaid corporate stock, defendant set up that he had offered to pay for his stock, but that the corporate officers had refused to receive payment or to issue the stock, and, as against the prima facie case made by the plaintiff, testified that he had several times offered to pay the secretary, who refused to receive the money; and the secretary testified that he refused the offer under the direction of the president, but the president, being called by plaintiff, denied that he had ever given such instructions. The testimony being closed, counsel for both parties conceded that there was no question for the jury, each moved for the direction of a verdict in his favor, and defendant's motion was granted. *Held*, that defendant might well be regarded as having abandoned the defense, in so far as it depended upon this evidence, and as having taken the position that plaintiff's evidence did not make out a case

5. The president of a corporation has no authority to deplete the coffers of the company by instructing the treasurer to refuse to receive payment of stock subscriptions when tendered. Bank v. Dunn, 6 Pet. 51, followed.

In error to the circuit court of the United States for the eastern district of New York.

Action by the assignee of an insolvent corporation against a stockholder therein to recover for unpaid stock. The circuit court directed a verdict for plaintiff, but subsequently granted a motion for a new trial. See 32 Fed. Rep. 272. Another trial being had, a verdict was directed for defendant, and judgment entered thereon. Plaintiff appeals. Reversed.

Statement by Mr. Justice SHIRAS:

This was an action brought originally in the New York supreme court, and afterwards removed into the circuit court of the United States for the eastern district of New York, by Henry Potts, Jr., as assignee of the Chester Tube & Iron Company, plaintiff, against William H. Wallace.

The Chester Tube & Iron Company was a corporation of Pennsylvania, duly incorporated under the provisions of an act of assembly of that state, approved April 29, 1874, entitled "An act to provide for the incorporation and regulation of certain corporations" for the purpose of the manufacture of iron or steel, or of any article of commerce made from them. The place where the business of the corporation was to be transacted was Chester, Delaware county, in the state of Pennsylvania, and the capital stock was fixed at $100,000, divided into 2,000 shares of the par value of $50 each. The whole amount of the capital stock was subscribed for by the defendant, William H. Wallace, and six other persons, who had associated themselves together for the purpose of forming the corporation. The charter or agreement of association was dated the 13th day of December, 1877, and letters patent were issued by the governor of Pennsylvania on the 5th day of January, 1878. The charter was signed by the associates, and William S. McManus, Augustus B. Wood, William H. Wallace, Patrick Reilly, and John Shotwell were named therein as directors for the first year.

In and by this charter the defendant, Wallace, subscribed for 300 shares of the stock, and he continued to hold his position as director of the company until the 6th day of July, 1880, when, at a meeting of the board then holden, he resigned, his resignation was

accepted, and on the 14th day of July, 1880, one F. C. Shotwell was elected to take his place. There was no meeting of the board of directors from January 21, 1880, to July 6, 1880.

At a meeting of the board on August 3, 1880, the following resolution was adopted:

"Whereas it has become apparent that, in order to enable this company to meet its liabilities, some indulgence on the part of its creditors is necessary, therefore, resolved, that the president is authorized to negotiate for and effect an extension of the claims against the company upon such terms as he may deem most likely to make it meet its indebtedness; and in the event of his failure to accomplish such extension, the president is authorized to execute, under the corporate seal, with his attestation, a deed of general assignment for all the estate and property of the company for the benefit of its creditors pro rata and without preference."

On the 14th day of September, 1880, a deed, purporting to be a deed of assignment by the Chester Tube & Iron Company, by its president, William S. McManus, under its seal, was executed to Henry Potts, Jr., and was recorded the same day in the recorder's office of Delaware county, Pa. This deed purported to convey and transfer to Henry Potts, Jr., as assignee, all the property and estate of the company of every description, in trust to sell and dispose of the same, and to collect all the claims of the company, conduct all the steps necessary for the purpose of converting the assets into cash, and to divide the same without preference among the creditors of the corporation, with the further provision that, should there be any surplus after paying the debts, the same should be returned to the corporation.

In pursuance of the provisions of the Pennsylvania statutes, regulating such assignments, Henry Potts, Jr., on October 20, 1880, executed his bond, conditioned for the faithful performance of his duties as assignee, in the penalty of $191,000, which bond was approved by the court of common pleas of Delaware county. Henry Potts, Jr., assumed the trust, and proceeded with the execution of the same so far as to file an account, which account was confirmed by the court of Delaware county. On the 5th of March, 1882, a petition was filed in said court, alleging the death of Henry Potts, Jr., and on the same day an order was made appointing Henry W. Potts as assignee to fill the vacancy occasioned by the death of Henry Potts, Jr., and directing him to give a bond, with sureties, in the sum of $44,000, and such bond was filed on March 6, 1882; and on December 16, 1882, the supreme court of New York, county of Kings, in which the action brought by Henry Potts, Jr., against the defendant Wallace was still pending, ordered that Henry W. Potts, as assignee of the Chester Tube & Iron Company, be substituted as plaintiff in the place of Henry Potts, Jr., deceased.

On the 22d day of June, 1883, on the petition of Henry W. Potts, assignee, the said action was removed to the circuit court of the United States for the eastern district of New York, and at the May term, 1888, came on to be tried before the Honorable E. Henry Lacombe, circuit judge, and a jury, and resulted in a verdict for the defendant on the 9th day of May, 1888.

On February 5, 1889, judgment was entered on the verdict in favor of the defendant and against the plaintiff, and on the 5th day of April, 1889, a writ of error was allowed, and the cause was brought thereby into the supreme court of the United States.

The record discloses, in addition to the foregoing facts, that the defendant's answer admitted that he had subscribed for 300 shares of stock, had not paid anything on account of the same, and that demand for payment had been made on him by the plaintiff as assignee.

To meet the prima facie case thus made out against him, the defendant put in evidence proceedings of the stockholders on August 12th, and of the board of directors on August 20th. At these meetings the president and treasurer were directed to execute and deliver to A. B. Wood, trustee, a bond and mortgage of the company for $11,200, to secure money advanced by him, as trustee for John E. and Mary D. Browning, for the use of the company, and also to assign to A. B. Wood all the company's interest in the leasehold, machinery, and fixtures of the company, in payment of $12,260 due Wood for money advanced by him individually for the use of the company. The resolutions of the stockholders and of the directors at these meetings directed the president that, after the mortgage and assignment to A. B. Wood were executed and delivered, he should execute the deed of general assignment provided for by the resolution of August 3, 1880.

The defendant likewise put in evidence, under objection by the plaintiff, the proceedings of a meeting of the directors held on September 16, 1880, wherein resolutions were passed declaring the act of the president in executing and delivering the deed of assignment to have been void and without authority, and in fraud of the rights of the company, and contrary to the will of the directors and stockholders. These resolutions further provided that the said pretended assignment should be repudiated, that notice of this action should be given to Henry Potts, Jr., and that the president should be and was removed from office, and D. F. Houston elected to take his place.

The defendant likewise offered evidence tending to show that several times during the year 1879 and early in 1880, when the affairs of the company were in an apparently prosperous condition, he offered to pay to the

treasurer of the company the amount of his subscription, $15,000, and demanded his stock; that the treasurer, acting, as he testified, under directions of the president, refused to accept the money and to deliver the stock. The defendant likewise proved his resignation as director on July 6, 1880.

The record further discloses that, after the defendant had put in the foregoing evidence, the plaintiff called W. S. McManus, the president, who testified that he had never refused to accept defendant's subscription money or to deliver the stock, and that he gave no instructions to the treasurer to refuse defendant's payment or to refuse to deliver his stock. He also testified that he continued to consult with the defendant about the affairs of the company down until July, 1880.

The record further shows that, on the closing of the testimony, it was conceded by the counsel for the plaintiff and the defendant, respectively, that there was no question of fact to be submitted to the jury; that thereupon the counsel for the plaintiff requested the court to direct the jury to find a verdict for the plaintiff, which request was denied, and this ruling was excepted to; that the court, on motion of defendant's counsel, directed a verdict in favor of the defendant; and that the plaintiff's counsel duly excepted to the ruling in that behalf. The jury, under the direction of the court, found a verdict for the defendant.

Sidney Ward, for plaintiff in error.
B. F. Tracy, for defendant in error.

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*Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The assignments in error are 19 in number, but they present substantially but one question, did the court err, in view of all the evidence, in directing the jury to find a verdict for the defendant?

*There were no findings of fact by the court or jury, and no charge or opinion of the court is shown by the record. We are therefore left to draw the materials upon which we are to revise the judgment of the court below from the various offers of evidence and exceptions thereto, read in the light afforded by the respective briefs and arguments of counsel.

Taken in logical order, the first ground of defense is found in the position that the assignment to Potts for the benefit of creditors was invalid; and the want of validity is supposed to be found in the fact that, in executing the deed of assignment, the president did not follow certain instructions and conditions imposed upon him by the board. Undoubtedly, the act of the president in executing and delivering the deed of assignment was fully warranted by the resolution of the board of August 3, 1880, but it is claimed that, by reason of proceedings at the stockholders' meeting held on August 12th, and at a meeting of the board of directors on August 20th, the authority of the president, granted by the resolution of August 3d, was modified, or made conditional on certain other acts that he was to do.

At the stockholders' meeting a resolution was passed directing the president, directors, and officers of the company to execute a bond and mortgage to secure A. B. Wood, one of the directors, for certain trust moneys he had advanced to the company, and also to make an assignment to said Wood of the leasehold and fixtures of the company, in payment of moneys alleged to have been advanced by him for the use of the company.

The resolution of the board of directors of August 3d, authorizing the president to make a deed of assignment for the benefit of creditors was laid before the stockholders, and, upon motion, was approved and ratified; and the president was authorized to execute a general assignment after the mortgage and assignment of lease to A. B. Wood should be duly executed and delivered.

At a meeting of the board held on August 20, 1880, the action of the stockholders in directing the execution of a mortgage and assignment of the lease to A. B. Wood was reported, and was, by a resolution, approved.

*It would seem that the mortgage and assignment of lease to Wood were never executed, and that the president on September 14, 1880, executed and delivered the deed of assignment to Potts.

As already stated, this action of the president in making the deed of assignment, without the mortgage and assignment to Wood having been executed, was sought to be repudiated by the board at a meeting held on September 16, 1880.

Whether the proposition to secure Wood, one of the directors of an insolvent company, by a mortgage covering all the property of the company, would have been valid as against the other creditors of the company, is more than doubtful. However that may be, the record does not show that any steps were ever taken to prevent the assignment to Potts from taking effect. There is no evidence that Potts was ever notified of the action of the directors attempting to make the deed of general assignment subject to a prior mortgage and assignment in favor of Wood; nor does it appear that any effort was made in the court having jurisdiction of the subject to set aside the deed to Potts. On the contrary, it appears that the assignee was suffered to proceed in the execution of his duties as assignee by filing his bond and inventory and an account, and, upon the death of Henry Potts, Jr., no objection was made on behalf of Wood or the company to resist the appointment of a successor.

The proposition that Wallace, when called upon by the assignee to pay for his stock,

could take refuge in the abortive attempt of the directors to prefer one of their own number, seems to us to be altogther inadmissible.

Another ground of defense urged was that the plaintiff had mistaken his remedy; that the proceeding to enforce the liability of Wallace should have been by a bill in equity.

We might dismiss this position by the observation that it does not appear to have been taken by the defendant in his answer, or to have been brought to the attention of the court at the trial.

As, however, for other reasons, the case has to go back for another trial, it may be well for us to briefly consider the merits of the suggestion.

"It is undoubtedly true that, in Pennsylvania, in the case of an insolvent corporation, its assets, including unpaid capital stock, constitute a trust fund, and that such fund cannot be appropriated by individual creditors, by means of attachments or executions directed against particular assets, but should be distributed, on equitable principles, among the creditors at large.

Accordingly it was ruled by the supreme court of Pennsylvania in Lane's Apppeal, 105 Pa. St. 49, and in Bell's Appeal, 115 Pa. St. 88, 8 Atl. Rep. 177, cases cited by defendant's counsel, that a bill in equity is a proper remedy whereby to subject the property of an insolvent corporation to the claims of its creditors.

Some general expressions were used in those opinions, cited in the brief of defendant's counsel, which seem to countenance the proposition that the only remedy in each case is by a bill in equity, but an examination of the facts of the cases, and of the reasoning of the opinions, clearly shows that what the court meant was that the proceeding must, in some form, be a remedy for all, and not for some, of the creditors,—that the remedy must be coextensive with the nature of the property as a trust fund.

That this is the proper reading of those cases is shown by the later case of Bank v. Gillespie, 115 Pa. St. 564, 9 Atl. Rep. 73. That was the case of a suit brought by an assignee of an insolvent bank for the benefit of creditors against a subscriber for stock remaining unpaid, and the supreme court, per Paxson, C. J., said:

"There being no assessment in evidence, the learned judge left it to the jury to find whether the whole of the unpaid subscription was required to pay the debts of the company. We see no error in this. If the unpaid subscriptions were required to pay the creditors, no assessment was necessary, under the authority of Yeager v. Trust Co., 14 Wkly. Notes Cas. 296. It was there said that 'the uncontradicted evidence shows that it was necessary to collect the whole of the stock subscription in order to pay the sums due the depositors of this insolvent corporation.' "There is not even an apparent conflict between the case referred to and the later cases of Lane's Appeal, 105 Pa. St. 49, and Bell's Appeal, in the same volume at page 88. Those were creditors' bills, filed against insolvent corporations, to compel the payment by the stockholders of their unpaid subscriptions, and it was held that in such cases there must be an account taken of the amount of debts, assets, and unpaid capital, and a decree for an assessment of the amount due by each stockholder. The reason of this is plain. Upon the insolvency of a corporation a stockholder is liable for only so much of his unpaid subscription as may be required to pay the creditors. Hence he may not be called upon in an arbitrary way to pay any sum that an assignee or creditor may demand. It is therefore requisite to ascertain, in an orderly manner, the extent of the stockholders' liability before proceedings are commenced to enforce it. But the necessity for this does not exist when the whole amount is required to pay the debts. Hence in such cases, as was said in Yeager v. Trust Co., supra, an assessment is not essential. The assignee may sue at once, for all is required."

At the trial in the present case (see page 27 of the record) the counsel for the defendant consented to take the statement of the company's clerk, without contradicting it, that the assets of the company appeared to be $250,000, and the liabilities $270,000 to $275,000. It was not necessary, therefore, to have a preliminary assessment against Wallace, as the jury could have found, under the concession of his counsel, that the entire amount of his unpaid stock was necessary to meet the indebtedness of the corporation. We understand the concession to mean that the debts exceeded the assets, including the unpaid subscriptions of the defendant and the other stockholders. If we are wrong in this, the defendant can show the facts, and invoke, if he be so advised, the doctrine of Bank v. Gillespie, if, indeed, that doctrine will avail him.

We are now brought to the last and most substantial ground urged by the defense; the one on which, we may conjecture, that the court below chiefly relied in directing the jury to find their verdict for the defendant. It is thus expressed in the brief of the defendant's counsel:

"All duties and obligations imposed upon the defendant by his subscription were fully discharged and canceled by the refusal on the part of the company, while it continued solvent, to receive the payment and performance tendered."

It may be readily conceded that if the evidence in the case disclosed that the defendant's offer of payment and performance was refused by the company while solvent, and that the defendant availed himself of such refusal, and declared himself off from his contract of subscription, the defendant was

thereby exonerated from the obligation of his subscription, and that his liability to pay would not be revived by the subsequent insolvency of the company and by the demands of the assignee.

The record discloses a very different state of facts.

The defendant was himself one of the original corporators, and was, by the articles of association, made one of the directors of the company. This position he continued to occupy until July 6, 1880, which date, according to the uncontradicted evidence, was subsequent to the actual insolvency of the company.

John Shotwell testified that he was treasurer and secretary of the company from the time of its organization to its failure; that he ascertained that the company was in embarrassed circumstances in the spring of 1880; that he had a habit of going to the defendant's office and talking with him about the company's affairs; that the company's notes went to protest in August. The resolution of the board to make the assignment for the benefit of creditors was adopted on August 3, 1880. Certainly, up until July 6, 1880, Wallace indicated no intention to withdraw himself from the company. On the contrary, he continued, from time to time, to declare his readiness to pay his subscription, and to stand on his rights as a stockholder. He himself testified that he learned that the company was in trouble in June, 1880; that the president consulted with him in regard to the company's affairs after that; that these consultations continued down to two or three months before the final collapse; that defendant's firm continued to be agents of the company up to the time of its failure; and that what he was seeing the president about was business connected with the company, the selling of goods and collecting of accounts due, etc.; and that, so long as he considered the stock good, he was ready to take it and pay for it.

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Even, therefore, if the company had, while solvent, refused to receive payment and to issue a certificate of stock, the evidence shows that the defendant did not elect to declare himself absolved from his contract, but stood upon his rights, as a stockholder and director, until the company's affairs had become involved in embarrassment. It was then too late for the defendant to change his position. If on August 3, 1880, the day on which the directors resolved to make an assignment, the affairs of the company had been prosperous and its stock valuable, Wallace was still in a position to demand his stock and to compel payment to himself of any dividends that might be declared.

So that, even if the company and the defendant had then agreed that the latter should then be exonerated from his liability to the company, such an agreement would have been void as against the creditors of the insolvent company. In Sawyer v. Hoag, 17 Wall. 610, it was held that the relations of a stockholder to the corporation, and to the public who deal with the latter, are such as to require good faith and fair dealing in any transaction between him and the corporation, of which he is part owner and controller, which may injuriously affect the rights of creditors or of the general public, and a rigid scrutiny will be made into all such transactions in the interest of creditors; and that it was not competent for the insolvent company to make a valid agreement with a stockholder to exonerate him from his liability. In other words, the doctrine laid down was that the governing officers of a corporation cannot, by agreement, or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

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In Hawley v. Upton, 102 U. S. 314, it was said, per Waite, C. J., that "it cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that needs to be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock represents. If such an obligation exists, the courts can enforce the contribution when required. He cannot be discharged from the obligation he has assumed until the contribution has been actually paid, or the obligation in some lawful way extinguished."

In Burke v. Smith, 16 Wall. 394, it was said, per Strong, J.: "It has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose the benefit of his subscription. Every such arrangement is regarded in equity, not merely as ultra vires, but as a fraud upon other stockholders, upon the public, and upon the creditors of the company."

In Upton v. Tribilcock, 91 U. S. 45, it was held that "the original holder of stock in a corporation is liable for unpaid installments of stock without an express promise to pay them; and a contract between a corporation, or its agents and him, limiting his liability therefor, is void both as to the creditors of the company and its assignee in bankruptcy."

It requires no argument to show that if a company cannot, by agreement in any form, when in insolvent circumstances, release the obligation of a subscriber to its stock, much less can it attain the same end by declining to accept payment of his subscription; and it is equally obvious that, even if such refusal is made when the company is supposed to be prosperous, yet if the stockholder declines to acquiesce in such refusal, and persists in

maintaining his position as a stockholder and director until insolvency has supervened, it is then too late for him to claim the benefit of the company's refusal.

We have thus far dealt with this aspect of the case as if the company had, in point of fact, refused to accept the defendant's subscription money and to recognize him as a stockholder; but an examination of the record shows that there was no such refusal by the company, either before or after it became insolvent.

The defendant's witnesses, consisting of Shotwell, the treasurer, of William Bispham, a partner of the defendant, and of the defendant himself, testified that several times during the year 1879 and the early part of 1880 the defendant had offered to pay the amount of his subscription, which the treasurer refused to accept, and the treasurer testified that, in so refusing, he was acting under the instructions of the president; but the president, when called on behalf of the plaintiff, denied that he had ever refused to accept the defendant's subscription money or to give him his stock, and denied that he had ever instructed the treasurer to do so.

With the testimony in this condition, the counsel of both parties conceded of record that there was no question of fact to be submitted to the jury, and requested the court to give peremptory instructions to the jury, and the court accordingly directed the jury to find for the defendant.

As the plaintiff had clearly made out a prima facie case before the defendant went into his evidence, and as the defendant did not ask to go to the jury on the questions of fact, he might well be regarded as having abandoned his defense so far as that depended on the evidence adduced by himself, and as having taken the position that the plaintiff's evidence did not make out a case.

But even if it should, for the sake of the argument, be conceded that the jury did find that the treasurer, in refusing to accept the money, obeyed instructions given him by the president, such action on the part of the president was not the action of the company, and did not bind the company or its creditors.

The president had no legal power or authority to deplete the coffers of the company, by instructing the treasurer to refuse to accept subscription money when tendered. In Bank v. Dunn, 6 Pet. 51, it was held that an agreement by the president and cashier that the indorser on a note shall not be liable on his indorsement does not bind the bank; that it is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank, except in the discharge of their ordinary duties.

It is true that if the acts of the president are ratified by the corporation, or if the corporation permits a general course of conduct, or accepts the benefit of his act, they will be bound by it; but the general rule is that the president cannot act or contract for the corporation, except in the course of his usual duties.

And the rule is still stronger against the power of the president to bind the corporation by giving up its securities or releasing claims in its favor.

In the present instance there is no evidence whatever of ratification by the directors of the alleged act of the president in reference to the defendant's obligation. It does not appear that they knew anything about it, and it is plain that the company received no benefit from it.

Upon the facts disclosed by the record, we are clearly of opinion that the court below erred in instructing the jury to find for the defendant, and in entering judgment on the verdict.

The judgment is reversed, with directions to grant a new trial, and for further proceedings in conformity with this opinion.

(147 U. S. 133)

FISHER et al. v. SHROPSHIRE et al.

(January 3, 1893.)

No. 54.

VENDOR'S LIEN — CONVEYANCE BY VENDEE — WAIVER—NECESSARY PARTIES—SET-OFF AGAINST WIFE OF ADVANCES TO HUSBAND.

1. The doctrine of a vendor's lien arising by implication exists in the state of Iowa.

2. Code Iowa, § 1940, provides that no vendor's lien shall be recognized or enforced, after a conveyance by the vendee, unless such lien is reserved by an instrument duly acknowledged and recorded, or unless such conveyance is made after suit brought by the vendor to enforce such lien. Section 2628 provides that, when a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons, as against the plaintiff's title, if the real estate affected be situated in the county where the petition is filed. *Held* that, where a petition to establish and enforce a vendor's lien was filed in the county where the land was situated, the lien was not defeated by a conveyance made by the vendee subsequent to such filing in pursuance of an agreement of purchase made prior thereto, although delivery of process to the sheriff, and service thereof, were not made until after such conveyance, especially as it was apparent that the grantee therein was not deprived, against his will, of protection for purchase money paid by him before notice of the lien.

3. Waiver of a vendor's lien cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance, nor from the lapse of more than two years between the surrender of possession by the vendor and the filing of his petition to establish and enforce the lien, unaccompanied by any acts on his part manifesting an intention not to rely on the land for security, or inconsistent with the continued existence of the lien.

4. A suit to enforce a vendor's lien, brought in a state court against the vendee as sole defendant, was removed by him to the federal court on the ground of diverse citizenship,

after he had conveyed the land to a citizen of the same state as the complainants. *Held*, that such grantee, although a proper party, was not an indispensable party, under Equity Rule 47, and that defendant's motion to dismiss the suit because he was not joined was properly overruled; it further appearing that such grantee was aware of the pendency of the suit, testified therein, and had opportunity to intervene without ousting the jurisdiction.

5. In a suit to establish and enforce a vendor's lien, and for an accounting, the vendee should be credited with advances to the vendor's husband, who had charge of the land, made for the benefit of both husband and wife, and for the benefit of the land, where it appears from the dealings of the parties, their correspondence, and the evidence, that there was no intention to trust the husband alone, or to look to him individually for repayment; but the vendor should not be credited with a distinct individual indebtedness of the husband. 31 Fed. Rep. 694, modified.

Appeal from the circuit court of the United States for the southern district of Iowa.

In equity. Bill by Loretta Shropshire and Alexander C. Shropshire against John Fisher and William Lyle, executors, and Esther Lyle, sole devisee of John Lyle, deceased, to establish and enforce a vendor's lien, and for an accounting. Decree for complainants. 31 Fed. Rep. 694. Reversed and remanded, with direction to enter a decree for complainants for a less amount.

Statement by Mr. Chief Justice FULLER:

*134 *In 1876 Mrs. Loretta Shropshire owned in her own right 540 acres of land in Iowa, derived from the estate of a former husband, 40 acres of which constituted her homestead. May 1, 1877, she borrowed from the German Savings Bank of Davenport, Iowa, $10,000 for 3 years, with interest at the rate of 10 per cent. per annum, payable semiannually, and she and her husband, Alexander C. Shropshire, executed a mortgage on the 540 acres. Judgments were rendered against her for various sums, and her brother, Alexander Rhinehart, became her surety upon a bond for a stay of execution. The stay having expired, all the real estate of Mrs. Shropshire, except her homestead, was held for sale, subject to the prior mortgage of the bank.

The statute of Iowa provides that "in no action where the defendant has * * * stayed execution on the judgment shall he be entitled to redeem." McClain, Ann. Code, § 4331. In February, 1878, Mrs. Shropshire applied for assistance to John Lyle, and it was arranged between her brothers, Alexander K. and Jehu Rhinehart, and herself, *135 that Jehu Rhinehart should bid in the property at the sheriff's sale, and, if she succeeded in raising the amount of the judgment, that he should deed the land to her or to whomsoever she might direct. Lyle thereupon advanced to Mrs. Shropshire $4,250, and Jehu Rhinehart executed to him a quitclaim deed, dated March 28, 1878, for 500 acres of the land purchased at the sheriff's sale, for the expressed consideration of $4,250, and Mrs. Shropshire and her husband executed to Lyle a quitclaim deed for the 40 acres of land constituting the homestead tract dated March 20, 1878, and expressing a consideration of $1,000.

May 1, 1878, Mrs. Shropshire and her husband executed to Lyle a quitclaim deed of the entire tract, the consideration named being $14,250. May 1, 1879, Lyle purchased, and took an assignment of, the German Savings Bank mortgage. Mr. and Mrs. Shropshire continued in the possession of all the lands deeded to Lyle until January 1, 1881, when the property was surrendered to him, and he and those claiming under him have continued in possession from thence hitherto.

The original bill in this case was filed by Mrs. Shropshire, February 26, 1883, in the district court of Jasper county, Iowa, in which county the lands were situated, against John Lyle as sole defendant. On March 1, 1883, Lyle conveyed the lands to his grandson, George Lyle, and he took possession on the next day. The cause was then removed to the circuit court of the United States for the southern district of Iowa, on September 14, 1883, on the application of John Lyle, upon the ground that he was a citizen of the state of Illinois, and the plaintiff, Mrs. Shropshire, was a citizen of Iowa. The bill was amended January 15, 1886, by making A. C. Shropshire, the husband, a party complainant, and on August 27th of that year, the bill was further amended. The bill, as amended, in substance alleged that the advancement by John Lyle of $4,250 was a loan; that the quitclaim deeds of Rhinehart, Mrs. Shropshire, and her husband were intended simply as mortgages to secure the amount of the loan; that upon that loan and the German Savings Bank mortgage various payments *136 had been made; that John Lyle, being the holder of the quitclaim deeds and the savings-bank mortgage, bought the lands in question of Mrs. Shropshire at the price of $42.50 per acre, and took possession of the same about January 1, 1881; and that there was a large amount of the purchase price still due, which defendant had neglected and refused to pay. The bill prayed that an account be taken of the amount due complainants, that the defendant be decreed to pay the balance due upon the purchase price of the land, and that a vendor's lien be established therefor, and for general relief.

The defendant answered under oath, denying all the material averments of the bill, and insisting upon the deeds as absolute conveyances, and alleged that in 1882 he sold, and in 1883 conveyed, the lands in question to one George Lyle, and that the deed was delivered and recorded before this suit was brought. Defendant also averred that Mrs. Shropshire was largely indebted to him, and that upon a final settlement, January 27, 1880, a balance of $7,900 had been found due to him from her. He further declared it to be wholly false, and without color of truth, that he purchased the farm from Mrs. Shropshire January 1, 1881, at $42.50 per acre, or

at any other sum or price, and that the alleged sale was "without any basis of fact whatever."

Defendant also moved the court to dismiss the bill for defect of parties, in that George Lyle had not been made a party defendant, which motion was overruled.

An interlocutory decree was entered November 11, 1886, determining that the deeds from the complainants to the defendant were mortgages, and that on or about January 1, 1881, defendant John Lyle had agreed to take the lands and pay therefor $21,600. A special master was appointed to take and state all the accounts between the parties, and in December, 1886, he filed his report, showing a balance due Mrs. Shropshire upon the purchase of the land in the sum of $7,807.31, or, in another view, of $2,028.51, with interest from January 1, 1881. The accounts thus stated in the alternative were arrived at by charging Lyle with the $21,600, and crediting him with an alleged individual indebtedness of Mrs. Shropshire, as well as the joint *137 indebtedness of husband and wife,* amounting together to $18,687.13, and deducting $4,894.44 payments, leaving $7,807.31; but the master reported that if the court should be of opinion that certain sums, which he enumerated and described as "individual indebtedness" of A. C. Shropshire, amounting in the aggregate to $5,778.80, should also be deducted, then the balance due was but $2,028.51.

May 28, 1887, a final decree was entered, confirming the master's report, and decreeing the payment of the sum of $10,810.46, with interest at 6 per cent. from that date, establishing a vendor's lien against all the lands above referred to, and directing a sale on default of payment. From this decree the pending appeal was prosecuted. The opinion of the circuit court is reported in 31 Fed. Rep. 694.

A. H. McVey, for appellants. Jas. G. Day and Wm. Phillips, for appellees.

*138 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered *139 the opinion of the court:

*No complaint is made of the interlocutory decree adjudging the deeds to be mortgages, and that John Lyle, on or about January 1, 1881, agreed to pay for the lands the sum of $21,600.

The errors assigned question the action of the court in overruling exceptions to the master's report in respect of various particulars forming the basis of the amount found due, and to the finding that there was no settlement between the parties January 27, 1880; in approving the report as a whole; in finding that anything was due; in holding that complainants were entitled to a vendor's lien; in decreeing a sale; and in refusing to require George Lyle to be made a party to the action.

The deed of Rhinehart to John Lyle was dated March 28, 1878, and those of Mr. and Mrs. Shropshire, March 20, 1878, and May 1, 1878, respectively. The mortgage of the German Savings Bank was assigned to Lyle, May 2, 1879. The purchase by Lyle for $21,600 was made on or about January 1, 1881. This, therefore, is not the case of a conveyance presently made in consideration of the promise to pay the stipulated price, but of a sale of the equity of redemption, and the bill is, in effect, one to enforce payment of the difference between the total purchase price and the amount which it would have been necessary for the vendors to pay in order to redeem from the mortgages, if they had not sold.

The transaction took the shape of a purchase for a specified sum to be paid within a reasonable time, as no time for payment was definitely fixed, and presumably as soon as the indebtedness to the vendee could be ascertained and applied. The decree is for the balance of the purchase money alone, although under the circumstances an accounting was necessary in arriving at that balance.

The courts of the United States enforce grantors' and vendors' liens if in harmony with the jurisprudence of the state in which the action is brought, and the principle upon which such a lien rests has been held to be that one who gets the estate of another ought not, in conscience, to be allowed to keep it without paying the consideration. *Chilton* v. Braiden's Adm'x, 2 Black, 458; Story, Eq. Jur. § 1219.

Although there is some contrariety of expression, the doctrine of a vendor's lien arising by implication seems to have been generally recognized in the state of Iowa.

In Porter v. City of Dubuque, 20 Iowa, 440, the supreme court said:

"The right to a lien in favor of a vendor upon the real estate sold to a vendee is not based upon contract, nor is it properly an equitable mortgage; neither can it be regarded as a trust resulting to the vendor by reason of the vendee holding the estate with the purchase money unpaid. It is a simple equity raised and administered by courts of chancery. It is not measured by any fixed rules, nor does it depend upon any particular fact or facts. Each case rests upon its own peculiar circumstances, and the vendor's lien is given or denied according to its rightfulness and equity, in the judgment of the court, upon the facts developed in the particular case." It was stated, however, that whether the doctrine should obtain in Iowa might be regarded as still an open question, although it had been declared in Pierson v. David, 1 Iowa, 23, that the lien was firmly established. This case is cited with approbation in Johnson v. McGrew, 42 Iowa, 560, but it is added that, whatever might be the view of the question under the general doctrines of equity, there could be no doubt respecting it under the provisions of the stat-

ute; and reference is then made to sections 3671 and 3672 of the Iowa Revision of 1860, which were sections 2094 and 2095 of the Code of 1851. These sections provided that the vendor of real estate, when all or part of the purchase money remained unpaid after the day fixed for the payment, might file his petition asking the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property, and that the vendee should in such case, for the purpose of foreclosure, be treated as a mortgagor of the property purchased, and his rights be foreclosed in a similar manner. And it was held that the sections applied as well where a deed had been made as where it had not.

*141 In McDole v. Purdy, 23 Iowa, 277, a vendor's lien was allowed and enforced for a deficiency in value of lands taken in exchange, on account of the false representations of the other party; and to the same purport see Brown v. Byam, 65 Iowa, 374, 21 N. W. Rep. 684.

In Huff v. Olmstead, 67 Iowa, 598, 25 N. W. Rep. 784, the plaintiff conveyed to the defendant in consideration of a partial cash payment and a promise by defendant to execute a mortgage back to secure the payment of the balance of the purchase money, unless he should sooner convey to plaintiff a good title to certain other lands in payment of the balance. Defendant did not convey the other lands, but he executed a mortgage, and had it placed on record, differing in its terms, however, from the one agreed on. The plaintiff did not accept the mortgage, and it was held that he had a vendor's lien on the land conveyed to the defendant.

In Devin v. Eagleson, 79 Iowa, 269, 44 N. W. Rep. 545, where land had been purchased and partly paid for, and had passed into the possession of the purchaser under an agreement that he would as soon as possible execute a mortgage thereon to the vendor to secure the residue of the purchase money, and the mortgage was prepared, but not executed, it was decided that the vendor had a lien, according to the terms of the prepared mortgage, for the residue of the purchase price, and that the agreement to execute the mortgage was excepted from the statute of frauds by section 3665 of the Code. In that case, the language above given from Porter v. City of Dubuque, as to the character of a vendor's lien, was quoted, though it was stated that plaintiff's lien was not such a lien, but one based upon a contract which a court of equity would enforce.

Sections 2094 and 2095 of the Code of 1851 were carried forward into the Code of 1873, but changed to cases where the vendor had "given a bond or other writing to convey," and section 1940 was enacted, which provided: "No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executor or assigns, to enforce such lien." McClain, Ann. Code 1888, p. 776, § 3111.

Under this section it has been decided that, after the execution of a conveyance by the vendee, the lien ceases to exist, even though the grantee knew that the purchase money had not been paid. This is because the grantee has the right to assume that a vendor's lien as against him is waived, (Cutler v. Ammon, 65 Iowa, 283, 21 N. W. Rep. 604; Prouty v. Clark, 73 Iowa, 55, 34 N. W. Rep. 614; Rotch v. Hussey, 52 Iowa, 694, 3 N. W. Rep. 727;) a presumption which cannot be indulged in where suit to enforce such lien is pending.

It is argued that the second branch of the section should be construed to mean that no vendor's lien shall be recognized or enforced after a conveyance, not only unless the lien is reserved, but also unless the conveyance is made after suit brought. It appears to us that this would disregard both language and obvious intention, and that where the conveyance is after suit brought the grantee takes subject to the maintenance of the lien.

Section 2628 of the Code provides: "When a petition has been filed affecting real estate, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title, if the real estate affected be situated in the county where the petition is filed." 2 McClain, Ann. Code, p. 1037, § 3834.

The circuit court held that, as the petition in this case was filed February 26, 1883, in the county wherein the land was situated, and as the conveyance to George Lyle was made March 1, 1883, that conveyance did not affect the rights and equities of complainants; that it was the filing of the petition, and not service of notice, that created notice to third parties of the pendency of the action; and that, even though there was a verbal contract in regard to the alleged purchase by George Lyle, made in December, 1882, yet that did not defeat a vendor's lien under section 1940 of the Code. These conclusions we understand to be in accord with the decisions of the supreme court of Iowa. Noyes v. Kramer, 54 Iowa, 22, 6 N. W. Rep. 123; Haverly v. Alcott, 57 Iowa, 171, 10 N. W. Rep. 326.

*It is said that this cannot be so, because the effect of lis pendens is merely to give constructive notice to any purchaser after the filing of the petition, and that, if actual notice would not protect the vendor's lien, then, a fortiori, a constructive notice would not. But the notice given by filing the petition is notice of the assertion of the lien, and not merely of the fact that the purchase money has not been paid. The reservation of the lien by recorded instrument, or its as-

sertion by suit for its enforcement, alike avoid the objection that it is a secret lien, and prevent the acquisition of superior equities by third parties.

Appellants further insist that no suit can be held to be "brought," under section 1940, although the petition be previously filed, until the delivery of the process notice to the sheriff, with intent that it be served immediately, and that this (or this and service) alone constitutes the commencement of the action, (Code, §§ 2599, 2532;) that the first publication of notice of suit in this case was not until March 22, 1883, and the publication was not completed until April 12, 1883, (sections 2619, 2620;) and that hence the conveyance to George Lyle had priority. Section 2532 relates simply to the bar of the statute of limitations, and section 2599 to the general rule in respect of the manner of commencing actions; but, as already said, it is the filing of the petition, and not the delivery or service of process, that creates notice to third parties of the pendency of the action, and prevents them from acquiring an interest in the subject-matter thereof as against the lien so asserted.

Undoubtedly, a lien of the character we are considering may be defeated if the grantor or vendor do any act manifesting an intention not to rely on the land for security; but this must be an act substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance. We find no sufficient evidence of a waiver here, and we do not regard the lapse of time between the surrender of possession in January, 1881, upon the purchase being made, and the filing of the bill in February, 1883, as justifying a conclusion to that effect. The position is also taken that the remedy at law must first be exhausted or shown not to exist before a bill in equity can be filed to enforce such a lien. But our attention has been called to no decision by the courts of Iowa laying down that rule, and although we are aware that it obtains in some jurisdictions, and under some circumstances, it is inapplicable here, and need not be discussed as an independent proposition.

We are of opinion, in view of all the facts and circumstances disclosed by the record, and of the concession that the deeds were mortgages, and that John Lyle agreed on January 1, 1881, to pay the Shropshires $21,600 for the land, subject, of course, to the reduction of that amount by the indebtedness of the Shropshires to him, complainants were entitled to maintain a lien upon the property for the balance due them, which the conveyance to George Lyle could not in itself destroy.

In this connection it should be observed, further, that George Lyle had not paid the entire alleged consideration for the land before the bill was filed. The evidence of George Lyle and his grandfather is in many particulars directly in conflict. George testified that he made a verbal contract for the purchase of the farm about December 1, 1882, for $22,000, which he paid in cash; that he traded for it 640 acres of land in Union county, Iowa, at $30 per acre, and $3,800 in cash. This would be $23,000. He also said that he gave a note of $1,600 for the stock on the place. John testified that George turned over to him, on the purchase price, sale notes to the amount of about $4,000, and gave his note for $6,000, and that a half section in Union county was part of the consideration, and was to be deeded as he might direct; that the agreed price for the 320 acres was $8,000. The deed for this land conveyed 320 acres for the expressed consideration of $8,000, and bore date September 20, 1883. Payments made after this bill was filed were made by George Lyle in his own wrong, so far as complainants' rights were concerned; and, treating the doctrine that all the purchase money must be paid before notice of a prior lien, in order that a subsequent purchaser may be protected, as so far qualified that protection may be accorded for the amount actually paid before notice, (Kitteridge v. Chapman, 36 Iowa, 348,) it is quite apparent that George Lyle was not deprived against his will of that protection by the relief awarded.

The motion to dismiss the suit for defect of parties was properly overruled. By Equity Rule 47 it is provided that in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties, by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction as to the parties before it, the court may, in its discretion, proceed in the cause without making such persons parties, and in such case the decree shall be without prejudice to the rights of the absent parties. When this bill was filed the conveyance to George Lyle had not been made. What rights may have accrued to him prior to that date are not affected by the decree. The suit was removed into the circuit court of the United States by the defendant John Lyle; and, having done that, he then contended that the court had no jurisdiction, because George Lyle was an indispensable party defendant, and he was a citizen of the same state as complainants. We do not think this will do. If George Lyle, who was fully aware of the pendency of the suit, and gave his testimony therein, desired to set up equities which he claimed arose from the payment of part of the purchase price of the property before the suit was brought, he might, as pointed out by the circuit court, have intervened in the cause, for the protection of his rights, without ousting the jurisdiction. This he did not do, and

we are not prepared to hold the circuit court should be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it.

Undoubtedly, George Lyle would have been a proper party to the proceeding, but we do not regard the case as one in which his interest in the subject-matter and in the relief sought was so bound up with John Lyle that his legal presence as a party was an absolute necessity, without which the court could not proceed. Bank v. Campbell, 14 Wall. 87, 95.

This brings us to the examination of the matters complained of in regard to the master's report. The rule in relation to the findings and conclusions of a master, concurred in by the circuit court, is that they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. Crawford v. Neal, 144 U. S. 585, 596, 12 Sup. Ct. Rep. 759; Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. Rep. 821.

We have carefully examined the evidence, and are satisfied that the findings of the master (including that rejecting the alleged settlement in January, 1880) ought not to be disturbed, under a proper application of the rule just stated, except in one particular, in respect of which we hold a serious and important error has been committed. The report of the master states certain items, amounting to $5,778.80, as the "individual indebtedness" of A. C. Shropshire to John Lyle on January 1, 1881, including interest. In the summary of the account stated between the parties, the report puts the balance due in the alternative. If the $5,778.80 were rejected as a credit in Lyle's favor, the balance found was $7,807.31, and, if it were allowed, the balance was $2,028.51. The circuit court entered a decree for a larger amount, with interest thereon. We cannot concur in this conclusion. Lyle's advances were made for the benefit of both the Shropshires. The husband had charge of the farm, and the stock that was procured from time to time and placed upon it through the business transacted with Lyle was for the benefit of both. Lyle gave credit to the farm and its operations, and not to A. C. Shropshire, as contradistinguished from his wife. Some of the credits allowed to the Shropshires in the $4,894.44 appear to have been realized out of items thrown into the alleged individual indebtedness of A. C. Shropshire. The course of dealing between the parties, their correspondence, the whole evidence taken together, seem to us wholly inconsistent with the idea that Lyle was trusting A. C. Shropshire to the extent indicated, and looked to him for repayment, or that Shropshire and his wife so understood. The indebtedness was joint, and not several. There is, however, included in this amount of $5,778.80 a note of $1,000 of Augustus and Alexander C. Shropshire, with interest from December 1, 1877, to January 1, 1881, amounting to $327.83, which should be excluded as individual indebtedness of A. C. Shropshire, and not properly chargeable in this account. All equitable considerations are open in such a suit, and we think that the equities require that John Lyle should receive an additional credit of $4,450.97. The balance due upon the account stated, corrected in this particular, would be $3,356.34.

The decree is reversed, and the cause remanded, with a direction to enter a decree for the amount of $3,356.34, with interest from January 1, 1881.

(147 U. S. 118)

ANKENEY et al. v. HANNON et al.

(January 3, 1893.)

No. 91.

COURTS—FOLLOWING STATE DECISIONS—MARRIED WOMEN — CHARGE ON SEPARATE ESTATE—LIABILITY OF PROPERTY SUBSEQUENTLY ACQUIRED.

1. Where a commission to dispose of part of the business on the docket of the supreme court of a state is appointed under an amendment of the state constitution giving the commission, in regard to such business, like jurisdiction and power as may be vested in the court, its decision on a question properly presented to it in a judicial proceeding is entitled, in the supreme court of the United States, to like consideration and weight as a decision upon the same question by the supreme court of the state.

2. The provisions of Rev. St. Ohio, §§ 3108–3111, as existing in 1880, in regard to contracts by married women, whether considered by themselves or in connection with sections 4990, 5319, which relate to the remedy merely, do not enlarge the capacity of married women to make contracts, except in the instances specifically mentioned, and therefore confer no power to charge any after-acquired separate estate. Levi v. Earl, 30 Ohio St. 147, followed.

3. A married woman, having no power, in Ohio, to contract in reference to her separate estate previous to its existence, her promissory note, charging her separate estate with the payment thereof, cannot be enforced in equity against a separate estate acquired by her subsequent to the execution of the note.

Appeal from the circuit court of the United States for the southern district of Ohio.

In equity. Suit by Joseph A. Ankeney and William R. Ankeney against Clara M. Hannon and Joseph E. Hannon to charge the separate estate of the defendant Clara M. Hannon with the payment of certain promissory notes. Bill dismissed on general demurrer. Complainants appeal. Affirmed.

A. B. Cummins, for appellants. L. Maxwell and Wm. M. Ramsey, for appellees.

Mr. Justice FIELD delivered the opinion of the court.

This is a suit in equity to charge the separate estate of a married woman with the payment of certain notes of which her husband is one of the makers, such estate having been acquired subsequently to their execution. It arises out of the following facts: On the 25th

of March, 1880, Joseph E. Hannon, Clara M. Hannon, and William H. Hannon executed their three promissory notes, aggregating $14,969.31, dated at Xenia, Ohio, and payable to the order of Joseph E. Hannon, one of the makers. They were subsequently transferred to the complainants before maturity for a valuable consideration. Clara M. Hannon is the wife of Joseph E. Hannon, and at the time the notes were signed she possessed a small separate estate; and in each of the notes she inserted the following provision: "Mrs. Clara M. Hannon signs this note with the intention of charging her separate estate, both real and personal." As appears from the statement of counsel, a general demurrer was filed to the original bill, and in disposing of it the court expressed an opinion that the complainants could charge the separate estate in existence when the notes were given, but intimated that the after-acquired property could not be thus charged. The separate estate existing at the time of the execution of the notes was of small value, and the complainants desired to present the question of the liability of the after-acquired estate of the wife for the payment of the notes. They therefore amended their bill so as to show
*119 that Mrs. Hannon was not, at its filing, or thereafter, possessed of any *of the property which she owned at the time of the execution of the notes, but that she had subsequently acquired by inheritance from the estate of her father, who died in 1882, property of the value of more than $200,000. The amended bill also alleged that Clara M. Hannon signed the notes with the intention to bind her separate estate, whether then in possession or thereafter acquired. To the bill as thus amended a general demurrer was also filed and sustained by the court, and a decree entered that the bill be dismissed. From this decree the appeal is taken.

The case thus presents the single question whether the separate estate of the wife, Mrs. Clara M. Hannon, acquired by her by inheritance from her father, in 1882, is chargeable with the payment of the notes described, executed, and delivered by her and others in
*123 March, 1880.

*At common law, a married woman is disabled from executing any promissory notes, either alone or in conjunction with her husband. A note or other contract signed by both is the obligation of the husband alone; and, in the absence of legislation, a separate estate to her can only be created by conveyance, devise, or contract, and remedies against such estate can be enforced only in
*124 equity. At the time Mrs. Hannon signed the notes in controversy, married women in Ohio were subject *to their common-law disabilities, except with respect to certain statutory contracts, and had power to charge their separate estates only in accordance with the ordinary rules of equity. Subsequently, in 1884, the laws of Ohio were amended, authorizing married women, during coverture, to contract to the same extent and in the same manner as if they were unmarried. Amendatory sections Rev. St. 3108–3111. And in March, 1887, it was further provided that "a husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might, if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other." But at the time the notes in question were signed by Mrs. Hannon the rights and liabilities of married women in Ohio, so far as they differed from the doctrine of the common law, were determined by the following sections of the Revised Statutes, which embodied the provisions of the act known as the "Keys Act," passed in April, 1861. These sections are as follows:

"Sec. 3108. An estate or interest, legal or equitable, in real property belonging to a woman at her marriage, or which may have come to her during coverture, by conveyance, gift, devise, or inheritance, or by purchase with her separate means or money, shall, together with all rents and issues thereof, be and remain her separate property, and under her control; and she may, in her own name, during coverture, make contracts for labor and materials for improving, repairing, and cultivating the same, and also lease the same for any period not exceeding three years. This section shall not affect the estate by the curtesy of a husband in the real property of his wife after her decease; but during the life of such wife, or any heir of her body, such estate shall not be taken by any process of law for the payment of his debts, or be conveyed or incumbered by him, unless she join therein with him in the manner prescribed by law in regard to her own estate.

"Sec. 3109. The personal property, including rights in action belonging to a woman at her marriage, or coming to her during coverture, by gift, bequest, or inheritance, or by
*125 *purchase with her separate money or means, or due as the wages of her separate labor, or growing out of any violation of her personal rights, shall, together with all income, increase, and profit thereof, be and remain her separate property and under her sole control; and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of a husband to personal property reduced to his possession with the express assent of his wife; but personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care, or protection thereof, but the same shall remain her separate property, unless, by the terms of said assent, full authority is given by the wife to the husband to sell, incumber, or otherwise dispose of the same for his own use and benefit.

"Sec. 3110. The separate property of the wife shall be liable to be taken for any judg-

ment rendered in an action against husband and wife upon a cause existing against her at their marriage, or for a tort committed by her during coverture, or upon a contract made by her concerning her separate property, as provided in section 3108.

"Sec. 3111. A married woman, whose husband deserts her, or from intemperance or other cause becomes incapacitated, or neglects to provide for his family, may, in her own name, make contracts for her own labor, and the labor of her minor children, and in her own name sue for and collect her own or their earnings; and she may file a petition against her husband, in the court of common pleas of the county in which she resides, alleging such desertion, incapacity, or neglect, and, upon proof thereof, the court may enter a judgment vesting her with the rights, privileges, and liabilities of a feme sole, as to acquiring, possessing, and disposing of property, real and personal, making contracts, and being liable thereon, and suing and being sued in her own name; but after such judgment the husband shall not be liable upon any contract so made by her in her own name, or for any tort thereafter committed by her."

Sections 4996 and 5319 should also be quoted, as they are supposed by the appellants to have some bearing upon the questions presented.

*120 *Section 4996 is as follows: "A married woman cannot prosecute or defend by next friend, but her husband must join with her, unless the action concerns her separate property, is upon her written obligation, concerns business in which she is a partner, is brought to set aside a deed or will, or to collect a legacy, or is between her and her husband."

Section 5319 is as follows: "When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced, as if she were unmarried, and her separate property and estate shall be liable for the judgment against her, but she shall be entitled to the benefit of all exemptions to heads of families."

These last two sections originally were parts of an act passed in 1874.

It has been held by the supreme court of Ohio that the legislation contained in these provisions, considered either by itself or in connection with the act of March 30, 1874, the provisions of which are embraced in sections 4996 and 5319 of the Revised Statutes, does not enlarge the capacity of married women to make contracts except in the instances specifically mentioned. The case of Levi v. Earl, reported in 30 Ohio St. 147, maintains this position, after an elaborate analysis and consideration of the legislation on the powers and disabilities of married women in the state. That case was decided, it is true, by the supreme court commission of Ohio, and not by the supreme court of the state, but that commission was appointed by the governor of the state, under an amendment of the constitution adopted to dispose of such part of the business on the docket of the supreme court as should by arrangement between the commission and the court be transferred to the commission. The amendment declares that the commission shall have like jurisdiction and power in respect to such business as may be vested in the court. A decision of the commission upon a question properly presented to it in a judicial proceeding is therefore entitled to the like consideration and weight as a decision upon the same question by the court itself, and is equally authoritative.

*121 *The case cited, among other things, adjudges and declares (1) that by the provisions of law quoted the wife is authorized to make contracts in her own name for labor and materials for improving, repairing, and cultivating her separate estate as defined by them, and for leasing the same for a term not exceeding three years, and that upon such contracts the wife is liable to an action at law and to a judgment and execution as a feme sole, but that all her other engagements, debts, or obligations are void at common law, the same as before the adoption of the provisions mentioned; (2) that by those provisions the marital rights of the husband were divested as to the wife's general estate, and the wife was invested with the control of the same, and could bind it not only by the contracts which she was authorized to make in her own name, but to the same extent as she could charge her separate estate in equity before the provisions were adopted; (3) that the power of a court of equity to charge the separate estate of a married woman as existing and exercised before those provisions were adopted still existed not only as to such separate property, but also as to her separate property as defined by those provisions, except as to such contracts as she was authorized to make in her own name, upon which a remedy at law was given by the statute.

It has also been held by the supreme court of Ohio that sections 4996 and 5319 of the Revised Statutes, which embody the provisions of the act of March 30, 1874, were intended simply as an amendment to the Code of Civil Procedure, and did not affect or enlarge the rights or liabilities of married women, but related merely to the remedy. Jenz v. Gugel, 26 Ohio St. 527; Allison v. Porter, 29 Ohio St. 136; Avery v. Van Sickle, 35 Ohio St. 270.

The powers and liabilities of married women not being affected in any particulars except those mentioned by the legislation of Ohio previous to the execution of the notes in controversy, the defendant Mrs. Hannon did not charge her subsequently acquired estate at law for their payment when she signed them in connection with her husband. Even if, under the legislation in question, she would, by the decision in Williams v. Urmston, 35 Ohio St. 296, which is said to *qualify* in some respects the decisions in Levi v.

Earl, have charged at law her separate estate existing at the time of the execution of the notes in the absence of the express statement in them that she intended thus to charge it, there is nothing in the legislative provisions adopted which enlarges her power at law to charge any future-acquired estate. The question, then, remains to be considered whether her after-acquired estate is chargeable in equity. That is to be determined by the ordinary rules of equity, and we think it is clear that the contracts of married women are not chargeable in equity upon their subsequently acquired estates.

The separate estate of a married woman, as we have stated, is, in the absence of legislation on the subject, created by conveyance, devise, or contract. Its creation gives to her the beneficial use of the property, which otherwise would not be brought under her control. As to such property, she is regarded in equity as a feme sole, and it was therefore formerly held that her general engagements, though not personally binding upon her, could be enforced against the property. This doctrine, however, has been modified in modern times. It is now held that to charge her separate estate with her engngement it must have been made with an intention on her part to create a charge upon such estate; that is, with reference to the property, either for its improvement, or for her benefit upon its credit. There has been much divergency of opinion and some conflict, both in the courts of England and of this country, as to what is necessary to establish such intention on the part of the wife to charge her separate estate for her contract. It is conceded that there must have been an intention on her part to effect such a charge, otherwise her engagement will not have that effect.

The numerous decisions in the high court of chancery of England have shown this divergency and conflict in a marked degree. Lord Thurlow placed the right of the wife to charge the property upon her right as owner to dispose of it without other authority. Hulme v. Tenant, 1 Brown, Ch. 16; Fettiplace v. Gorges, 3 Brown, Ch. 8. But this theory was afterwards rejected by Lord Loughborough, who denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground that the securities which the wife had executed operated as appointments of her separate property. Duke of Bolton v. Williams, 2 Ves. Jr. 138.

The doctrine proceeded upon the assumption that the wife's separate estate was not liable for her general engagements, but only for such as were specifically charged in writing upon it. This theory Lord Brougham rejected, holding that there was no valid distinction between a written security, which the married woman was incapable of executing, and a promise by parol, and that mere parol engagement of the wife was equally effective to create a charge as her bond or note. Murray v. Barlee, 3 Mylne & K. 209.

The reasoning of Lord Brougham to establish his views was afterwards met and rejected by Lord Cottenham. Owens v. Dickenson, 1 Craig & P. 48.

The court of appeals of New York in the case of Yale v. Dederer, 22 N. Y. 450, considered very fully the evidence which would be required to charge the separate estate of the wife upon her contract, and in its examination reviewed the various decisions of the English court of chancery, pointing out their many differences and conflicts, and placed its decision upon this ground: that such estate could not be charged by contract unless the intention to charge it was stated in the contract itself, or the consideration was one going to the direct benefit of the estate. In that case a married woman signed a promissory note as a surety for her husband, and it was held, though it was her intention to charge such estate, that such intention did not take effect, as it was not expressed in the contract itself.

In the case of Willard v. Eastham, 15 Gray, 328, the same question was elaborately considered by the supreme judicial court of Massachusetts. In that case a debt was contracted by a married woman for the accomodation of another person, without consideration received by her, and it was held that the contract could not be enforced in equity against her separate estate unless made a charge upon it by an express instrument; and the court concludes, after a full consideration of the subject, by observing that the whole doctrine of the liability of a married woman's separate estate to discharge her general engagements rests upon grounds which are artificial, and which depend upon implications too subtle and refined; and that "the true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well-reasoned opinions of the court of appeals of New York in the case of Yale v. Dederer," which we have cited, and says: "Our conclusion is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

We concur in these views as to the limitation on the authority of a court of equity in relation to the subject. In this case the amended bill avers that the defendant Mrs. Hannon executed the notes in question with

the intention of charging her after-acquired property; but, inasmuch as her contract is in writing, the averment can be regarded only as the pleader's conclusion, which must be determined by the application of the law to the undertaking itself. There is nothing in the written agreement which makes any reference to an after-acquired estate.

In Pike v. Fitzgibbon, 17 Ch. Div. 454, the question as to the power of a married woman to bind her subsequently acquired estate was considered. In that case Lord Justice James said: "Another point also has been raised, of which we must dispose, and which has arisen, as it seems to me, from a misapprehension of some of the cases. It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, has acquired a sort of equitable status of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. It is contended that because equity enables her, having estate settled to her separate use, to charge that estate, and to contract debts payable out of it, therefore she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a court of equity to contract debts to be paid and satisfied out of any estate settled to her separate use, which she may afterwards acquire, or, to carry the argument to its logical consequences, out of any property which may afterwards come to her. In my opinion, there is no authority for that contention, which appears to arise entirely from a misapprehension of the case of Picard v. Hine, L. R. 5 Ch. App. 274, and one or two other cases which follow it, in which this point was never suggested. * * * I desire to have it distinctly understood as my opinion and the opinion of my colleagues, and therefore as the decision of this court, that in any future case the proper inquiry to be inserted is, what was the separate estate which the married woman had at the time of contracting the debt or engagement? and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the court. That is all that the court can apply in payment of the debt." Lord Justice Brett, in his concurring opinion, said: "The decisions appear to me to come to this: that certain promises (I use the word 'promises' in order to show that in my opinion they are not contracts) made by a married woman, and acted upon by the persons to whom they are made, on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered, whether such judgment be recovered during or after the cessation of the coverture. That proposition so stated does not apply to separate estate coming into existence after the promise which it is sought to enforce."

It is true that in that case, (Pike v. Fitzgibbon,) as stated by Lord Justice James, it did not appear that the appellant had, since the date of her engagement, acquired any property settled to her separate use, and had not asked by the appeal to vary the judgment as regards subsequently acquired property. "It is therefore sufficient," said the lord justice, "to state, as a warning in any future case, that the only separate property which can be reached is the separate property, or the residue of the separate property, that a married woman had at the time of contracting the engagements which it is sought to enforce." But in King v. Lucas, 23 Ch. Div. 712, in the court of appeal, the question whether the engagements of a married woman could be charged upon her subsequently acquired estate was actually involved, and the decision in Pike v. Fitzgibbon was held conclusive. Said Cotton, L. J.: "With respect to her separate estate, she is treated as a feme sole, but it has been decided that it must be separate estate which belonged to her at the time of the making of the contract, and is still remaining at the time when the contract is enforced, and judgment obtained. In Pike v. Fitzgibbon it was held by a learned judge that all separate property could be charged which belonged to the married woman at the time when the contract was enforced, but that was held to be erroneous by the court of appeal, and the rule was laid down that the contract could be enforced only against the separate estate existing at the date of the contract. In the present case, therefore, there is no question as to any principle; the only question is whether certain property was the separate property of the lady when she made the contract."

In view of the considerations stated and the decisions mentioned, and numerous others which might be cited, we are of opinion that in Ohio the separate property of a married woman could not be charged in equity by contracts executed previous to its existence, for the obvious reason that, in reference to such property, the contracts could not be made. The after-acquired estate was not at the time available in a court of equity to meet the contracts, for at their date it had no existence.

The English Married Woman's Property Act of 1882 provided that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." And in section 1, subsec. 4, it was declared that "every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of contract, but also all separate property which she may there-

after acquire." And yet in Deakin v. Lakin, 30 Ch. Div. 169, it was held that this act did not enable a married woman who had no existing separate property to bind by a contract separate property afterwards acquired, and Pearson, J., said: "In my opinion, according to the true construction of the act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property, her contract will bind it. If she afterwards commits a breach of the contract, and proceedings are taken against her for the breach of contract, any separate property which she has acquired since the date of the contract, and which she has at the time when judgment is recovered against her, will be liable for the breach of contract. But the act does not enable her, by means of a contract entered into at a time when she has no existing separate property, to bind any possible contingent separate property."

It follows that the decree must be affirmed, and it is so ordered.

(147 U. S. 72)

ALEXANDRE et al. v. MACHAN et al.

(January 3, 1893.)

No. 61.

ADMIRALTY — REVIEW ON APPEAL — CONCLUSIVENESS OF FINDINGS OF TRIAL COURT — EXCEPTIONS — COLLISION — CHANGE OF COURSE IN EXTREMIS.

1. Act Feb. 16, 1875, (18 St. p. 315,) "to facilitate the disposition of cases in the supreme court," is to be construed as settling the following propositions: That the findings by the court below are conclusive, and have practically the same effect as the special verdict of a jury; that a bill of exceptions cannot be used to bring up the evidence for a review of the findings; that the only rulings on which the supreme court is authorized to pass are such as may be presented by a bill of exceptions prepared as in an action at law; that the lower court is bound to find only the ultimate facts; that the supreme court will not take notice of a refusal to find incidental facts, which only amount to evidence from which an ultimate fact is obtained; and that, where the court below refuses to make a finding as to the existence of a material fact which has been established by uncontradicted evidence, or where it finds a fact not supported by evidence, and an exception is taken, the question may be brought to the supreme court for review in that particular.

2. Where the evidence was conflicting as to whether the wind was S. W. or S. S. W. at the time of a collision between a steamer and a barque, a finding that "the wind was blowing from the southwest or the south southwest" is sufficiently exact.

3. A barque bound for New York from Havana, and sailing with a free wind, was sunk in a collision with a steamer off the New Jersey coast, between Absecon and Barnegat. *Held*, that the court below was warranted in finding that the course of the barque was "about N. E.," on the ground that the usual course of vessels in that vicinity, bound to and from the same ports, and sailing with a free wind, is N. E. or N. E. by N., and a deviation from such course would not be presumed without some controlling reason.

4. Exceptions which are dependent on the construction to be given to findings of the court below, and are not to the findings themselves, are impertinent.

5. In a case of collision between a steamship and a barque, at night and in a fog, the circuit court found, on conflicting evidence, that on that night the wind was strong from the S. W. or the S. S. W.; that the course of the barque was about N. E., and that of the steamer about S. by W. ½ W., the steamer going about 11 knots an hour, and the barque about 4 knots an hour; that each kept her respective course until she heard the fog signal of the other; that the steamer's wheel was put to starboard and hard astarboard immediately on hearing the fog horn of the barque; that the whistle of the steamer first heard by those in charge of the barque indicated to them that the vessels were quite near to each other; that they thought the steamer was approaching bearing abeam on the barque's port side; that, immediately after, they saw her masthead light and then her green light, whereupon the mate told the wheelman to port the wheel; that the wheelman had hardly got the wheel over when the steamer struck the barque; and that during the time the steamer was running under her hard astarboard wheel she changed her course to the eastward three or four points; and the barque, after she luffed, changed her course one or two points by the time the vessels came together. *Held* that, as it could not be said that the findings were not supported by the testimony, the conclusion of law on such findings that "the barque's change of course was an error in extremis" would be affirmed on appeal to the supreme court, though the findings were inconsistent with the theories of both parties. 35 Fed. Rep. 604, affirmed.

Appeal from circuit court of the United States for the southern district of New York. Affirmed.

Statement by Mr. Justice BROWN.

*This was a libel by the owners of the British barque Helen against the American steamship City of New York for a collision, which occurred on the evening of June 28, 1879, off the New Jersey coast between Barnegat and Absecon, and resulted in the sinking of the Helen, and the total loss of the vessel and cargo. The district court found both vessels to have been in fault, and decreed an apportionment of damages. 15 Fed. Rep. 624. Both parties appealed to the circuit court, by which the decree of the district court was reversed, the City of New York found to have been solely in fault, and a final decree entered for the libelants for $60,223.12, including costs. 35 Fed. Rep. 604. From this decree the owners of the steamship appealed to this court. The following facts and conclusions of law were found by the circuit court:

"(1) The British barque Helen, an iron vessel of 282 tons register, while on a voyage from Havana to New York city, loaded with sugar, was sunk by collision with the steamship City of New York, June 28, 1879, about 10:50 P. M. The captain and three of the seamen of the barque were drowned when the vessel sank.

"(2) The collision took place at a point off the coast of New Jersey, 6¼ miles from shore, in 10 fathoms of water, 12½ miles from Barnegat lighthouse, and 9½ miles from Tucker's Beach lighthouse.

"The City of New York was a wooden steamship, 242 feet long and 1,715 tons reg-

ister, having a left-handed propeller, and was bound on a voyage from New York to Havana. Her full speed was about 12 knots an hour, and when going at full speed her headway could not be stopped by reversing her engines within a distance of an eighth of a mile.

*74 "(3) On the night in question the wind was blowing strong from the southwest or the south southwest. About half an hour preceding the collision the night became foggy; so much so that vessels could not discover one another at a distance of one-eighth of a mile. During this time, and until within about three or four minutes before the collision, the vessels had been approaching each other, the course of the steamer being about S. by W. ½ W., and the course of the barque being about N. E. The steamship was going about 11 knots an hour, which was all the speed she could make against the wind. The barque was going about 4 knots an hour, and each vessel kept her respective course until she heard the fog signal of the other.

"(4) During the half hour preceding the collision three seamen were on the deck of the barque besides the mate, one seaman being at the wheel and two on the lookout forward, alternately blowing the fog horn, and the barque's lights were properly set and burning. During the same time the navigation of the steamer was in charge of her second mate, her quartermaster was at the wheel, her engine was in charge of a competent engineer, she had a lookout on the forward deck, and her regulation lights were properly set and burning. The lookout on each vessel was vigilant. Each vessel observed the proper fog signals. The steamer maintained her full speed against the wind until her engines were reversed, just before she struck the barque.

"(5) Before either vessel discovered the other those in charge of each heard the fog signals of the other. At about two minutes prior to the collision those in charge of the steamer first heard the fog horn of the barque, and from the apparent direction of the sound thought she was one point off the steamer's starboard bow. Immediately upon hearing the fog horn the mate ordered the wheel of the steamer put to starboard and hard astarboard. The order was promptly executed, and the steamer proceeded on under full speed until those in charge discovered the sails of the barque. The steamer had run under hard astarboard helm at least a minute before the barque was seen. Those in charge of the steamer then discovered that the barque's course was eastward, across the steamer's bow. The steamer then sounded *75 successive whistles of alarm, and those in charge saw the barque luffing to the starboard. Thereupon the mate immediately ordered the steamer's engines reversed and her wheel ported, and this order was promptly executed, but she was then close to the barque, probably not to exceed 150 feet, and her headway could not be stopped in time to avoid a collision, and the steamer struck the barque on the barque's port side, her stem striking just forward of the barque's mizzen rigging, with such force that she penetrated the barque a distance of five feet, and the barque sank almost instantly.

"The whistle of the steamer first heard by those in charge of the barque indicated to them that the vessels were quite near to each other. They thought the steamer was approaching bearing abeam on the barque's port side. Immediately after they saw her masthead light and then her green light, whereupon the mate told the wheelsman to port the wheel, and called to those below to save themselves. The man at the wheel had hardly got the wheel over when the steamer struck the barque. During the time the steamer was running under her hard astarboard wheel she changed her course to the eastward three or four points, and the barque, after she luffed, changed her course one or two points by the time the vessels came together."

The sixth finding relates only to the damages, and is immaterial.

"Conclusions of law: (1) The steamer was guilty of fault in violating the twenty-first rule, because she did not slacken her speed when she heard the fog signals of the barque, and also because she did not go at a moderate speed when in a fog, and also because she changed her course and kept on at great speed after she heard the barque's fog horn before seeing her. (2) The barque's change of course was an error in extremis."

R. D. Benedict, for appellants. G. A. Black, for appellees.

*76 *Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

Notwithstanding the ruling of this court in The Abbotsford, 98 U. S. 440, that the finding of facts by the circuit court is conclusive, and that the only rulings that can be reviewed by this court are those made upon questions of law, but few collision cases have been brought to this court since the act of February 16, 1875, (18 St. p. 315,) took effect, in which an effort has not been made, under one guise or another, to obtain a review of the findings of the circuit judge upon the testimony. If it were the duty of the court to review the testimony upon every finding of fact to which the defeated party chose to take an exception, and inquire whether such testimony authorized the finding, the title of the act "To facilitate the disposition of cases" was a misnomer, and the act itself might better never have been passed. In this case 16 exceptions were taken to the findings of the court; 21 specifications of error are embodied in the seventeenth exception to the opinion of the court, which was incorporated in the bill of exceptions; and there

are also 35 exceptions to the refusal of the court to find the facts and law as requested by the claimants.

In construing the act of 1875 the following propositions may be regarded as settled:

(1) That the facts found by the court below are conclusive; that the bill of exceptions cannot be used to bring up the evidence for a review of these findings; that the only rulings upon which we are authorized to pass are such as might be presented by a bill of exceptions prepared as in actions at law; and that the findings have practically the same effect as the special verdict of a jury. The Abbotsford, 98 U. S. 440; The Clara, 102 U. S. 200; The Benefactor, Id. 214; The Annie Lindsley, 104 U. S. 185; Collins v. Riley, Id. 322; Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 1 Sup. Ct. Rep. 582; Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. Rep. 91; The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. Rep. 159; The Gazelle, 128 U. S. 474, 9 Sup. Ct. Rep. 139.

(2) That it is only the ultimate facts which the court is bound to find; and that this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained. The Francis Wright, 105 U. S. 381; Insurance Co. v. Allen, 121 U. S. 67, 71, 7 Sup. Ct. Rep. 821; The John H. Pearson, 121 U. S. 469, 7 Sup. Ct. Rep. 1008.

(3) If the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court. The Francis Wright, 105 U. S. 381, 387; The E. A. Packer, 140 U. S. 360, 11 Sup. Ct. Rep. 794.

In the case of The Francis Wright the court held that the bill of exceptions ought to show the grounds relied on to sustain the objections, so that it might appear that the court below was properly informed as to the point to be decided, and that the facts sought to be incorporated were conclusively proven by uncontradicted evidence; and, if the exception were as to facts found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated in the bill of exceptions. In The E. A. Packer, 140 U. S. 360, 11 Sup. Ct. Rep. 794, the circuit court refused to find a specific fact which this court thought to be material, and to have been proven by uncontradicted testimony, and the case was remanded for a further finding in regard to this point.

This case, then, must turn upon the question whether the circuit court found any facts which were wholly unsupported by testimony, or refused to find any fact material to the issue, when such fact was proven by uncontradicted evidence.

The undisputed facts are that the night was foggy, and that the barque was bound from Havana to New York upon a northerly and easterly course, and was sailing free under a strong southerly wind. The steamship was bound from New York to Havana upon a course S. by W. ½ W., and was proceeding at her usual full speed, which was from 10 to 11 knots an hour. Each was making the fog signals required by law, which were heard upon each vessel before the other vessel came in sight. About two minutes prior to the collision the officers in charge of the steamer first heard the fog horn of the barque, and, from the apparent direction of the sound, thought she was one point off the steamer's starboard bow. Immediately upon hearing the fog horn the mate ordered the wheel of the steamer to starboard and hard astarboard. The order was promptly executed, and after the steamer had run at full speed under her hard astarboard helm about a minute, the sails of the barque were discovered crossing the steamer's bows to the eastward. The steamer immediately blew several alarm whistles, and the officer of the deck saw the barque luffing to starboard. The steamer's engines were thereupon immediately reversed, and her wheel ported; but, being then close to the barque, her headway could not be stopped in time to avoid a collision, and she struck the barque upon her port side between the main and mizzen rigging, with such force that she penetrated the barque a distance of five feet, and sank her almost immediately. The captain and three of the crew were drowned.

1. Appellants' first exception is to the third finding of fact, that "the wind was blowing from the southwest or the south southwest," because it does not find the direction in which the wind was blowing, and because the direction of the wind was neither S. W. nor S. S. W., but S. There was some conflict of testimony upon this point between the crews of the respective vessels and the observers at the signal stations and lighthouses between Sandy Hook and Cape May; but, as the district judge was also of the opinion that the wind was somewhere from S. W. to S. S. W., it is impossible for us to say that there was no testimony to support this finding. If it were impossible to ascertain definitely from the testimony whether it was from the S. W. or S. S. W., there was clearly no obligation to find the exact point from which it was blowing. As observed by the district judge, this finding "confirms the previous conclusion that the barque, up to the time of the colli-

sion, had been sailing on a northeast course, since that would bring such a wind about a point on her starboard quarter, as all her witnesses testify."

2. The finding that the vessels could not discover one another at a distance of one-eighth of a mile is substantially confirmed by all the testimony and by the opinion of the district judge, who makes a similar statement three or four times in his opinion.

3. Appellants also except to the finding that the course of the barque was "about N. E.," instead of about N. E. by N. ½ N.; but as the vessel had a free wind, and the usual course at this point between Absecon and Barnegat on the New Jersey coast, where the collision occurred, was N. E. or N. E. by N. for vessels bound to New York from Cape Henlopen, a departure from that course will not be presumed, in the absence of some controlling reason. Indeed, the probability that a steamer or a vessel sailing with a free wind will pursue the course customarily pursued in that vicinity, by vessels bound from and to the same port, is so strong that a deviation from that course without apparent cause will not be considered as established without a clear preponderance of testimony. The district judge also found that the general course of the vessel was N. E. until her wheel was put to port, just before the collision. Exception was also taken to the finding that "the steamship was going about eleven knots an hour." As the appellants claim in their brief she was making 11 knots an hour, and both courts agree in this opinion, it is difficult to see why an exception was taken to this finding.

4. The fourth, fifth, and seventh exceptions are dependent upon the construction to be given to the several findings made by the court, and are not to the findings themselves, and hence are impertinent. The sixth exception is unimportant.

5. The remaining 10 exceptions to the findings of fact are taken to the several clauses of the last paragraph of the fifth finding. [80] There were also 21 specifications of objections to the opinion of the circuit court, embodied in a single exception—the seventeenth; and 35 exceptions to the refusal of the court to find the facts and conclusions of law as requested by the claimants. But the substance of all these objections to the findings and opinion of the circuit court turn upon those contained in the paragraph above cited, which indicate that the change of course made by the barque just prior to the collision was an error in extremis, for which the barque was not responsible. This was the point upon which the circuit and district courts chiefly differed, and upon which the stress of the case was laid. The finding in question was as follows: "The whistle of the steamer first heard by those in charge of the barque indicated to them that the vessels were quite near to each other. They thought the steamer was approaching bearing abeam on the barque's port side. Immediately after, they saw her masthead light and then her green light, whereupon the mate told the wheelsman to port the wheel, and called to those below to save themselves. The man at the wheel had hardly got the wheel over when the steamer struck the barque. During the time the steamer was running under her hard astarboard wheel she changed her course to the eastward three or four points, and the barque, after she luffed, changed her course one or two points by the time the vessels came together."

In this connection the allegation of the original libel was that "the wind at the time was W. S. W., and the said barque was heading E. by N. ½ N., running free, and going at the rate of about three knots an hour. * * * That when the said steamer was close upon the said barque, and the impending collision inevitable, and in the effort to escape the same, order was given to port the barque's helm, which order was obeyed, but did not alter the course of said barque more than a point, and in a direction away from the said approaching steamer." The answer denied "that such order was given when the collision was inevitable, or that it did not alter the course of the barque more than a point, or that such alteration was in a direction away from the approaching steamer;" and averred "that at about 10 o'clock and 50 [81] minutes the second mate in the pilot house heard the blast of a fog horn about a point or so on the starboard bow of the steamer, whereupon he ordered the wheel of said steamer to be put hard astarboard, which order was obeyed, and was the proper order, and would have been efficient for the avoiding of the collision but for the change of course on the part of the barque, hereafter spoken of. * * * That when, or almost immediately after, the helm of the said steamer was starboarded, the helm of said barque was ported, and her head began to come up towards the course of the said steamship; that said change of course of said barque was at once seen and reported by the lookout on the steamer, and seen by her second mate in the pilot house, and that as soon as such change was seen, and when the head of the steamer had been changed about a point under her starboard helm, her helm was put hard aport, and her engine was stopped and reversed. * * * And these respondents allege that the said barque changed her course under her port wheel four or five points before the collision, and that at the time of the collision she was heading about east and said steamer was heading about S. or S. by W., and that such change of course on the part of the barque carried her across the bow of the said steamship, which had taken the proper measures to avoid her, and but for the said change of course on the part of said barque would have succeeded in doing so."

The case was tried upon these allegations,

and the district judge found that all the witnesses agreed that, at the time of the collision, the barque "was heading about E. or E. by N., or about four points to the eastward of the usual course for vessels bound for New York;" that the testimony of the mate and wheelsman of the barque, who were the officers of the deck, that her course prior to the collision was E. by N. ½ N., was untrue and wholly irreconcilable with the admitted facts, and with the other accredited testimony; and, inferentially, at least, that their testimony was fabricated for the purpose of demonstrating that the change of course from E. by N. ½ N. to E. or E. by N. (from half a point to a point and a half) was so slight that it must have been made in extremis, while, if the course of the barque had been N. E., the change would have been from three to four points. The district court found the course to have been N. E.; that this course was continued until the helm was ported; and that the "change of three to four points was too great, and was commenced too early and too far off from the steamer to be regarded as a change in extremis, and, as this change of course evidently contributed to the collision the barque must also be held chargeable with fault." A decree was thereupon rendered apportioning the damages, and both parties appealed to the circuit court.

Pending that appeal, the libel was amended by averring that "the wind at the time appeared to be by said barque's compasses W. S. W., and the said barque was heading, as it appeared by said compasses, E. by N. ½ N., running free, and going at the rate of about three knots an hour. * * * That the said barque was an iron vessel, and had a list to starboard, and her compasses were affected by those facts, and she had a deviation card on board, by means of which corrections in the readings of said compasses were made, which said deviation card was lost with said vessel, and, the master being drowned, libelants were unable to more accurately state the said deviation than that it was between one and three points on different courses."

Exceptions were filed to this libel for indefiniteness and insufficiency, and a second amended libel was filed, averring "that the wind at the time appeared to be, by said barque's compasses, W. S. W. Libelants believe that the true direction of the wind was S. W.; that the compasses of the barque indicated it to be W. S. W. for the reasons hereinafter stated. The said barque was heading, as it appeared by said compasses, E. by N. ½ N., and libelants believe her true heading was N. E. ½ E., and that the said heading appeared to be E. by N. ½ N., by said barque's compasses, for the reasons hereinafter stated." The previous allegation with regard to deviation was repeated with the addition that "libelants believe that such deviation on a true N. E. ½ E. course was two points, so that the course appeared by said barque's compasses to be E. by N. ½ N." To this amended libel an answer was filed, and the case went to trial in the circuit court. The circuit court was of opinion that if the barque changed her course four or five points to the starboard, as claimed by the steamship, such change could not have been made when the vessels were within two or three hundred feet of each other; that, if it could be demonstrated that, at the time of the collision, the barque was headed about east, and that her course previous to the change was N. E., the argument for the steamer would be convincing; but that this could not be demonstrated unless the testimony of the wheelsman of the steamer, who gave the course on which the steamer was headed when the barque's change of course took place, and also when the collision took place, was accepted as correct. "It is highly improbable," said the court, "that in the excitement and confusion of the moment the helmsman of the steamer looked at his compass so carefully as to accurately note the steamer's course when he was ordered to put his wheel hard aport, and again when the collision took place. Equally improbable is his testimony that while the steamer was under a hard astarboard helm her course was only changed about three quarters of a point, although she was running at full speed for a minute under that helm, and, that while she was under her helm hard aport at the time she was reversing her engines, her course was changed a point and three quarters to starboard."

The court conceded that the mate of the barque, who was the only witness who attempted to give her course by the compass, was not entitled to any credit, but that the testimony of the wheelsman, the lookout, and the engineer of the steamer so strongly confirmed by the testimony of the witnesses for the barque, to the effect that her change of course was not made until the vessels were so close together that a collision was unavoidable, that it was not necessary to devote any time to the attempt to ascertain what the course of the barque was previously to the time this change was made. "All the witnesses for the steamer agree that the barque's change of course took place under their observation, and that the steamer sounded an alarm of successive blasts of her steam whistle and reversed her engines." The court evidently was not satisfied with the testimony that the barque was headed east, or nearly so, at the moment of impact, and gave weight to the testimony of a diver who visited the wreck a few days after the collision, and testified that she was lying at the bottom of the ocean headed about N. N. E. on a line parallel with the shore. It thought this testimony more persuasive in fixing her heading approximately than the conjectural opinions of witnesses formed in the excitement and confusion of the moment, who thought she was headed about east. In

short, it came to the conclusion that the change of course which brought the two vessels together was made by the steamer, while running a minute under her hard astarboard helm, rather than by the barque, and that, upon this assumption, if the course of the barque were changed only one or two points, the vessels would have come together at the angle shown in the diagrams of the witnesses upon both sides. It was evidently of the opinion that the testimony that the barque was headed east, or nearly so, at the moment of collision, indicating, as it did, a change of course of three or four points, was outweighed by the testimony of the witnesses that, whatever change of course was made, took place when the vessels were in plain sight of each other, and so close together that a collision was unavoidable.

Upon the findings of the circuit court there can be no question of the gross negligence of the steamship. She was not only not running at the moderate speed required by rule 21, but she failed to take the proper precautions when the proximity of the sailing vessel became known to her. Upon hearing the fog horn of the barque only one point on her starboard bow, the officer in charge should at once have checked her speed, and, if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other. Indeed, upon the testimony in this case, it is open to doubt whether, if the engine had been at once stopped, the steamer would have come to a standstill before she had crossed the course of the barque. There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it by a change of the helm, without taking the additional precaution of stopping until its location is definitely ascertained. The Hypodame, 6 Wall. 216; The Kirby Hall, 8 Prob. Div. 71; The Sea Gull, 23 Wall. 165, 177; The Ceto, 6 Asp. 479, 14 App. Cas. 670.

So far as the case of the barque is concerned, there was evidently testimony to support the findings of the circuit court, and if these findings are consistent, and justify its conclusion of law that the barque's change of course was an error in extremis, we cannot do otherwise than affirm the decree. In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor. Taking the finding of the circuit court, that the course of the barque was about N. E., in connection with the fact that after she luffed she changed her course but one or two points by the time the vessels came together, it is evident that that court did not agree with the district court that she was headed E. or E. by N. at the time of the collision. Nor is this finding inconsistent with his further finding that when the barque was first seen the officers of the steamer discovered that her course was eastward, since that may be construed as any point east of north. The evident gist of the steamer's complaint is the refusal of the circuit court to find the heading of the barque at the moment of collision. Had it found such course to be E. or E. by N., as the answer averred, and as much of the testimony indicated, it would necessarily follow that she must have changed her course from three to four points under her hard aport helm,—a change scarcely consistent with an error in extremis. But the testimony upon this point was that of the mate and the wheelsman of the barque, and is a mere inference from their thoroughly discredited testimony that the course of the barque was E. by N. ½ N., and that she swung only a point to starboard. Having once found that this was not the course of the barque, and that such course was N. E., this testimony falls to the ground. The testimony of the mate and wheelsman of the steamer, that the barque was heading E. by N. or E. by N. ½ N. at the moment of collision, was evidently nothing but a mere guess. Indeed, it is very improbable that, in the excitement and consternation occasioned by the immediate presence of such a peril, the wheelsman of either vessel would stop to look at the compass or notice the bearing, even of his own vessel, much less that of the other. While the testimony of the diver, that her heading after she sunk was N. N. E., may not have been entitled to great weight, it was a circumstance tending to support the theory that she was not heading E. by N. It is evident that if her general course were N. E., and her helm were put hard aport, as all agree it was, she could not have been heading N. N. E. at the time of the collision. It is evident that the circuit court was dissatisfied with all the testimony upon the subject of the barque's heading at the time of the collision, and rested its conclusion upon the finding that, during the time the steamer was running under her hard astarboard wheel, she changed her course to the eastward two or three points, and the barque, after she luffed, changed her course but one or two points by the time the vessels came together. Taken in connection with the further finding that the mate told the wheelsman to port the wheel after he saw the masthead light and the green light of the steamer, it justified the conclusion that this order was given in extremis.

The court evidently thought that more satisfactory evidence of the heading of the two vessels at the time of the collision was derived from the fact that the steamer, while running at 11 miles an hour, put her helm hard astarboard from one to two minutes prior to the collision. At this rate of speed it is by no means improbable that she swung three or four points before the collision took place, while the other testimony left it at least doubtful whether the barque swung more than one. This inference is strengthened by the fact that the steamer's screw was left-handed, and that a reversal of the engine would have a tendency to throw her head still more rapidly to port. Evidently the order to port the steamer was given when the vessels were so near together that it could have had but slight effect upon her course.

Upon the whole, it is impossible for us to say that these findings, while inconsistent with the theory of both parties, were not supported by the testimony, or that they did not justify the conclusion that the change of course of the barque was made in extremis. The decree of the court below is therefore affirmed.

(147 U. S. 47)

MONROE CATTLE CO. v. BECKER.

(January 3, 1893.)

No. 87.

TEXAS SCHOOL LANDS — APPLICATIONS TO PURCHASE—FORFEITURES—EVIDENCE.

1. Under the Texas statutes relating to the sale of school lands (Acts July 8, 1879, and April 6, 1881) the surveyor of the county, after receiving and recording in due form an application to purchase lands, cannot entertain another application to purchase the same lands until the expiration of 90 days; and the failure of the applicant during that period to make his first payment, and to present to the surveyor the certificate of the commissioner of the general land office, works a forfeiture of the application, and in that event the surveyor may thereafter entertain a new application.

2. When the ninetieth day falls on Sunday, and default is made by the applicant, the lands are again open for sale on the Monday following, and not on the preceding Saturday.

3. An applicant who makes an application in the name of a third person cannot, after the application has been filed and recorded by the surveyor, abandon the same, and make a new application in the names of other parties before the expiration of the 90 days.

4. A person made a series of applications for the same lands in the names of different parties, allowing each application to lapse for want of payment within the 90 days, and thereafter immediately filing a new application, thus keeping the lands from market beyond the statutory time. Finally he made a new application before the expiration of the last 90 days, and a patent was issued thereon. *Held* that, as against an adverse claimant, a purchaser of this title was estopped from setting up that the prior applications were fictitious, and left the land open for purchase upon the application for which the patent issued.

5. The title acquired under the patent in such case was attacked by a bill charging that the series of applications, whereby the land was withheld from market, were fictitious, and made solely for that purpose. The bill having required an answer under oath, the defendant denied the fraudulent purposes and designs charged, and the person who filed the applications testified that the parties in whose names the respective applications were made were living persons, and that he made the applications for the bona fide purpose of procuring the lands for them. *Held* that, in the absence of any contradictory testimony, the charges of the bill must be regarded as not sustained.

Appeal from the circuit court of the United States for the northern district of Texas.

Bill by the Monroe Cattle Company against A. W. Becker to enjoin an action at law for the recovery of certain school lands, and for the cancellation of defendant's patent therefor. The circuit court dismissed the bill, and defendant appealed. Reversed.

Statement by Mr. Justice BROWN:

This was a bill in equity to enjoin an action at law for the recovery of the possession of 11 sections of school lands in Shackleford county, Tex., and for the cancellation and annulment of certain patents for the same issued to the defendant, Becker.

By an act of the legislature of Texas of July 8, 1879, as amended by a subsequent act of April 6, 1881, provision was made for the sale of lands set apart for the benefit of the school fund, and for a method of bringing such lands into the market. This method is described in sections 6–8 of the amended act, and sections 9, 10, and 15 of the original act, and is substantially as follows:

(1) The purchaser applies to the surveyor of the county in which the land is situated, describing the land he proposes to purchase, which must not exceed seven sections, and pays the surveyor one dollar.

(2) The surveyor records the application in a book kept for the purpose, and indorses such application, "Recorded," giving the date, page, and volume of the record, signs his name thereto, and delivers the application to the proposed purchaser.

(3) The purchaser immediately forwards the application to the state treasurer, together with one twentieth of the appraised value of the land.

(4) The treasurer enters a credit in his books for the amount received, giving a description of the land, and then issues his receipt for the money, and forwards it, with the application, to the commissioner of the general land office.

(5) The commissioner of the general land office files the application and receipt in his office, and issues his own receipt in lieu thereof, setting forth the amount paid to the treasurer, and the quantity and valuation of the land applied for.

(6) This certificate or receipt authorizes the surveyor to survey the land embraced in the original application.

(7) The surveyor is then required to enter the same on his books as sold, and is forbidden to entertain another application for such land until notified of the forfeiture.

(8) The applicant is required to make his

first payment of one twentieth, or the whole, as the case may be, of the value of the land, and present the receipt of the commissioner of the general land office to the surveyor within 90 days from the date of the record of his application, and, if he fail to do this, the land is again treated as for sale, and the surveyor is authorized to receive applications for its purchase.

(9) No person can renew his file, nor file on the same land more than once in 12 months, nor can he renew his file in the name of any other person. All applications for the purchase of lands are required to be made in the real name of the person intending to be the actual purchaser thereof.

(10) Upon the receipt of the application by the surveyor, the purchaser is required to execute his promissory note payable to the governor, for the balance of the appraised value of the land, which note is forwarded to the commissioner of the general land office, and registered in a book, and then delivered to the treasurer of the state to be filed in his office.

Under the provisions of these acts no one person could purchase more than seven sections of land.

On November 25, 1882, one J. A. Rhomberg, (whose Chrstian name does not appear,) a resident of Iowa, but engaged in the construction and operation of a railroad in Texas, made application for the purchase of seven sections of the land in question on behalf of Maggie L. Rhomberg, and also made application for the remaining four sections on behalf of one Frank Robinson, and filed the same with the surveyor of the county pursuant to these acts. The surveyor received and recorded the applications, indorsed them as recorded, and returned them, duly indorsed, to Rhomberg, who was acting as agent of both of these applicants.

* * * Prior to this time, however, and as early as February 28th of the same year, Rhomberg had made application for the same land in the names of different persons; had allowed these applications to lapse by the nonpayment of the twentieth of their value within 90 days; and on the 29th and 30th of May had made other applications in the names of other persons, and had also allowed these to lapse by nonpayment; and again, on the 28th of August had made other applications in still other names, and in this way had kept the lands out of the market, until November 25th, when he made the final applications above stated.

Before any further action was taken upon the last applications, and on January 2, 1883, one F. B. Jacobs, and on January 8th, one Malinda Fisher, filed their applications with the surveyor for the purchase of the same lands. The surveyor recorded these applications, indorsed upon them a memorandum of such record, and returned them duly indorsed to the applicants.

On January 9th these applications of Jacobs were delivered to the state treasurer, and first payments were made on each of the sections applied for in his name. The applications of Malinda Fisher were also delivered to the state treasurer, the date of which does not exactly appear, but the first payments were also made upon these applications before January 18th. The treasurer received the applications and first payments of Jacobs and Fisher, made the proper entries in his books, issued his receipts for the money, and forwarded the receipts and applications to the commissioner of the general land office. The commissioner received and filed the applications and receipts, made the proper entries upon his books, and delivered his certificates in lieu of said receipts, all within less than 90 days from the original applications of November 25th.

On January 18th, a few days after the applications of Jacobs and Fisher, but less than 90 days after his last application of November 25th, Rhomberg presented his applications duly indorsed to the state treasurer, and tendered to him the first payments required by the act to be made upon each of the 11 sections. The treasurer refused to receive such applications, or to accept the money, giving as his reason for such refusal that previous payments had been made upon these sections in the names of Jacobs and Fisher.

Rhomberg did not abandon these applications, but continued to press them, and made repeated tenders to the state treasurer, who, after several refusals, finally, on February 17, 1885, received the applications, accepted the first payments, made all the entries required by law regarding the same, issued his receipts for the payments, and forwarded the applications, with the receipts, to the commissioner of the general land office. The commissioner of the general land office ruled at first that first payments could not be received from two different applicants for the same sections, but finally withdrew this ruling, and accepted the tender made by Rhomberg on February 17, 1885.

The title of Maggie L. Rhomberg and Frank Robinson became subsequently vested by intermediate conveyances in the defendant, Becker, who, in May and June, 1886, made full and final payments to the state treasurer of the purchase money, and letters patent were subsequently, and in the years 1886 and 1887, issued to him by the proper officers of the state of Texas for the whole 11 sections.

On March 12, 1883, Jacobs and Fisher conveyed the sections for which they had applied to the Monroe Cattle Company, which inclosed the land in controversy in its pastures, used and occupied the same, and paid taxes thereon, but made no further effort to perfect its claim to the land, nor made any further payments of purchase money, either of principal or of interest, although, under the acts of 1879 and 1881, payments of interest were required to be made on or before the 1st day of March of each year upon all

purchases of school lands, the appraised value of which had not been fully paid.

On February 14, 1887, the defendant, Becker, began an action of ejectment against the Monroe Cattle Company, and on February 1, 1888, the latter filed this bill to restrain Becker from further prosecuting his action at law, to remove the cloud upon its title to the land, and for the cancellation of the patents granted to the defendant. Upon a hearing on the pleadings and proofs the court entered a decree dismissing the bill, and the plaintiff appealed to this court.

A. H. Garland and Heber J. May, for appellant. W. D. Williams, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves the construction of the statutes of Texas with regard to the purchase of school lands, and depends upon the question whether, during the 90 days allowed to the proposed purchaser to make his first payment, it is competent for the surveyor to receive another application for the same land, or rather to permit a person, who had theretofore filed applications for two parties, to treat such applications as withdrawn and abandoned, and to make other applications in the name of different persons within the 90 days.

No one can examine critically the provisions of the statutes in question without noticing the solicitude of the legislature to prevent a monopoly of these lands by capitalists, or their withdrawal from the market by fictitious applications. To secure a measurably equal allotment to each purchaser it was provided:

(1) That no one should purchase more than three sections within five miles of the center of any county, or upon any water front, nor more than seven sections in any case.

(2) That he should make his first payment within 90 days of his application.

(3) That applications should be made in the real name of the actual purchaser.

(4) That no one should renew his application nor file on the same land more than once in 12 months.

(5) That no one should renew his file in the name of another.

In this case there were circumstances calculated to arouse suspicion in the conduct of both parties. Upon the one hand, Rhomberg made application on February 28, 1882, for the purchase of these 11 sections in the names of F. Becker, S. L. Rhomberg, and Conrad Becker. These applications were suffered to lapse, and on the ninetieth day thereafter, namely, May 29th, he made application for seven sections of the same lands in the name of J. M. Beechem, and on the following day for four sections in the name of M. B. Thompson. These applications were also suffered to lapse, and 92 days thereafter, namely, August 28th, he applied for the same sections, except section 66, in the name of Margaretta Rhomberg and F. M. Robinson. He also seems to have intended that these should lapse, but, as the ninetieth day (November 26th) fell on Sunday, he wrote his attorneys on the 22d: "The old file expires on Sunday next. You will therefore probably have to refile on Saturday." A new application was therefore made on Saturday, November 25th, in the name of Maggie L. Rhomberg and Frank Robinson. In this connection the bill charged that Rhomberg made these applications in the names of other persons, who did not intend to be actual purchasers, for his own use and benefit, in order to acquire more than he was permitted to purchase directly from the state; that he further determined, in violation of the provision against renewing files in the names of other persons, to take advantage of the 90-day limit, to allow the applications to be forfeited, and to make new applications in the names of other persons, not intending to be actual purchasers, and thus to hold the lands for a longer period than was permitted by the law; and, for the time being, to avoid the payment of any part of the purchase money and of the taxes, which would be assessed after the first payments had been made.

An answer under oath being required, the defendant denied the fraudulent purposes and designs charged against Rhomberg in the bill, and in his testimony Rhomberg swore that Margaretta and Maggie L. Rhomberg were different persons, as were also F. M. Robinson and Frank Robinson, and that they were each of them bona fide living persons, three of them living in Iowa, and one in Chicago; that Margaretta Rhomberg was his sister-in-law; that he was only distantly related to the husband of Maggie L. Rhomberg, and that he was not related to either of the Robinsons; that he was not interested in any of the purchases himself; that he considered investments in Texas school lands good, and made his views known to many of his relatives and friends, and advised them to buy; that, as he was making his headquarters in Texas, many of them confided their interests to him; that he looked after them without demanding or expecting any pay for his services; and that the persons for whom he acted furnished the money to pay for the lands. He admitted making several applications to purchase the lands in question, and that these were abandoned without making the first payments; that the different applications were not renewals, but were for different persons; and that they were not intended to keep other persons from purchasing the lands. In short, that the applications were made bona fide for the benefit of the applicants, and that he had no personal interest in any of them. As there was no testimony contradictory of this, Rhomberg being the only witness examined on the subject, the charges of fraud must be regarded as not

sustained, if, indeed, the answer be not sufficient for that purpose without other testimony. Hughes v. Blake, 6 Wheat. 453; Vigel v. Hopp, 104 U. S. 441; Beals v. Railroad Co., 133 U. S. 290, 10 Sup. Ct. Rep. 314.

Upon the other hand, the answer charges that one H. C. Jacobs was county surveyor and J. L. Fisher was county judge of Shackleford county; that they were partners as real-estate agents, transacting business under the name of Jacobs & Fisher; that the F. B. Jacobs who made application in January was a brother of H. C. Jacobs, and postmaster at Albany, the county seat of Shackleford county, and that Malinda Fisher, who applied for the remainder of the lands, was the wife of one John A. Fisher, deputy surveyor of the county, and brother of the other member of the firm of Jacobs & Fisher; that they entered into a conspiracy to levy a contribution upon all the purchasers of school lands in the county, and to control the same for their own benefit; that the firm of Jacobs & Fisher wrote letters to Rhomberg soliciting his business, promising to sell his lands at an advance, and offered to make files of applications, promising special favors and attention to all who should employ them. It seems that Rhomberg did employ them in this connection, and had some correspondence with them. As these charges were made upon information and belief only, and as there is no evidence to support them, except the similarity of names, they must also be treated as not sustained.

The case resolves itself, then, into the simple question whether the surveyor was authorized to receive the applications of November 25th, and whether the plaintiff is in a position to take advantage of his failure of jurisdiction in this particular. The language of the act is somewhat ambiguous, but the intent of the legislature that no application shall be entertained within the 90 days is entirely clear. It provides that the state treasurer "shall then issue his receipt for said amount and forward it, with the above-named application, to the commissioner of the general land office, who shall file said application and receipt in his office, and issue his receipt in lieu thereof, * * * which certificate shall authorize the * * * surveyor to survey the land * * * and enter the same on his books as sold, and shall not entertain another application to purchase said land until notified of the forfeiture as hereinafter specified." Grammatically, the words "shall not entertain" refer to the commissioner of the land office; but the proviso that, "should the applicant fail to make his first payment * * * and present the certificate of the commissioner of the general land office to the surveyor or his deputy within ninety days from the date of the record of his application, then, and in that case, the said lands shall be again for sale, and the surveyor shall be authorized to receive applications for the same," indicates that the words "shall not entertain another application" refer to the surveyor, and not to the commissioner. As more than 90 days had elapsed from May 29th and 30th, the applications of August 28th are admitted to have been regular, and no other application could have been lawfully entertained within 90 days thereafter. As the ninetieth day fell on Sunday, the lands were not open to another application until Monday; the general rule being that, when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. End. Interp. St. § 393; Salter v. Burt, 20 Wend. 205; Hammond v. Insurance Co., 10 Gray, 306. The defendant claims that, while the act prohibited the entertaining of a second application in less than 90 days from the prior application, Rhomberg in fact had the right to withdraw and abandon the application and make another at any time within the 90 days. As no record exists of its abandonment, and no allusion is made to it in Rhomberg's letter of November 22d, such abandonment can only be presumed from the fact that the new application was made November 25th. There is nothing, however, to distinguish this from the prior applications in that particular. A construction of the act, too, which would permit such an abandonment would defeat the very object of the legislature, which was to fix a time within which no other application should be entertained, so that parties desiring to purchase the land would be apprised of the day when it would be open to an application. Such persons, however, could never know when an application would be abandoned, and such proceedings would permit an applicant, by a simple change of name of the person he represents, to keep the lands out of the market for an indefinite period. It is true that in Martin v. Brown, 62 Tex. 469, it was held that a fictitious application to purchase would not have the effect of preventing another person from applying before the expiration of the 90 days, but it certainly does not lie in the mouth of the defendant to claim that Rhomberg's first application was fictitious, since his whole case depends upon the propriety and legality of his action. In Martin v. Brown the demurrer admitted that the first application was fictitious, and made by an agent for his own benefit, for the purpose of withholding the lands from the market. In this case the defendant claims, and proves by the testimony of Rhomberg, that the application was made by him in good faith for the benefit of the applicants, and not for his own.

During the 90 days allowed by law for the first payment the land is in the position of reserved lands under railroad grant acts. The grant does not attach to them if at the time they are pre-empted or otherwise segregated from the public lands. This principle

is established by a large number of cases in this court. Wilcox v. Jackson, 13 Pet. 498; Leavenworth, etc., R. Co. v. U. S., 92 U. S. 733; Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. Rep. 566; Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. Rep. 112; Bardon v. Railway Co., 145 U. S. 535, 12 Sup. Ct. Rep. 856; U. S. v. Southern Pac. Ry. Co., 146 U. S. —, 13 Sup. Ct. Rep. 152.

Defendant's position that the subsequent issuing of a patent put an end to the equitable rights of the appellant cannot be sustained, either under the decisions of this court or that of the supreme court of Texas. In the case of Garland v. Wynn, 20 How. 6, the general rule was stated to be "that, where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate their conflicting claims." To the same effect are Cunningham v. Ashley, 14 How. 377; Lytle v. Arkansas, 22 How. 193, 203; Berthold v. McDonald, Id. 334; Lindsey v. Hawes, 2 Black, 554; Shepley v. Cowan, 91 U. S. 330; Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. Rep. 782; Sturr v. Beck, 133 U. S. 541, 550, 10 Sup. Ct. Rep. 350. In the case of Stark v. Starrs, 6 Wall. 402, 419, these cases are said to be "only applications of the well-established doctrine that, where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title." And in Silver v. Ladd, 7 Wall. 219, it was held that the proper relief was not the annulment and cancellation of the patent wrongfully issued, but was one founded upon the theory that the title which had passed from the United States to the defendant inured in equity to the benefit of the plaintiff, and that the decree should compel him to convey to the plaintiff, or to have such conveyance made in his name by a commissioner appointed by the court for that purpose. See, also, Johnson v. Towsley, 13 Wall. 72. It seems that this is also the law of Texas. Todd v. Fisher, 26 Tex. 239; Mitchell v. Bass, Id. 376; League v. Rogan, 59 Tex. 427; Sherwood v. Fleming, 25 Tex. Supp. 408, 427; Wright v. Hawkins, 28 Tex. 452.

It is no defense that plaintiff has not complied with the law as to making the final payments. It appears that Jacobs and Fisher executed their obligations, as required by the act, for the balance of the appraised value, and that such obligations as have matured have been discharged and paid off, as well as the matured interest thereon. In any event, the defendant is in no position to claim a forfeiture on this ground. Canales v. Perez, 65 Tex. 291, 69 Tex. 676, 7 S. W. Rep. 507.

The act of the legislature of Texas approved April 14, 1883, for the appointment of a land board to investigate all purchases of state school lands held under the acts of 1879 and 1881, cuts no figure in this case. Such an act could operate only as between the state and the purchaser. It would be beyond the competency of the legislature to affect the vested rights of the plaintiff as between him and the defendant by the passage of the act in question.

Section 66 was not included in the applications of August 28th, but was included in one of those of November 25th, and therefore, as to this section, the defendant has shown the better right.

Defendant was impleaded by the name of A. W. Becker. Initials are no legal part of a name, the authorities holding the full Christian name to be essential. Wilson v. Shannon, 6 Ark. 196; Norris v. Graves, 4 Strob. 32; Seely v. Boon, 1 N. J. Law, 138; Chappell v. Proctor, Harp. 49; Kinnersley v. Knott, 7 C. B. 980; Turner v. Fitt, 3 C. B. 701; Oakley v. Pegler, (Neb.) 46 N. W. Rep. 920; Knox v. Starks, 4 Minn. 20, (Gil. 7;) Kenyon v. Semon, (Minn.) 45 N. W. Rep. 10; Beggs v. Wellman, 82 Ala. 391, 2 South. Rep. 877; Nash v. Collier, 5 Dowl. & L. 341; Fewlass v. Abbott, 28 Mich. 270. This loose method of pleading is not one to be commended, but, as no advantage was taken of it in the court below, it will not be considered here.

*The decree of the circuit court, except as to section 66, is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

(146 U. S. 515)

BRINKERHOFF et al. v. ALOE.

(December 12, 1892.)

No. 85.

PATENTS FOR INVENTIONS—ANTICIPATION—RECTAL SPECULA—COMBINATION—INVENTION.

1. The first claim of letters patent No. 224,991, issued March 2, 1880, to A. W. Brinkerhoff for an improvement in "rectal specula," consisting in a slide extending the entire length of the tube, is void, in view of the prior art; and the fact that the slide of the patent is of metal, while former slides were of glass, is immaterial, since the material of which the slide is composed was not claimed as an essential feature of the device. 37 Fed. Rep. 92, affirmed.

2. The third claim of the patent, covering an "incline" in cylindrical tubular specula, having slotted sides and closed ends, such incline being for the purpose of preventing injury by impaction against pile tumors, enlarged glands, etc., in withdrawing the instrument, was anticipated by prior devices, wherein the incline, though not so pronounced as in the patent, seems to have effectually answered the purpose. 37 Fed. Rep. 92, affirmed.

3. The second claim of the patent which covers the "incline," in combination with the tube, slot, and slide, is void for want of invention, as the combination produced no new result from the joint and co-operating action of the old elements. 37 Fed. Rep. 92, affirmed.

Appeal from the circuit court of the United States for the eastern district of Missouri.

Suit by Milford H. Brinkerhoff and Willie C. Brinkerhoff, executors of Alexander W. Brinkerhoff, deceased, against Albert S. Aloe, for infringement of a patent. The circuit court held that the patent was void for want of invention, and because of anticipation by prior devices, and dismissed the bill. 37 Fed. Rep. 92. Complainants appealed. Affirmed.

The case is stated in the opinion delivered below by THAYER, J., which is here given in full:

"This is a bill to restrain the infringement of letters patent No. 224,991, granted to Alexander W. Brinkerhoff, under date of March 2, 1880, for an improvement in 'rectal specula.' The patentee, in his specification, thus describes his invention: 'My speculum is made of metal, and plated in the usual manner, to secure a bright interior and smooth surface. In shape it is conical, and has one side slotted through its entire length of chamber. Into such slot is closely fitted a movable slide, having upon its rear end a handle for actuating it. On the side of the tube opposite the slide is another handle, by which to hold the tube when in use. Around the large end of the tube is a flange or lip, * * * and in the forward end of the chamber is an incline, made necessary in specula having closed ends, * * * to prevent the impaction of pile tumors, enlarged glands, or surplus membrane in the end of the chamber, and thereby enable the operator to withdraw the instrument with safety and ease.' Of the nature of his invention the patentee says: 'My invention consists in the use of a slide extending through the length of one side of the tube, and an incline inside of the forward or small end of the chamber, extending from the bottom of the chamber upward and forward to the under side of the slide when in place, to prevent injury to the membrane while withdrawing the instrument,' etc. The claims made in the specification are as follows: '(1) A slide in the side of a speculum, extending through its whole length, and used substantially as herein described. (2) The incline in the front end of the chamber, in combination with the tube, slot, and slide, substantially as and for the purposes herein set forth. (2) In cylindrical tubular specula having a slotted side and closed end to prevent the entrance of faeces, the incline in the front end of the chamber, extending upward from the bottom and forward to under side of slide, substantially as described, and for the purposes herein set forth.'

"1. It is clear that the first claim of this patent, covering 'a slide in the side of a speculum extending through its whole length,' cannot be sustained. Indeed, it is not seriously contended by complainant's counsel that the device covered by that claim is novel. I shall not go into the details of the evidence, therefore, on this branch of the case, but will content myself with the general statement that the testimony of Dr. Warren B. Outen, Dr. Charles Bernays, and Dr. Charles E. Michel, as well as the testimony of William Grady and Herman Speckler, satisfies me that rectal speculums closed at one end, having a slot in the side extending the full length of the chamber, and fitted with a slide, had been used by the medical fraternity in this country before the date of the alleged invention. While it is true that defendant has not produced any of the specula that were so in use, and has only produced a model of one made in his own shop since this suit was filed, known as the 'Reed Speculum,' yet I consider this fact not sufficient in itself to overcome the positive statements of intelligent and entirely disinterested witnesses, who had occasion to know the fact whereof they speak, that specula with slotted sides fitted with slides were in use, and to some extent were on sale, in this country prior to the date of the alleged invention in July, 1878. The Reed instrument, and possibly all the instruments of which the witnesses above named have spoken, had glass slides, instead of metal; but that fact is not important, as the material of which the slide is composed is not claimed as an essential feature of the device. But, even if the foregoing view is erroneous, I am furthermore of the opinion that the first claim of the patent was anticipated by 'Segala's Tri-Valve Vaginal Speculum,' which was produced on the hearing, and was shown to have been in use in this country since 1860; also by the 'catheter' which was produced on the trial, and shown to have been on sale in this country since 1874. The uses for which both of the instruments last referred to were designed are analogous to that in which complainant employs his instrument. Both instruments are tubular; each has a slot in the side extending the full length of the chamber fitted with a metal slide, which is intended to be wholly or partially withdrawn (the same as the slide in the rectal speculum) when the operator has occasion to examine or treat the particular organs for the treatment of which these instruments were constructed. In view of the slides shown in Segala's vaginal speculum, and in the catheter, and the use made of the same, it must be held that there is nothing novel in the slide in complainant's patent. He has, in this particular matter, merely appropriated a device long known and used in surgical instruments fitted for the examination of certain interior membranes or cavities of the body, for the improvement of another instrument adapted to the treament of other interior membranes. Hilton's rectal speculum, an instrument said to have been in use in England as early as 1870, also clearly anticipates the first claim of complainant's patent, and probably the second and third claims. If Hilton's speculum, as contended, was described in a printed publication in England as early as 1876, that fact also invalidates the first claim of the patent under consideration, and most likely the second and

third claims. The original printed publication relied upon, said to have been published in London as early as 1876, was not produced at the hearing before the master, but in lieu thereof a volume entitled 'Rest & Pain,' published in New York in 1879, which purports to be a reprint of the earlier English publication, was produced. Some testimony was offered to the effect that application had been made to the English publishers, and to other booksellers in London and in this country, for a copy of the original publication, and that they reported the work to be out of print. All of the testimony, however, tending to show that a book entitled 'Rest & Pain' was published in London in 1876, and that the work reprinted in this country in 1879 is an accurate copy thereof, is of the nature of hearsay; and as objection was duly taken to the testimony when it was produced before the master, and was insisted upon at the trial, the objection must be sustained, no matter how persuasive the inference may be that there was a foreign publication which described Hilton's speculum. The latter instrument is accordingly ignored as an anticipation of complainant's invention.

"2. The third claim of the patent is a claim for the 'incline' in cylindrical tubular specula having a slotted side and closed end. The particular device attempted to be covered by this claim was anticipated, in my opinion, by a rectal speculum produced by Dr. Mudd, and shown to the satisfaction of the court to have been purchased at an instrument store, and to have been in use in this country before the date of complainant's invention. The instrument in question is tubular. It is conical in form, has a slotted side, a closed end, and, what is of more importance, an incline at the closed end, extending from the bottom of the chamber upward and forward to the end of the slot. It is true that the angle made by the incline with the axis of the tube in the latter instrument approaches more nearly to a right angle than the incline in complainant's speculum; nevertheless there is a pronounced 'incline;' and, moreover, Dr. Mudd testifies that one purpose of the 'incline' is to protect the mucous membrane from injury when the speculum is withdrawn. It should be further observed that complainant's specification does not make the angle at which the incline is set in his speculum an essential feature of the device. As described in his specification, the utility of the incline consists in preventing the 'impaction of pile tumors,' etc., and in enabling the operator to withdraw the instrument without injury to the membranes. This is precisely the function of the incline in the speculum produced by Dr. Mudd, and apparently it was set at an angle which effectually accomplished that purpose. At all events, no complaint appears to have been made against that speculum on the ground that the incline failed to accomplish the purpose had in view. The Squire's speculum also shows an incline in the forward or closed end, in all respects like that in complainant's instrument; but the testimony in the case leaves it somewhat doubtful whether the 'incline' in Squire's speculum was placed therein shortly before or shortly after complainant claims to have invented it. For that reason the patent is not affected by the evidence offered by defendant in relation to the Squire's instrument.

"3. In view of what has been said it appears that plaintiff's right to relief depends on the second claim for the 'incline, * * * in combination with the tube, slot, and slide.' This claim is attacked on two grounds: First, that the combination, as a whole, was anticipated by Dr. Hodgen when he caused an incline in the form of a mirror to be set permanently in the forward end of the old 'Reed Speculum,' about the year 1876; and, second, that the combination is devoid of invention and patentable novelty. I shall concede that the evidence as to what Dr. Hodgen caused to be done with the Reed speculum 12 or 13 years since is, under the circumstances, not of that certain and convincing character which ought to be required to overturn the claims of a duly-issued patent. The second objection to the claim, however, is more formidable. The Reed speculum, before alluded to, shows 'the tube, slot, and slide' combined in a manner that does not differ essentially from the form in which the same elements are combined in complainant's combination. To these three elements the patentee added a fourth,—the 'incline in the front end of the chamber,'—but the 'incline,' as before stated, was itself an old device, which had been used in specula such as was produced by Dr. Mudd. Furthermore, it was used in the old instruments for the same purpose that complainant professes to have invented it; that is to say, to avoid injuring protruding membranes when the speculum was withdrawn. Even if complainant had been the first to use the incline in tubular specula having closed ends, the device was a very obvious one, scarcely rising to the dignity of an invention, considering the function it performed, as is well illustrated by the account which the patentee gives of the manner in which the idea was conceived. He states that he first constructed his speculum as shown in the specification, with a tube, slot, and slide, but without an incline. When he made the first trial of the instrument he discovered the risk of injuring such membranes as happened to protrude through the slot, as others had discovered who made the Mudd instrument. Thereupon he employed a jeweler to solder a small piece of metal in the forward end of the chamber, so as to form an incline, and subsequently amended his specification by adding the third claim, which is substantially a claim for the incline as an independent device. But, regardless of the obvious nature of the improvement made by adding the incline, the

court is of the opinion that the combination so formed was not patentable, because no new result or effect was produced by the united action of the old elements. To sustain a patent on a combination of old devices, it is well settled that a new result must be obtained, which is due to the joint and cooperating action of all the old elements. Either this must be accomplished, or a new machine of distinct character and function must be constructed. Pickering v. McCullough, 104 U. S. 310; Hailes v. Van Wormer, 20 Wall. 353; Double-Pointed Tack Co. v. Two Rivers Manuf'g Co., 9 Biss. 258, 3 Fed. Rep. 26; Machine Co. v. Young, 14 Blatchf. 46. If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed, and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable. Hailes v. Van Wormer, supra; Reckendorfer v. Faber, 92 U. S. 347. In the present case the incline, when placed in combination with the 'tube, slot, and slide,' acted precisely as it did when placed in the forward end of a slotted tube not provided with a slide. Its action was in no sense modified by the new relation in which it was placed, nor did it, in unison with the other elements of the combination, produce a distinctively new result. In accordance with these views the bill is dismissed."

J. C. Smith, for appellants. Geo. H. Knight, for appellee.

*517 *Mr. Chief Justice FULLER. Having reached the same conclusions as those expressed in the opinion of the circuit court, reported in 37 Fed. Rep. 92, we direct the decree to be affirmed.

(146 U. S. 657)

HUNTINGTON v. ATTRILL.

(December 12, 1892.)

No. 33.

SUPREME COURT — JURISDICTION — "PENAL LAWS" — CONSTITUTIONAL LAW.

1. Plaintiff recovered a judgment in a court of New York against defendant upon his personal liability as a director and stockholder in a New York corporation, under the New York statute, (Laws 1875, c. 611, §§ 21, 37;) the grounds of liability being that defendant, as a director, made and filed a false certificate that the stock was fully paid in, (in which case the statute makes him personally liable for all the debts contracted by the corporation while he was an officer thereof,) and that the debt was incurred before the stock was fully paid, (in which case defendant, as a stockholder, was liable to the amount of his stock.) Plaintiff thereafter brought a bill in a state court of Maryland to set aside an alleged fraudulent transfer of property by defendant, and to charge the same with the payment of the New York judgment. This case was taken to the court of appeals of Maryland, which decided against the plaintiff's claim upon the ground that the New York judgment was for a penalty under the New York statute, and therefore could not be enforced in Maryland. Two of the judges dissented upon the ground that this decision failed to give the New York judgment full faith and credit, as required by the constitution of the United States (article 4, § 1) and Rev. St. § 905. *Held*, that this decision involved the determination of a federal question, and was reviewable by the supreme court of the United States. Mr. Chief Justice Fuller, dissenting.

2. The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude the courts of another state, when the judgment is sought to be enforced therein, from ascertaining whether the claim is really of such a nature as those courts are authorized to enforce. Wisconsin v. Pelican Ins. Co., 8 Sup. Ct. Rep. 1370, 127 U. S. 265, followed.

3. The words "penal" and "penalty," in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws, and "penal laws," strictly and properly, are those imposing punishment for an offense committed against the state, which the executive of the state has the power to pardon; and the expression does not include statutes which give a private action against the wrongdoer.

4. The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to the person injured by the wrongful act.

5. Laws N. Y. 1875, c. 611, §§ 21, 37, making the officers of a corporation liable for its debts in case they make any false certificate or report, and also, in the case of limited liability companies, rendering the stockholders liable to the full amount of the stock held by them, respectively, for all debts contracted by the company before the whole amount of capital stock has been paid in, is not a penal statute, in the international sense; so that a judgment recovered thereunder cannot be enforced in another state, and the decision of a court of another state that the judgment is not enforceable therein is a failure to give such judgment the full faith and credit required by the constitution of the United States (article 4, § 1) and by Rev. St. § 905. Mr. Chief Justice Fuller, dissenting.

In error to the court of appeals of the state of Maryland. Reversed.

John K. Cowen, E. J. D. Cross and H. L. Bond, for plaintiff in error. S. T. Wallis and Wm. A. Fisher, for defendant in error.

*660 *Mr. Justice GRAY delivered the opinion of the court.

This was a bill in equity, filed March 21, 1888, in the circuit court of Baltimore city, by Collis P. Huntington, a resident of New York, against the Equitable Gaslight Company of Baltimore, a corporation of Maryland, and against Henry Y. Attrill, his wife and three daughters, all residents of Canada, to set aside a transfer of stock in that company made by him for their benefit and in

fraud of his creditors, and to charge that stock with the payment of a judgment recovered by the plaintiff against him in the state of New York, upon his liability as a director in a New York corporation, under the statute of New York of 1875, (chapter 611,) the material provisions of which are copied in the margin.[1]

The bill alleged that on June 15, 1886, the plaintiff recovered, in the supreme court of the state of New York, in an action brought by him against Attrill on March 21, 1883, a judgment for the sum of $100,240, which had not been paid, secured, or satisfied, and that the cause of action on which that judgment was recovered was as follows: On February 29, 1880, the Rockaway Beach Improvement Company, Limited, of which Attrill was an incorporator and a director, became a corporation under the law of New York, with a capital stock of $700,000. On June 15, 1880, the plaintiff lent that company the sum of $100,000, to be repaid on demand. On February 26, 1880, Attrill was elected one of the directors of the company, and accepted the office, and continued to act as a director until after January 29, 1881. On June 30, 1880, Attrill, as a director of the company, signed and made oath to, and caused to be recorded, as required by the law of New York, a certificate, which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in, and by making such false certificate became liable, by the law of New York, for all the debts of the company contracted before January 29, 1881, including its debt to the plaintiff. On March 8, 1882, by proceedings in a court of New York, the corporation was declared to be insolvent, and to have been so since July, 1880, and was dissolved. A duly exemplified copy of the record of that judgment was annexed to and made part of the bill.

The bill also alleged that "at the time of its dissolution, as aforesaid, the said company was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the state of New York all the stockholders of the company were liable to pay all its debts, each to the amount of the stock held by him, and the defendant, Henry Y. Attrill, was liable at said date, and on April 14, 1882, as such stockholder, to the amount of $340,000, the amount of stock held by him, and was on both said dates also severally and directly liable, as a director, having signed the false report above mentioned, for all the debts of said company contracted between February 26, 1880, and January 29, 1881, which debts aggregate more than the whole value of the property owned by said Attrill."

The bill further alleged that Attrill was in March, 1882, and had ever since remained, individually liable in a large amount over and above the debts for which he was liable as a stockholder and director in the company, and that he was insolvent, and had secreted and concealed all his property for the purpose of defrauding his creditors.

The bill then alleged that in April, 1882, Attrill acquired a large amount of stock in the Equitable Gaslight Company of Baltimore, and forthwith transferred into his own name, as trustee for his wife, 1,000 shares of such stock, and, as trustee for each of his three daughters, 250 shares of the same, without valuable consideration, and with intent to delay, hinder, and defraud his creditors, and especially with the intent to delay, hinder, and defraud this plaintiff of his lawful suits, damages, debts, and demands against Attrill, arising out of the cause of action on which the aforesaid judgment was recovered, and out of the plaintiff's claim against him as a stockholder; that the plaintiff in June, 1880, and ever since, was domiciled and resident in the state of New York, and that from February, 1880, to December 6, 1884, Attrill was domiciled and resident in that state, and that his transfers of stock in the gas company were made in the city of New York, where the principal office of the company then was, and where all its transfers of stock were made; and that those transfers were, by the laws of New York, as well as by those of Maryland, fraudulent and void as against the creditors of Attrill, including the creditors of the Rockaway Company, and were fraudulent and void as against the plaintiff.

The bill further, by distinct allegations, averred that those transfers, unless set aside and annulled by a court of equity, would de-

[1] Sec. 21. If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.

Sec. 37. In limited liability companies, all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed. * * * The capital stock of every such limited liability company shall be paid in, one half thereof within one year, and the other half thereof within two years, from the incorporation of said company, or such corporation shall be dissolved. The directors of every such company, within thirty days after the payment of the last installment of the capital stock, shall make a certificate stating the amount of the capital so paid in, which certificate shall be signed and sworn to by the president and a majority of the directors; and they shall, within the said thirty days, record the same in the office of the secretary of state, and of the county in which the principal business office of such corporation is situated.

Sec. 38. The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution.

prive the plaintiff of all his rights and interests of every sort therein, to which he was entitled as a creditor of Attrill at the time when those fraudulent transfers were made, and "that the said fraudulent transfers were wholly without legal consideration, were fraudulent and void, and should be set aside by a court of equity."

The bill prayed that the transfer of shares in the gas company be declared fraudulent and void, and executed for the purpose of defrauding the plaintiff out of his claim as existing creditor; that the certificates of those shares in the name of Attrill as trustee be ordered to be brought into court and canceled; and that the shares "be decreed to be subject to the claim of this plaintiff on the judgment aforesaid," and to be sold by a trustee appointed by the court, and new certificates issued by the gas company to the purchasers, and for further relief.

One of the daughters demurred to the bill because it showed that the plaintiff's claim was for the recovery of a penalty against Attrill arising under a statute of the state of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the state of Maryland.

By a stipulation of counsel, filed in the cause, it was agreed that, for the purposes of the demurrer, the bill should be treated as embodying the New York statute of June 21, 1875; and that the Rockaway Beach Improvement Company, Limited, was incorporated under the provisions of that statute.

The circuit court of Baltimore city overruled the demurrer. On appeal to the court of appeals of the state of Maryland, the order was reversed, and the bill dismissed. 70 Md. 191, 16 Atl. Rep. 651.

The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that state and in Maryland, a penalty which could not be enforced in the state of Maryland; and that the judgment obtained in New York for this penalty, while it "merged the original cause of action so that a suit cannot be again maintained upon it," and "is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings," yet did not change the nature of the transaction, but, within the decision of this court in Wisconsin v. Insurance Co., 127 U. S. 265, 8 Sup. Ct. Rep. 1370, was in its "essential nature and real foundation" the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the state in which it was rendered. Pages 193–198, 70 Md., and pages 653, 654, 16 Atl. Rep.

The court then took up the clause of the bill, above quoted, in which it was sought to charge Attrill as originally liable under the statute of New York, both as a stockholder and as a director, and, observing that "this liability is asserted to exist independently of the judgment," summarily disposed of it, upon the grounds that it could not attach to him as a stockholder, because he had not been sued, as required by the New York statute, within two years after the plaintiff's debt became due, nor as a director, because "the judgment against Attrill for having made the false report certainly merges all right of action against him on this account," but that, if he was liable at the times and on the grounds "mentioned in this clause of the bill," this liability was barred by the statute of limitations of Maryland. Pages 198, 199, 70 Md., and page 654, 16 Atl. Rep.

Having thus decided against the plaintiff's claim under his judgment, upon the single ground that it was for a penalty under the statute of New York, and therefore could not be enforced in Maryland, and against any original liability under the statute, for various reasons, the opinion concluded: "Upon the whole, it appears to us that the complainant has no cause of action which he can maintain in this state." Page 199, 70 Md., and page 654, 16 Atl. Rep.

Judge Stone, with whom Judge McSherry concurred, dissented from the opinion of the majority of the court, upon the ground that it did not give due effect to the act of congress passed in pursuance of the constitution of the United States, and providing that the records of judgments rendered by a court of any state shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state whence they are taken. Act May 26, 1790, c. 11, (1 St. p. 122; Rev. St. § 905.) He began his opinion by saying: "I look upon the principal point as a federal question, and am governed in my views more by my understanding of the decisions of the supreme court of the United States than by the decisions of the state courts." And he concluded thus: "I think the supreme court, in 127 U. S. 265, 8 Sup. Ct. Rep. 1370, meant to confine the operation of the rule that no country will execute the penal laws of another to such laws as are properly classed as criminal. It is not very easy to give any brief definition of a criminal law. It may perhaps be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and which the state alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which,

while imposing a duty, at the same time confer a right upon the citizens to claim damages for its nonperformance, are not criminal. If all the laws of the latter description are held penal, in the sense of criminal, that clause in the constitution which relates to records and judgments is of comparatively little value. There is a large and constantly increasing number of cases that may in one sense be termed penal, but can in no sense be classed as criminal. Examples of these may be found in suits for damages for negligence in causing death, for double damages for the injury to stock where railroads have neglected the state laws for fencing in their tracks, and the liability of officers of corporations for the debts of the company by reason of their neglect of a plain duty imposed by statute. I cannot think that judgments on such claims are not within the protection given by the constitution of the United States. I therefore think the order in this case should be affirmed." Pages 200–205, 70 Md., and pages 654–656, 16 Atl. Rep.

A writ of error was sued out by the plaintiff, and allowed by the chief justice of the court of appeals of Maryland, upon the ground "that the said court of appeals is the highest court of law or equity in the state of Maryland, in which a decision in the said suit could be had; that in said suit a right and privilege are claimed under the constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under said constitution and statutes; and that in said suit there is drawn in question the validity of a statute of, and an authority exercised under, the United States, and the decision is against the validity of such statute and of such authority."

It thus appears that the judgment recovered in New York was made the foremost ground of the bill, was fully discussed and distinctly passed upon by the majority of the court of appeals of Maryland, and was the only subject of the dissenting opinion; and that the court, without considering whether the validity of the transfers impeached as fraudulent was to be governed by the law of New York or by the law of Maryland, and without a suggestion that those transfers alleged to have been made by Attrill with intent to delay, hinder, and defraud all his creditors were not voidable by subsequent as well as by existing creditors, or that they could not be avoided by the plaintiff, claiming under the judgment recovered by him against Attrill after those transfers were made, declined to maintain his right to do so by virtue of that judgment, simply because the judgment had, as the court held, been recovered in another state, in an action for a penalty.

The question whether due faith and credit were thereby denied to the judgment rendered in another state is a federal question, of which this court has jurisdiction on this writ of error. Green v. Van Buskirk, 5 Wall. 307, 311; Crapo v. Kelly, 16 Wall. 610, 619; Dupasseur v. Rochereau, 21 Wall. 130, 134; Crescent City Livestock Co. v. Butchers' Union Slaughter-House Co., 120 U. S. 141, 146, 147, 7 Sup. Ct. Rep. 472; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269; Carpenter v. Strange, 141 U. S. 87, 103, 11 Sup. Ct. Rep. 960.

In order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: "The courts of no country execute the penal laws of another." The Antelope, 10 Wheat. 66, 123. In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word "penal" in our language.

In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. U. S. v. Reisinger, 128 U. S. 398, 402, 9 Sup. Ct. Rep. 99; U. S. v. Chouteau, 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. In the words of Chief Justice Marshall: "In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party." Tayloe v. Sandiford, 7 Wheat. 13, 17.

Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be "penal against the hundred, but certainly remedial as to the sufferer." Hyde v. Cogan, 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming and, if the loser does not sue within a certain time, authorizing a qui tam action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit

by a common informer. Bones v. Booth, 2 W. Bl. 1226; Brandon v. Pate, 2 H. Bl. 308; Grace v. McElroy, 1 Allen, 563; Read v. Stewart, 129 Mass. 407, 410; Cole v. Groves, 134 Mass. 471. As said by Mr. Justice Ashhurst in the king's bench, and repeated by Mr. Justice Wilde in the supreme judicial court of Massachusetts, "it has been held in many instances that, where a statute gives accumulative damages to the party grieved, it is not a penal action." Woodgate v. Knatchbull, 2 Term R. 148, 154; Read v. Chelmsford, 16 Pick. 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be "not like a penal law, where a punishment is imposed for a crime," but "rather as a remedial than a penal law," because "the act indeed does give a penalty, but it is to the party grieved." Lake v. Smith, 1 Bos. & P. (N. R.) 174, 179, 180, 181; Wilkinson v. Colley, 5 Burrows, 2694, 2698. So in an action given by statute to a traveler injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offense, or to conclude against the form of the statute, because, as Chief Justice Shaw said: "The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." Reed v. Northfield, 13 Pick. 94, 100, 101.

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The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries;' the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'" 3 Bl. Comm. 2.

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Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states. The general rules of international comity upon this subject were well summed up, before the American Revolution, by Chief Justice De Grey, as reported by Sir William Blackstone: "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and sequuntur forum rei." Rafael v. Verelst, 2 W. Bl. 1055, 1058.

Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive, or judicial, of other states take no action with regard to them, except by way of extradition, to surrender offenders to the state whose laws they have violated, and whose peace they have broken.

Proceedings in rem to determine the title to land must necessarily be brought in the state within whose borders the land is situated, and whose courts and officers alone can put the party in possession. Whether actions to recover pecuniary damages for trespasses to real estate, "of which the causes," as observed by Mr. Westlake, (Priv. Int. Law, [3d Ed.] p. 213,) "could not have occurred elsewhere than where they did occur," are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as affording a personal remedy. By the common law of England, adopted in most of the states of the Union, such actions are regarded as local, and can be brought only where the land is situated. Doulson v. Matthews, 4 Term R. 503; McKenna v. Fisk, 1 How. 241, 248. But in some states and countries they are regarded as transitory, like other personal actions; and whether an action for trespass to land in one state can be brought in another state depends on the view which the latter state takes of the nature of the action. For instance, Chief Justice Marshall held that an action could not be maintained in Virginia, by whose law it was local, for a trespass to land in New Orleans. Livingston v. Jefferson, 1 Brock. 203. On the other hand, an action for a trespass to land in Illinois, where the rule of the common law prevailed, was maintained in Louisiana; Chief Justice Eustis saying: "The present action is, under our laws, a personal action, and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought." Holmes v. Barclay, 4 La. Ann. 63. And in a very recent English case, in which the judges differed in opinion upon the question whether, since local venue has been abolished in England, an action can be maintained there for a trespass to land in a foreign country, all agreed that this question depended on the law of England. Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 358. See, also, Cragin v. Lovell, 88 N. Y. 258; Allin v. Lumber Co., 150 Mass. 560, 23 N. E. Rep. 581.

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In order to maintain an action for an injury to the person or to movable property,

some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, The Halley, L. R. 2 P. C. 193, 204; Phillips v. Eyre, L. R. 6 Q. B. 1, 28, 29; The M. Moxham, 1 Prob. Div. 107, 111; Wooden v. Railroad Co., 126 N. Y. 10, 26 N. E. Rep. 1050; Ash v. Railroad Co., 72 Md. 144, 19 Atl. Rep. 643. But such is not the law of this court. By our law, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another, and actionable there, although a like wrong would not be actionable in the state where the suit is brought. Smith v. Condry, 1 How. 28; The China, 7 Wall. 53, 64; The Scotland, 105 U. S. 24, 29; Dennick v. Railroad Co., 103 U. S. 11; Railway Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

Upon the question what are to be considered penal laws of one country, within the international rule which forbids such laws to be enforced in any other country, so much reliance was placed by each party in argument upon the opinion of this court in Wisconsin v. Insurance Co., 127 U. S. 265, 8 Sup. Ct. Rep. 1370, that it will be convenient to quote from that opinion the principal propositions there affirmed:

"The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." Page 290, 127 U. S., and page 1374, 8 Sup. Ct. Rep.

"The application of the rule to the courts of the several states and of the United States is not affected by the provisions of the constitution and of the act of congress, by which the judgments of the courts of any state are to have such faith and credit given to them in every court within the United States as they have by law or usage in the state in which they were rendered." Page 291, 127 U. S., and page 1375, 8 Sup. Ct. Rep.

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." Pages 292, 293, 127 U. S., and page 1375, 8 Sup. Ct. Rep.

"The statute of Wisconsin, under which the state recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offense committed against the state by violating her law. The prosecution was in the name of the state, and the whole penalty, when recovered, would accrue to the state." Page 299, 127 U. S., and page 1378, 8 Sup. Ct. Rep.

*672 *Such were the grounds upon which it was adjudged in that case that this court, under the provision of the constitution giving it original jurisdiction of actions between a state and citizens of another state, had no jurisdiction of an action by a state upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another state for a pecuniary penalty for a violation of its municipal law.

Upon similar grounds, the courts of a state cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States. Martin v. Hunter, 1 Wheat. 304, 330, 337; U. S. v. Lathrop, 17 Johns. 4, 265; Delafield v. Illinois, 2 Hill, 159, 169; Jackson v. Rose, 2 Va. Cas. 34; Ely v. Peck, 7 Conn. 239; Davison v. Champlin, Id. 244; Haney v. Sharp, 1 Dana, 442; State v. Pike, 15 N. H. 83, 85; Ward v. Jenkins, 10 Metc. (Mass.) 583, 587; 1 Kent, Comm. 402–404. The only ground ever suggested for maintaining such suits in a state court is that the laws of the United States are, in effect, laws of each state. Claflin v. Houseman, 93 U. S. 130, 137; Platt, J., in U. S. v. Lathrop, 17 Johns. 22; Ordway v. Bank, 47 Md. 217. But in Claflin v. Houseman the point adjudged was that an assignee under the bankrupt law of the United States could assert in a state court the title vested in him by the assignment in bankruptcy; and Mr. Justice Bradley, who delivered the opinion in that case, said the year before, when sitting in the circuit court, and speaking of a prosecution in a court of the state of Georgia for perjury committed in that state in testifying before a commissioner of the circuit court of the United States: "It would be a manifest incongruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty." Ex parte Bridges, 2 Woods, 428, 430. See, also, Loney's Case, 134 U. S. 372, 10 Sup. Ct. Rep. 584.

Beyond doubt (except in cases removed from a state court in obedience to an express act of congress, in order to protect rights under the constitution and laws of the United states) a circuit court of the United States cannot entertain jurisdiction of a suit in behalf of the state, or of the people thereof, to *673 recover a penalty imposed by way of punishment for a violation of a statute of the state;

"the courts of the United States," as observed by Mr. Justice Catron, delivering a judgment of this court, "having no power to execute the penal laws of the individual states." Gwin v. Breedlove, 2 How. 29, 36, 37; Gwin v. Barton, 6 How. 7; Iowa v. Chicago, B. & Q. R. Co., 37 Fed. Rep. 497; Ferguson v. Ross, 38 Fed. Rep. 161; Texas v. Day Land & Cattle Co., 41 Fed. Rep. 228; Dey v. Chicago, M. & St. P. Ry. Co., 45 Fed. Rep. 82.

For the purposes of extraterritorial jurisdiction, it may well be that actions by a common informer, called, as Blackstone says, "'popular actions,' because they are given to the people in general," to recover a penalty imposed by statute for an offense against the law, and which may be barred by a pardon granted before action brought, may stand on the same ground as suits brought for such a penalty in the name of the state or of its officers, because they are equally brought to enforce the criminal law of the state. 3 Bl. Comm. 161, 162; 2 Bl. Comm. 437, 438; Adams v. Woods, 2 Cranch, 336; Gwin v. Breedlove, above cited; U. S. v. Connor, 138 U. S. 61, 66, 11 Sup. Ct. Rep. 229; Bryant v. Ela, Smith, (N. H.) 396. And personal disabilities imposed by the law of a state, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person,—such as attainder, or infamy, or incompetency of a convict to testify, or disqualification of the guilty party to a cause of divorce for adultery to marry again,—are doubtless strictly penal, and therefore have no extraterritorial operation. Story, Confl. Law, §§ 91, 92; Dicey, Dom. 162; Folliott v. Ogden, 1 H. Bl. 123, and 3 Term R. 726; Logan v. U. S., 144 U. S. 263, 303, 12 Sup. Ct. Rep. 617; Dickson v. Dickson, 1 Yerg. 110; Ponsford v. Johnson, 2 Blatchf. 51; Com. v. Lane, 113 Mass. 458, 471; Van Voorhis v. Brintnall, 86 N. Y. 18, 28, 29.

The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick v. Railroad Co., 103 U. S. 11.

In that case it was held that, by virtue of a statute of New Jersey making a person or corporation, whose wrongful act, neglect, or default should cause the death of any person, liable to an action by his administrator, for the benefit of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the neglect and the death took place in New Jersey, might, upon general principles of law, be maintained in a circuit court of the United States held in the state of New York, by an administrator of the deceased, appointed in that state.

Mr. Justice Miller, in delivering judgment, said: "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed; for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties." 103 U. S. 17, 18.

That decision is important as establishing two points: (1) The court considered "criminal laws," that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extraterritorially. (2) A statute of a state, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a circuit court of the United States held in another state, without regard to the question whether a similar liability would have attached for a similar cause in that state. The decision was approved and followed at the last term in Railway Co. v. Cox, 145 U. S. 593, 605, 12 Sup. Ct. Rep. 905, where the chief justice, speaking for the whole court, after alluding to cases recognizing the rule where the laws of both jurisdictions are similar, said: "The question, however, is one of general law, and we regard it as settled in Dennick v. Railroad Co."

That decision has been also followed in the courts of several states. Herrick v. Railway Co., 31 Minn. 11, 16 N. W. Rep. 413; Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; Knight v. Railroad Co., 108 Pa. St. 250; Morris v. Railway Co., 65 Iowa, 727, 23 N. W. Rep. 143; Railway Co. v. Lewis, 24 Neb. 848, 40 N. W. Rep. 401; Higgins v. Railroad Co., 155 Mass. 176, 29 N. E. Rep. 534.

In the case last cited, a statute of Connect-

ticut having provided that all actions for injuries to the person, including those resulting instantaneously or otherwise in death, should survive, and that for an injury resulting in death from negligence the executor or administrator of the deceased might maintain an action to recover damages not exceeding $5,000, to be distributed among his widow and heirs in certain proportions, it was held that such an action was not a penal action, and might be maintained under that statute in Massachusetts by an administrator, appointed there, of a citizen thereof, who had been instantly killed in Connecticut by the negligence of a railroad corporation; and the general principles applicable to the case were carefully stated as follows: "These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if, under our forms of procedure, an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction." 155 Mass. 180, 29 N. E. Rep. 535.

The provision of the statute of New York now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or quasi criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in, and a certificate of the payment made by the officers, and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country.

The decisions of the court of appeals of New York, so far as they have been brought to our notice, fall short of holding that the liability imposed upon the officers of the corporation by such statutes is a punishment or penalty which cannot be enforced in another state.

In Garrison v. Howe, the court held that the statute was so far penal that it must be construed strictly, and therefore the officers could not be charged with a debt of the corporation, which was neither contracted nor existing during a default in making the report required by the statute; and Chief Justice Denio, in delivering judgment, said: "If the statute were simply a remedial one, it might be said that the plaintiff's case was within its equity; for the general object of the law doubtless was, beside enforcing the duty of making reports for the benefit of all concerned, to enable parties proposing to deal with the corporation to see whether they could safely do so." "But the provision is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within the language." 17 N. Y. 458, 465, 466.

In Jones v. Barlow, it was accordingly held that officers were only liable for debts actually due, and for which a present right of action exists against the corporation; and the court said: "Although the obligation is wholly statutory, and adjudged to be a penalty, it is in substance, as it is in form, a remedy for the collection of the corporate debts. The act is penal as against the defaulting trustees, but is remedial in favor of creditors. The liability of defaulting trustees is measured by the obligation of the company, and a discharge of the obligations of the company, or a release of the debt, bars the action against the trustees." 62 N. Y. 202, 205, 206.

The other cases in that court, cited in the court of appeals of Maryland in the present case, adjudged only the following points: Within the meaning of a statute of limitations applicable to private actions only, the action against an officer is not "upon a liability created by statute, other than a penalty or forfeiture," which would be barred in six years, but is barred in three years as "an action upon a statute for a penalty or forfeiture where action is given to the party ag-

grieved," because the provisions in question, said the court, "impose a penalty, or a liability in that nature." Bank v. Bliss, 35 N. Y. 412, 417. A count against a person as an officer for not filing a report cannot be joined with one against him as a stockholder for debts contracted before a report is filed, that being "an action on contract." Wiles v. Suydam, 64 N. Y. 173, 176. The action against an officer is an action ex delicto, and therefore does not survive against his personal representatives. Stokes v. Stickney, 96 N. Y. 323.

In a later case than any of these, the court, in affirming the very judgment now sued on, and adjudging the statute of 1875 to be constitutional and valid, said that "while liability, within the provision in question, is in some sense penal in its character, it may have been intended for the protection of creditors of corporations created pursuant to that statute." Huntington v. Attrill, 118 N. Y. 365, 378, 23 N. E. Rep. 544. And where such an action against an officer went to judgment before the death of either party, it was decided that "the original wrong was merged in the judgment, and that then became property, with all the attributes of a judgment in an action ex contractu," and that if, after a reversal of judgment for the plaintiff, both parties died, the plaintiff's representatives might maintain an appeal from the judgment of reversal, and have the defendant's representatives summoned in. Carr v. Rischer, 119 N. Y. 117, 124, 23 N. E. Rep. 296.

We do not refer to these decisions as evidence in this case of the law of New York, because in the courts of Maryland that law could only be proved as a fact, and was hardly open to proof on the demurrer, and, if not proved in those courts, could not be taken judicial notice of by this court on this writ of error. Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242; Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. Rep. 398; Wernwag v. Pawling, 5 Gill & J. 500, 508; Coates v. Mackey, 56 Md. 416, 419. Nor, for reasons to be stated presently, could those decisions, in any view, be regarded as concluding the courts of Maryland, or this court, upon the question whether this statute is a penal law, in the international sense. But they are entitled to great consideration, because made by a court of high authority, construing the terms of a statute with which it was peculiarly familiar; and it is satisfactory to find no adjudication of that court inconsistent with the view which we take of the liability in question.

That court and some others, indeed, have held that the liability of officers under such a statute is so far in the nature of a penalty that the creditors of the corporation have no vested right therein, which cannot be taken away by a repeal of the statute before judgment in an action brought thereon. Manufacturing Co. v. Beecher, 97 N. Y. 651, 26 Hun, 48; Iron Co. v. Pierce, 4 Biss. 327; Breitung v. Lindauer, 37 Mich. 217, 230; Gregory v. Bank, 3 Colo. 332. But whether that is so, or whether, within the decision of this court in Hawthorne v. Calef, 2 Wall. 10, 23, such a repeal so affects the security which the creditor had when his debt was contracted as to impair the obligation of his contract with the corporation, is aside from the question now before us.

It is true that the courts of some states, including Maryland, have declined to enforce a similar liability imposed by the statute of another state. But in each of those cases it appears to have been assumed to be a sufficient ground for that conclusion that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law, in the strict, primary, and international sense. Derrickson v. Smith, 27 N. J. Law, 166; Halsey v. McLean, 12 Allen, 438; Bank v. Price, 33 Md. 487.

It is also true that in Engine Co. v. Hubbard, 101 U. S. 188, 192, Mr. Justice Clifford referred to those cases by way of argument. But in that case, as well as in Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. Rep. 554, the only point adjudged was that such statutes were so far penal that they must be construed strictly; and in both cases jurisdiction was assumed by the circuit court of the United States, and not doubted by this court, which could hardly have been if the statute had been deemed penal, within the maxim of international law. In Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. Rep. 263, the liability sought to be enforced under the statute of New York was the liability of a stockholder arising upon contract; and no question was presented as to the nature of the liability of officers.

But in Hornor v. Henning, 93 U. S. 228, this court declined to consider a similar liability of officers of a corporation in the District of Columbia as a penalty. See, also, Neal v. Moultrie, 12 Ga. 104; Cady v. Sanford, 53 Vt. 632, 639, 640; Nickerson v. Wheeler, 118 Mass. 295, 298; Post v. Railroad Co., 144 Mass. 341, 345, 11 N. E. Rep. 540; Woolverton v. Taylor, 132 Ill. 197, 23 N. E. Rep. 1007; Mor. Corp. (2d Ed.) § 908.

The case of Railway Co. v. Humes, 115 U. S. 513, 6 Sup. Ct. Rep. 110, on which the defendant much relied, related only to the authority of the legislature of a state to compel railroad corporations neglecting to provide fences and cattle guards on the lines of their roads to pay double damages to the owners of cattle injured by reason of the neglect; and no question of the jurisdiction of the courts of another state to maintain an action for such damages was involved in the case, suggested by counsel, or in the mind of the court.

The true limits of the international rule are well stated in the decision of the judicial committee of the privy council of England, upon

an appeal from Canada, in an action brought by the present plaintiff against Attrill in the province of Ontario upon the judgment to enforce which the present suit was brought. The Canadian judges, having in evidence before them some of the cases in the court of appeals of New York, above referred to, as well as the testimony of a well-known lawyer of New York that such statutes were, and had been held by that court to be, strictly penal and punitive, differed in opinion upon the question whether the statute of New York was a penal law, which could not be enforced in another country, as well as upon the question whether the view taken by the courts of New York should be conclusive upon foreign courts, and finally gave judgment for the defendant. Huntington v. Attrill, 17 Ont. 245, and 18 Ont. App. 136.

In the privy council, Lord Watson, speaking for Lord Chancellor Halsbury and other judges, as well as for himself, delivered an opinion in favor of reversing the judgment below, and entering a decree for the appellant, upon the ground that the action "was not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the state of New York for punishment of an offense against their municipal law." The fact that that opinion has not been found in any series of Reports readily accessible in this country, but only in 8 Law T. R. 341, affords special reasons for quoting some passages.

"The rule" of international law, said Lord Watson, "had its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of some one representing the public, were local in this sense,—that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches by the lex loci, ought to be admitted in the courts of any other country. In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offenses against the state; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs which was the very essence of the international rule."

After observing that, in the opinion of the judicial committee, the first passage above quoted from Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 290, 8 Sup. Ct. Rep. 1370, "disclosed the proper test for ascertaining whether an action was penal, within the meaning of the rule," he added: "A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the state law, as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offenses against the state, unless their vindication rested with the state itself, or with the community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the state, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an actio popularis, pursued, not in his individual interest, but in the interest of the whole community."

He had already, in an earlier part of the opinion, observed: "Their lordships could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the state of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign court whose jurisdiction was invoked. Judicial decisions in the state where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case, and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries, or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

In this view, that the question is not one of local, but of international, law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears, to the tribunal which is called upon to enforce it, to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first in-

stance by the court, state or national, in which the suit is brought. If the suit is brought in a circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. Rep. 10; Railway Co. v. Cox, 145 U. S. 593, 605, 12 Sup. Ct. Rep. 905, above cited. If a suit on the original liability under the statute of one state is brought in a court of another state, the constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. Insurance Co. v. Hendren, 92 U. S. 286; Roth v. Ehman, 107 U. S. 319, 2 Sup. Ct. Rep. 312. But if the original liability has passed into judgment in one state, the courts of another state, when asked to enforce it, are bound by the constitution and laws of the United States to give full faith and credit to that judgment; and, if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it. This was directly adjudged in Wisconsin v. Pelican Ins. Co., above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one state, and which has not changed the essential nature of the liability, is brought in the courts of another state, this court, in order to determine, on writ of error, whether *694 the highest court of the latter state has given full faith and credit to the judgment,* must determine for itself whether the original cause of action is penal, in the international sense. The case, in this regard, is analogous to one arising under the clause of the constitution which forbids a state to pass any law impairing the obligation of contracts, in which, if the highest court of a state decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. New Orleans Water-Works Co. v. Louisiana Sugar-Refining Co., 125 U. S. 18, 38, 8 Sup. Ct. Rep. 741. So if the state court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability, and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.

Whether the court of appeals of Maryland gave full faith and credit to the judgment recovered by this plaintiff in New York depends upon the true construction of the provisions of the constitution of the act of congress upon that subject.

The provision of the constitution is as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Article 4, § 1.

This clause of the constitution, like the less perfect provision on the subject in the articles of confederation, as observed by Mr. Justice Story, "was intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty, in the rule among them," and had three distinct objects: First, to declare, and *695 by its own force establish, that* full faith and credit should be given to the judgments of every other state; second, to authorize congress to prescribe the manner of authenticating them; and, third, to authorize congress to prescribe their effect when so authenticated. Story, Const. §§ 1307, 1308.

Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any state may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." Rev. St. § 905, re-enacting act of May 26, 1790, c. 11, (1 St. p. 122.)

These provisions of the constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties. D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 457. And they confer no new jurisdiction on the courts of any state, and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other state than that in which the penalty was incurred. Wisconsin v. Pelican Ins. Co., above cited.

Nor do these provisions put the judgments of other states upon the footing of domestic judgments to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence. McElmoyle v. Cohen, 13 Pet. 312, 325. But, when duly pleaded and proved in

a court of that state, they have the effect of being, not merely prima facie evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the state in which they were rendered, denies to the party a right secured to him by the constitution and laws of the United States. Christmas v. Russell, 5 Wall. 290; Green v. Van Buskirk, Id. 307, and 7 Wall. 139; Insurance Co. v. Harris, 97 U. S. 331, 336; Crescent City Live-Stock Co. v. Butchers' Union Slaughter-House Co., 120 U. S. 141, 146, 147, 7 Sup. Ct. Rep. 472; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. Rep. 960.

The judgment rendered by a court of the state of New York, now in question, is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law, in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment inter partes. The court of appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit, and effect to which it was entitled under the constitution and laws of the United States.

Judgment reversed, and case remanded to the court of appeals of the state of Maryland for further proceedings not inconsistent with the opinion of this court.

Mr. Justice LAMAR and Mr. Justice SHIRAS, not having heard the argument, took no part in the decision of this case.

Mr. Chief Justice FULLER, dissenting.

This suit was not an action at law to recover judgment in Maryland upon the judgment in New York, nor was it an ordinary creditors' bill brought by a creditor to reach equitable assets. The judgment and execution had no extraterritorial force, and Huntington was a judgment creditor in New York only. It was the bill of a creditor at large to set aside an alleged fraudulent transfer, judgment not being essential under the statute of Maryland in that behalf. It could not have been sustained at all but for that act, and it did not assume to proceed upon the theory that the transfer was invalid because made with intent to defeat the collection of the judgment as such. The judgment of another state could not be made executory in Maryland, either at law or in equity.

The ground of relief in this case was the charge that Attrill had transferred certain stock in April, 1882, with intent to hinder, delay, and defraud the plaintiff of his lawful suits, debts, and demands in respect of a liability of Attrill to him as a stockholder and as a director of the Rockaway Company, which accrued in 1880, upon the statute of New York, under which that company was organized. An action upon this liability, either as stockholder or director, was barred by the statute of limitations of Maryland, and so the Maryland court held. The judgment recovered in New York in 1886 by Huntington against Attrill upon the alleged liability as a director was, however, referred to and made part of the bill, and in this judgment that cause of action had been merged; and it was averred that the transfer was fraudulent as to the indebtedness arising "out of the cause of action on which the judgment hereinbefore recited has been recovered," which was set forth in detail.

The New York statute was made part of the pleading, and admitted as a fact by the demurrer; and, while the Maryland court held that the judgment was conclusive evidence of its existence in the form and under the circumstances stated in the pleadings, it regarded it as not changing the character of the liability upon which it was based. The record established the relation of debtor and creditor at the time stated, and the amount and fact of the indebtedness, but nothing further.

As plaintiff had no judgment in Maryland, and had not sought to recover one, the pleader, in order to make out the alleged fraud as perpetrated in 1882, went into the original cause of action at large, and invited the attention of the court to its nature. The question at once arose whether the courts of Maryland were constrained to enforce such a cause of action, although record evidence of its maintenance in New York existed in the form of a judgment there. The court held that the liability was not one arising upon contract, but one imposed upon Attrill as a wrongdoer; that under the statute no inquiry was to be made whether the creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, nor was the recovery limited to the amount of the loss sustained; that all that it was necessary to show was that the act had been committed, and thereupon any creditor was entitled to recover the full amount of his debt. See Torbett v. Eaton, 113 N. Y. 623, 20 N. E. Rep. 876; Id., 49 Hun, 209, 1 N. Y. Supp. 614; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. Rep. 544. Hence the court concluded that the liability was in the nature of a penalty, within the rule theretofore laid down by the courts of New York, (Bank v. Bliss, 35 N. Y. 412; Wiles v. Suydam, 64 N. Y. 173; Stokes v. Stickney, 96 N. Y. 323; Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. Rep. 554; Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. Rep.

263,) and by the courts of Maryland, (Bank v. Price, 33 Md. 487; Norris v. Wrenschall, 34 Md. 492.) Its enforcement was therefore declined, and the bill dismissed.

It was for the Maryland court to determine whether such enforcement would either directly or indirectly involve the execution of the penal laws of another state; and, although it might have been mistaken in the conclusion arrived at, such error does not give this court jurisdiction to review its judgment. State courts do not adjudicate in the matter of the enforceability of statutory delicts at their peril.

In my opinion, the Maryland court gave all the force and effect to the judgment in question to which it was entitled. The pleadings were necessarily confined to the equities arising out of the original cause of action, and full faith and credit were accorded to the judgment as matter of evidence. Its effect as such could not render it incompetent for the state court to decide for itself the question which was raised upon the record. As there presented, it was for that court to say whether the obligation on Attrill to pay the sum for which the judgment was given was an obligation which the Maryland court was bound to recognize as proper foundation for relief in equity in respect of the transfer of April, 1882.

*I think that no federal question was involved, and that the writ of error ought to be dismissed.

(147 U. S. 36)

STREETER v. JEFFERSON COUNTY NAT. BANK.

(January 3, 1893.)

No. 81.

BANKRUPTCY—PREFERENCES—NEGOTIABLE INSTRUMENTS—DISCHARGE OF INDORSER.

A judgment and execution against the makers of promissory notes were set aside in a suit by the makers' assignee in bankruptcy, as constituting an unlawful preference, within the purview of the bankrupt law; the attorneys who procured the judgment having been the makers' attorneys, and aware of their insolvent condition, and of their desire that the holder should be preferred. At the commencement of the assignee's suit the sheriff having custody of the goods seized on execution was, with consent of the judgment creditor, appointed receiver, and sold the goods, and paid the proceeds into court by its order to await the result of the suit, and the proceeds were finally turned over to the assignee. *Held*, that the transaction amounted to a surrender of the preference under Rev. St. § 5084, providing that any person, having received any preference contrary to the bankrupt law, shall not prove the claim for which such preference was given without first surrendering to the assignee all benefit or advantage received by him under such preference; that the action of the holder of the notes in procuring such judgment, and issuing such execution, did not amount to actual fraud, within the meaning of section 5021, as amended in 1874, providing that, in cases of actual fraud on the part of the creditor, he shall not be allowed to prove for more than a moiety of his claim; and that the holder of the notes was not precluded by these acts from maintaining an action on the notes against the indorser, who was not a party to the original suit. 12 N. E. Rep. 706, 106 N. Y. 186, affirmed.

In error to the supreme court of the state of New York.

Action by the Jefferson County National Bank against John C. Streeter upon promissory notes. Judgment for plaintiff. 12 N. E. Rep. 706, 106 N. Y. 186. Defendant brings error. Affirmed.

Statement by Mr. Justice SHIRAS:

*On each of the dates, January 21 and February 7, and February 12, 1877, at the city of Watertown, Jefferson county, N. Y., Henry V. Cadwell, James C. Cadwell, and Lewis A. Cadwell, copartners doing business as such under the firm name of H. V. Cadwell & Co., executed their promissory note, payable one month from date, to the order of H. V. Cadwell & Co. at the Jefferson County National Bank of Watertown, N. Y., the first two notes being for the sum of $1,000 each, and the third for $750. Each of said notes was indorsed by the firm in their firm name, and by John C. Streeter as accommodation indorser, and passed into the possession of the bank, the defendant in error.

The notes, at their maturity, were presented for payment where the same were payable, and payment thereof demanded, which was refused; whereupon the notes were duly protested for nonpayment, and notice of such demand, refusal, and protest, in each instance thereof, was then and there duly given to each of said indorsers.

On or about the 16th day of March, 1877, the bank commenced an action on the three notes in the supreme court of the state of New York against Henry V. Cadwell, James C. Cadwell, and Lewis A. Cadwell, and such proceedings were had therein that the plaintiff, the said bank, recovered a judgment against the makers of the said notes for the full amount thereof. In this action the plaintiff in error, John C. Streeter, was impleaded as a defendant, but no service was made on him, and he did not appear. On the same day an execution on the judgment was issued and delivered to the sheriff of Jefferson county, who by virtue thereof levied upon the property of the defendants to an amount sufficient to satisfy the execution.

On the day the said levy was made, a petition in bankruptcy was filed in the district court of the United States for the northern district of New York against the said Henry V. Cadwell, James C. Cadwell, and Lewis A. Cadwell, upon which petition the said Cadwells were, on May 1, 1877, adjudged bankrupts, and an assignee of their property was appointed. By order of the court the sale, by virtue of the said execution, of the property so levied upon was enjoined, and the sheriff was appointed receiver of the estate of the said bankrupts, and directed to sell the property levied upon by him, and deposit the proceeds of such sale in the depository of the said court, subject to the further

order of the court; which sale was made, and the proceeds so deposited. The order also directed that the lien of the judgment creditors, if there should be such lien, should follow and attach to the moneys arising from the said sale.

In November, 1877, John C. Brown, the assignee, filed his bill in equity in the said district court of the United States, charging that the said bank, being a creditor of the said Henry V. Cadwell, James C. Cadwell, and Lewis A. Cadwell, and having reason to believe that they, the said Cadwells, were insolvent, did, with the assent, connivance, and procurement of the said Cadwells, and knowing that a fraud on the act of congress of March 2, 1867, and acts supplementary to and amendatory thereof, was intended, commenced an action in the supreme court of the state of New York against the said Cadwells in which action the said bank obtained judgment as aforesaid upon the said notes against the makers thereof. This bill avers that before the filing thereof the assignee demanded of the defendant, the said bank, that it surrender its preference and all claims derived from the judgment to the property of the said Cadwells, and all liens it claimed to have by virtue of the said judgment and execution, which the bank refused, and persisted in refusing, to do. The bill alleged that said judgment and execution were void as against the assignee by reason of these acts, and prayed that the said judgments be decreed to be in fraud of the said bankruptcy laws of the United States, and void as against the plaintiff and creditors of the insolvents aforesaid.

*The answer to this bill admits the refusal of the said bank to surrender its said preference and liens, but denies that it had knowledge of the insolvency of the said Cadwells at the time its said action was commenced against them, that said judgments were obtained with the consent, connivance, and procurement of the makers of the said notes, and that any fraud was intended upon the bankruptcy laws of the United States. Other allegations appear in the bill and answer, but upon them there was no contention at the trial of the cause.

The court being of opinion, from the evidence before it, that the said bankrupts, in contemplation of insolvency, desiring to secure their indorsers and the said bank, had decided to do so by means of judgments and executions, and that as the attorneys who brought the actions were the bankrupts' attorneys, and as the attorneys were under no professional obligations not to disclose the circumstances and designs of clients who desired to assist their employer, the said bank should be charged with all the knowledge possessed by the said attorneys. The court therefore rendered a decree in the cause adjudging the said judgment and execution void as against the complainant, the said assignee, and that the money which arose from the said sale by said receiver belonged to the said assignee.

The defendant, the said bank, took an appeal from this judgment and decree to the circuit court of the United States for the northern district of New York, where the action of the said district court was affirmed, and judgment of affirmation entered in the said circuit court on March 15, 1881. Subsequently, upon an order of the said court, the money so deposited as aforesaid was paid to the said assignee.

In September, 1881, the Jefferson County National Bank brought an action in the supreme court of the state of New York against John C. Streeter, as indorser on the said notes, for the respective amounts thereof, averring in its complaint the protest for nonpayment of the said notes, and notice thereof duly given to the said indorser, and alleging liability on the part of the said indorser for their payment. The defendant, Streeter, in his answer to said complaint, alleges that by reason of a fraudulent arrangement between the bank and the makers of the said notes, by which the bank became a preferred creditor of the same, and by reason of the decree aforesaid of the said circuit court of the United States adjudging such action of the bank to be void, the bank had, by reason of the provisions of the said statutes of the United States, precluded itself from all right or claim against the property of the makers of the said notes, and that all rights and remedies on the part of the bank and of himself, the said Streeter, were thereby lost; and that the defendant was thereby discharged from all liability to the plaintiff as indorser of said notes.

This case came for trial in the said supreme court of New York, and, a jury being waived, was tried by the court, and judgment given for the plaintiff; the court holding that the bank is not precluded from making a claim against the property of the makers of the said notes, or from proving its claim against them as bankrupts, and that the defendant, Streeter, has not been discharged from liability as indorser on said notes.

An appeal from this judgment was taken to the court of appeals of the state of New York, which affirmed the order of the said supreme court. On remittitur, entered June 8, 1887, the judgment of the said supreme court of appeals was made the order of the said supreme court of New York. 12 N. E. Rep. 706.

Thereupon the said John C. Streeter, defendant in the said action, sued out his writ of error, bringing the case before this court.

Watson M. Rogers, for plaintiff in error.
John Lansing, for defendant in error.

*Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

John C. Streeter, the plaintiff in error, contends that the record discloses, as matter of fact, that the Jefferson County National Bank, being the holder of certain promissory notes made by the firm of H. V. Cadwell & Co., entered into a collusive arrangement with said firm, who were insolvent at the time, and who were shortly afterwards adjudged bankrupts, whereby the bank was, by procuring judgment on said notes, to obtain an illegal preference over other creditors of the firm; that by reason of this collusive arrangement the bank disabled itself from proving its claim on these notes against the estate of the bankrupts, and thereby discharged Streeter, who was an accommodation indorser, from liability to the bank.

The assignee in bankruptcy brought an action in the district court of the United States for the northern district of New York to test the validity of the bank's judgment, and it was adjudged by that court that the judgments were void as against the assignee, and, on appeal, this judgment was affirmed by the circuit court.

The case will be found reported as Brown v. Bank, 19 Blatchf. 315, 9 Fed. Rep. 258.

An examination of that case discloses that the judgment in favor of the bank was held an illegal preference, within the purview of the bankrupt law, because the attorneys employed to represent the bank in bringing the suit and obtaining the judgment had been the attorneys of H. V. Cadwell & Co., and, as such, had obtained knowledge of their insolvent condition, and of their desire that the bank should obtain a preference.

The question that was presented to the New York supreme court and the New York court of appeals was whether the fraud imputed to the bank, arising from the knowledge of its attorneys of the insolvent condition of H. V. Cadwell & Co. at the time the judgments were obtained, was such a case of fraud as to disable the bank from proving its claim in bankruptcy, and thus to effect a discharge of Streeter as indorser.

The provision of section 5084 of the Revised Statutes of the United States is as follows:

"Any person who, since the 2d day of March, 1867, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provisions of the act of March 2, 1867, c. 176, to establish a uniform system of bankruptcy, or to any provisions of this title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom, until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference."

Section 5021, as amended in 1874, is as follows:

"Provided, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

It is contended on behalf of the plaintiff in error that the bank did not, within the meaning of the law, surrender its preference, and hence could not prove its claim, and that the case was one of "actual fraud" on the part of the bank, which could not, therefore, in any event prove for more than a moiety of its debt.

To sustain the contention that the bank did not surrender its preference, it is urged that the bank did not at once, on demand of the assignee, turn over the goods levied on, but litigated the matter with the assignee in both the district and circuit courts, and that the proceeds of the executions were not relinquished until final judgment was entered against the bank.

It was the opinion of the state court that as the sheriff, having custody of the goods seized on execution, was, with the consent of the bank's attorneys, appointed special receiver, and was ordered to sell the goods and pay the proceeds into court, to await the result of the litigation between the bank and the assignee in bankruptcy, and that as the proceeds were finally turned over to the assignee, and thus became subject to distribution as bankruptcy assets, the transaction amounted to a surrender under section 5084. In so holding, we think the state court was right.

As the bank did not, at any time, receive any money or property from the insolvent firm, but pursued only a lawful remedy in a lawful manner, it was not under any legal obligation to abandon its executions, and to turn over their fruits to the assignee immediately upon demand. We do not perceive that the course of the bank, in resisting the claim of the assignee by setting up a defense, is subject to just criticism, or thereby estopped itself from proving its claim after the assignee had prevailed in his suit.

The endeavor of the bank to maintain its executions would, if successful, have been for the benefit of the indorser, who would, in that event, have been the last to complain; and it is certainly not apparent why the indorser should be discharged from his liability by the effort of the bank to legally collect a debt in his exoneration.

The decision of the state court, that the facts did not make out a case of actual fraud on the part of the bank, so as to deprive it of a right to prove for more than a moiety of its debt, and thus relieve the indorser of liability, in whole or in part, seems to be well founded in reason. There was no actual knowledge by the bank or its officers that the insolvent firm had done anything what-

ever to facilitate the procurement of the judgments. There was no giving and accepting of any security. There was no finding in the district court of the United States of actual fraud.

The state court cites with approval the case of In re Riorden, 14 N. B. R. 332, in which it was held by Mr. Justice Blatchford, then sitting as district judge, that a mere fraud on the bankrupt law, by the acceptance of a preference, was not, in itself, actual fraud; and, commenting on this decision, the court said: "Such conclusion seems just and reasonable. The bringing of an action by a creditor in the ordinary mode of procedure in the state courts, and procuring a judgment, may be, as in this case, constructive fraud, for which the lien will be set aside. But even that will depend upon the further fact that bankrupt proceedings shall be instituted within the limited time provided by law. If such proceedings are not so begun, the lien would be valid and effectual. How, then, can it be construed to be actual fraud to pursue a legal remedy which may be efficatious, and especially when no action of the bankrupt debtor gives the creditor the obnoxious preference?"

It follows that, as the bank was not precluded from proving its claim, Streeter, the indorser, could, by paying and lifting the notes, have participated in the distribution of the bankrupt estate, and hence has failed to show any defense to the suit of the bank. The judgment of the court below is therefore affirmed.

(147 U. S. 1)

STATE OF IOWA v. STATE OF ILLINOIS.

(January 3, 1893.)

No. 5.

BOUNDARIES BETWEEN STATES—MISSISSIPPI RIVER.

The expressions, "middle of the Mississippi river" and "the center of the main channel of that river," as used respectively in the enabling acts under which the states of Illinois and Wisconsin were admitted into the Union, and "middle of the main channel of the Mississippi river," as used in the enabling acts of Missouri and Iowa, all being descriptive of the boundaries of those states, are synonymous terms, and mean the middle of the main navigable channel, or channel most used, and not the middle of the great bed of the stream, as defined by the banks of the river.

Original suit brought by the state of Iowa against the state of Illinois to determine the boundary line between them, along the course of the Mississippi river.

John Y. Stone, Atty. Gen., and James C. Davis, for complainant. George Hunt, Atty. Gen., for defendant.

*Mr. Justice FIELD delivered the opinion of the court.

The Mississippi river flows between the states of Iowa and Illinois. It is a navigable stream, and constitutes the boundary between the two states; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two states for the purpose of taxation and other purposes of government.

The complainant, the state of Iowa, contends that for taxation, and for all other purposes, the boundary line is the middle of the main body of the river, taking the middle line between its banks or shores without regard to the "steamboat channel," as it is termed, or deepest part of the stream, and that, to determine the banks or shores, the measurements must be taken when the water is in its natural or ordinary stage, neither swollen by floods nor shrunk by droughts.

On the other hand, the defendant, the state of Illinois, claims that, for taxation and all other purposes, its jurisdiction extends to the middle of "the steamboat channel" of the river, wherever that may be, whether on its east or west bank,—the channel upon which commerce on the river by steamboats or other vessels is usually conducted, and which for that reason is sometimes designated as "the channel of commerce."

The state of Iowa in its bill alleges that prior to and at the time of the treaty between England, France, and Spain, in 1763, (3 Jenkinson's Collection of Treaties, p. 177,) the territory now comprising the state of Iowa was under the dominion of France, and the territory now comprising the state of Illinois was under the dominion of Great Britain, and that, by the treaty named, the middle of the river Mississippi was made the boundary line between the British and French possessions in North America.

That by the treaty of Paris between Great Britain and the United States, which was concluded September 3, 1783, (Id. p. 410, art. 2, and 8 St. p. 80,) the territory comprising the state of Illinois passed to the United States, and that by the purchase of Louisiana from France, under the treaty of 1803, (8 St. p. 208,) the territory comprising the state of Iowa passed to the United States.

That the boundary between the territory comprising the states of Illinois and Iowa remained the middle of the river Mississippi, as fixed by the treaty of 1763.

That by the act of congress of April 18, 1818, known as the "Act Enabling the People of Illinois to Form a State Constitution," (3 St. p. 428,) the northern and western boundaries of Illinois were defined as follows: Starting in the middle of Lake Michigan, at north latitude 42 degrees and 30 minutes, "thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river;" and that the constitutions of Illinois of 1818, 1848, and 1870 defined the boundaries in the same way.

And the bill further alleges that the state of Illinois and its several municipalities border

ing on the Mississippi river claim the right to assess and do assess and tax, as in Illinois, all bridges and other structures in the river from the Illinois shore to the middle of the steamboat channel, or channel of the river usually traversed by steam and other crafts in carrying the commerce of the river, whether such channel is east or west of the middle of the main body or arm of the river, and that they thus assess and tax, as in that state, the bridge of the Keokuk & Hamilton Bridge Company across the river from Keokuk, Iowa, to Island No. 4, in Hancock county, Ill., from the west shore of the island westward 2,462 feet to the east end of the draw of the bridge, and to a point not over 580 feet east from the Iowa shore of the river and 941 feet west of the middle of the main arm or body of the river at that point.

That the steamboat channel, or channel of the river where boats ordinarily run in carrying the commerce of the river, varies from side to side of the river, sometimes being next to the Illinois shore and then next to the Iowa shore, and at most points in the river shifting from place to place as the sands of its bed are changed by the current of the water; that at the point of the Keokuk & Hamilton bridge, mentioned, the river bed is rock, and not subject to much change; that at that point, were it not for the bridge, the middle of the steamboat channel would be, and was before the bridge was erected, fully 300 feet east of the east end of the draw in the bridge, or 880 feet from the Iowa shore of the river and 2,162 feet from the shore of the river in Illinois on Island No. 4; that at places in the river there are two or more channels equally accessible and useful for navigation by steamboats and other crafts carrying the commerce of the river; and that at the Keokuk & Hamilton bridge the channel used by steamboats is partly artificial, constructed by excavation of rock from the river bed to facilitate the approach to the lock of the United States canal immediately north of the bridge.

That the state of Iowa claims the right to tax all bridges across the river to the middle thereof, and does tax the Keokuk & Hamilton bridge to its middle between the east and west abutments thereof,—that is, the west approach and abutment, 200 feet, and 1,096 feet of the bridge proper,—thereby treating, for convenience of taxation, the middle of the bridge between abutments as the middle of the river at that point, but which is in fact 225 feet less than one half the distance across the main arm or body of the river at that point.

That the state of Illinois and its municipalities assess and tax, as in that state, 716 feet of the bridge actually assessed and taxed in Iowa, and 225 feet of the bridge, in addition thereto, located in Iowa, but not taxed in that state.

That the Keokuk & Hamilton Bridge Company, owner of the Keokuk & Hamilton bridge, is a corporation of both of said states, consolidated, and complains of such double taxation.

That litigation is now pending over such taxation, and is liable at any time to arise over the taxation of any of the other bridges across the river between the said states, now nine in number.

To the end, therefore, that the line between the states may be definitely fixed by the only court having jurisdiction to do so, the complainant prays that this court will take jurisdiction of this bill, and that the state of Illinois be summoned and requested to answer it, waiving such answer being on oath, and that upon the final hearing this court will definitely settle the boundary between the states at the said several bridges.

To this bill the state of Illinois appeared by its attorney general and filed its answer, which denied that the boundary line between the states of Iowa and Illinois is the middle of the Mississippi river, and insisted that it is the middle of the steamboat channel, or channel commonly used by boats in carrying the commerce of the river, whether east or west of the middle of the river. It admitted that the state and its municipalities claimed the right to tax and did tax bridges and other structures in the river to the middle of the steamboat channel or channel of commerce, whether such channel was east or west of the middle of the main body or arm of the river, and did assess and tax the Keokuk & Hamilton bridge to its draw, and west of the middle of the main body or arm of the river; and that the steamboat channel or channel of commerce is first near one shore, and then near the other, and at other places nearly across the river. But it denied the right of the state of Iowa to tax the bridges mentioned crossing the Mississippi river to any point east of the middle of the steamboat channel, or channel of commerce of that river.

To the answer a replication was filed by the state of Iowa.

At the time of filing its answer the state of Illinois filed also its cross bill, in which it alleges that there exist nine bridges across the Mississippi river between the states, the most southern of which is the Keokuk & Hamilton Railroad bridge, and the most northern the Dunleth & Dubuque Bridge Company's railroad bridge.

That for the purposes of taxation the state of Illinois and its municipalities claim the right to assess and tax the respective bridges to the middle of the channel of commerce or steamboat channel,—that is, the channel usually used by steamboats and other crafts navigating the river; and that on the part of the state of Iowa and its municipalities it is claimed that each state has the right to assess and tax to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel may be.

That the supreme court of Iowa, in the case of Dunlieth & D. B. Co. v. County of Dubuque, 55 Iowa, 558, 8 N. W. Rep. 443, held that the authorities in Iowa have the right to tax such structures to the middle of the main arm or body of the stream, and no further, though at the point where such structure is situated the channel or part of the river followed by steamboat men in navigating the river is far east of the middle of such main body of the stream.

That, following the decision in that case, the authorities in Iowa assess and tax such structures to the middle of the main body of the river.

That at the point of the location of the Keokuk & Hamilton bridge the main body of the river, before the construction of the bridge, was between the Iowa shore at Keokuk, Lee county, Iowa, and the west shore of Island No. 4, located in the city of Hamilton, Hancock county, Ill., a breadth of about 3,042 feet; that in constructing the bridge a solid approach is extended from the shore at Keokuk into the river 200 feet, and from the shore on Island No. 4, in Illinois, about 700 feet, and the main body of the river confined between the abutments to the bridge 2,192 feet apart, and the bridge consists of the east and west abutments, 11 piers, a draw next to the west or Iowa abutment of 380 feet, and 10 spans, together 1,812 feet.

That the middle of the steamboat channel, or that part of the river usually traversed by steamboat men in navigating the river, is at or near the east end of the draw or pivot span, about 380 feet from the west abutment and 1,812 feet from the east abutment.

That the assessor in Illinois, in assessing the bridge, values the bridge to the east end of the draw, and assesses the same against that part of the bridge in Illinois, and the authorities in Iowa value and assess the bridge to the middle thereof, 1,096 feet east from the west abutment, as in the state of Iowa; that thereby 716 feet of the bridge are valued and assessed both in Illinois and Iowa; that litigation is now pending in the lower courts between the bridge company and the authorities over the assessments; and that the same trouble and complications are liable to arise over the assessment of any other of the bridges.

To the end, therefore, that the boundary line between the states of Illinois and Iowa at said several bridges may be defined and settled, the state of Illinois prays that the state of Iowa be made defendant to this cross bill, and required to answer it, and that upon the final hearing the court will define and establish at each of the bridges the boundary lines between the states of Illinois and Iowa, to which points the respective states may tax. To this cross bill the defendant, the state of Iowa, answered, admitting the existence of nine bridges across the Mississippi river, where it forms the boundary between the states of Illinois and Iowa, and that the state of Illinois and its several municipalities bordering upon the river claim the right to tax said bridges from the Illinois shore of the river to the middle of the channel of commerce or steamboat channel, and that the state of Iowa and its municipalities bordering on the river claim the right to tax, and do tax, the several bridges to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel—that is, that part of the river usually traversed by steam or other vessels carrying the commerce of the river—may be. It therefore prays that upon the final hearing the boundary lines between the two states may be established, to which the respective states may tax.

By setting down the case for hearing on the bill, answer, and replication, without taking any testimony, and on the cross bill and the answer to it, all the facts alleged in the answer to the original bill, as well as those alleged in the cross bill and not denied in the answer, are thereby admitted.

When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all the recognized treatises on international law, of modern times, that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream," as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi. Thus Wheaton, in his Elements of International Law, (8th Ed. § 192,) says:

"Where a navigable river forms the boundary of conterminous states, the middle of the channel, or thalweg, is generally taken as the line of separation between the two states, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river."

And in section 202, while thus stating the rule as to the boundary line of the Mississippi river being the middle of the channel, states

that the channel is remarkably winding, "crossing and recrossing perpetually from one side to the other of the general bed of the river."

Mr. Creasy, in his First Platform on International Law, expresses the same doctrine. He says:

"It has been stated that, where a navigable river separates neighboring states, the thalweg, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the medium filum aquae, was regarded as the boundary line, and still will be regarded prima facie as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the medium filum. When this is the case, the middle of the channel of traffic is now considered to be the line of demarkation." Page 223.

Mr. Creasy also refers to the language of Dr. Twiss on the same subject, who observes that "Grotius and Vattel speak of the middle of the river as the line of demarkation between two jurisdictions, but that modern publicists and statesmen prefer the more accurate and more equitable boundary of the navigable mid-channel. If there be more than one channel of a river, the deepest channel is regarded as the navigable mid-channel for the purpose of territorial demarkation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression of its bed. The islands on either side of the mid-channel are regarded as appendages to either bank; and, if they have once been taken possession of by the nation to whose bank they are appendant, a change in the mid-channel of the river will not operate to deprive the nation of its possession, although the water frontier line will follow the change of the mid-channel."

Halleck, in his Treatise on International Law, is to the same effect. He says:

"Where the river not only separates the conterminous states, but also their territorial jurisdictions, the thalweg, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited or totally unfit for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object." Volume 1, c. 6, § 23.

Woolsey, in his International Law, repeats the same doctrine, and says:

"Where a navigable river forms the boundary between two states, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of the parties. If a river changes its bed, the line through the old channel continues; but the equitable right to the free use of the stream seems to belong, as before, to the state whose territory the river has forsaken." Section 58.

The middle of the channel of a navigable river between independent states is taken as the true boundary line, from the obvious reason that the right of navigation is presumed to be common to both, in the absence of a special convention between the neighboring states, or long use of a different line equivalent to such a convention.

Phillimore, in his Commentaries on International Law, in the chapter upon "Acquisitions," speaks of decisions upon the law of property as incident to neighborhood proceeding upon the principle that "mid-channel" is the line of demarkation between the neighbors. Volume 1, 239.

The reason and necessity of the rule of international law as to the mid-channel being the true boundary line of a navigable river separating independent states may not be as cogent in this country, where neighboring states are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law.

As we have stated, in international law and by the usage of European nations, the terms "middle of the stream" and "mid-channel" of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 St. c. 67, p. 428,) under which Illinois adopted a constitution and became a state and was admitted into the Union, made the middle of the Mississippi river the western boundary of the state. The enabling act of March 6, 1820, (3 St. c. 22, § 2, p. 545,) under which Missouri became a state and was admitted into the Union, made the middle of the main channel of the Mississippi river the eastern boundary, so far as its boundary was conterminous with the western boundary of Illinois. The enabling act of August 6, 1846, (9 St. p. 56,) under which Wisconsin adopted a constitution and became a state and was admitted into the Union, gives the western boundary of that state, after reaching the river St. Croix, as follows: "Thence down the main channel of said river to the Mississippi, thence down the center of the main channel of that" (Mississippi) "river to the northwest corner of the state of Illinois." The northwest corner of the state of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, "middle of the Mississippi river," and "middle of the main channel of the Mississippi river," and "the center of the main channel of that river," as thus used, are synonymous. It is not at all likely that the congress of the

United States intended that those terms, as applied to the Mississippi river separating Illinois and Iowa, should have a different meaning when applied to the Mississippi river separating Illinois from Missouri, or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing.

The question involved in this case has been elaborately considered, both by the supreme court of Iowa and the supreme court of Illinois, in cases relating to the assessment and taxation of bridges crossing the Mississippi river, as to the point to which the jurisdiction of each state for taxation extends, and they differed in their conclusions. In Dunlleth & D. B. Co. v. County of Dubuque, 55 Iowa, 558, 564, 8 N. W. Rep. 443, the supreme court of Iowa, after observing that the act of congress admitting Iowa into the Union, and the constitution of Iowa in its preamble, declare that the eastern boundary of the state shall be "the middle of the main channel of Mississippi river," proceeds to inquire what line is understood by those words, "middle of the main channel." The defendant maintained that the deep water of the stream used in the navigation of the river was meant, while the plaintiff insisted that the words described the bed in which the stream of the river flows; that is, the bed over which the water flows from bank to bank. The court thought that the words, when applied to rivers generally, without the purpose of describing their currents or navigable characters, always bore the latter signification, observing that this was their primary meaning, and was of opinion that they were used
*12 in that sense in the act of congress admitting the state into the *Union, and in the constitution of Iowa. In support of this view the court referred to the changing character of the currents of the river followed by vessels, caused by the shifting nature of the sand bars found in the river. "The course of navigation," it said, "which follows what boatmen call the 'channel,' is extremely sinuous, and often changing, and is unknown except to experienced navigators. On the other hand, the bed of the main river, designated by the word 'channel,' used in its primary sense, is the great body of water flowing down the stream. It is broad, and well defined by islands or the main shore. It cannot be possible that congress and the people of the state, in describing its boundary, used the word 'channel' to describe the sinuous, obscure, and changing line of navigation, rather than the broad and distinctly defined bed of the main river. The center of this river-bed channel may be readily determined, while the center of the navigable channel often could not be known with certainty. The first is a fit boundary line of a state. The second cannot be."

In Buttenuth v. Bridge Co., 123 Ill. 535, 17 N. E. Rep. 439, the supreme court of Illinois reached a different conclusion after an elaborate consideration of the same question. That was a case where an alleged overestimate was made of a bridge crossing the Mississippi river at St. Louis; and the question discussed was, how far did the jurisdiction of Illinois extend over the river? After observing that when a river is a boundary between states, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at others, the court proceeds, treating the Mississippi river as a common boundary between the states of Illinois and Missouri, to inquire the meaning of the term, "middle of the Mississippi river," used in the enabling act of congress and in the constitution, defining the boundaries of the state of Illinois. It answers the inquiry by observing that the word "channel" is used as indicating "the space within which ships can and usually do pass," and says: "It is apprehended it is in this *13 sense the expressions 'middle *of the river,' 'middle of the main channel,' 'mid-channel,' 'middle thread of the channel,' are used in enabling acts of congress and in state constitutions establishing state boundaries. It is the free navigation of the river—when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway'—that states demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or states, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either state intended to surrender to the state or nation occupying the opposite shore the whole of the principal channel or highway for vessels, and thus debar its own vessels the right of passing to and fro for purposes of defense or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value, to independent states or nations."

The opinions in both of these cases are able, and present in the strongest terms the different views as to the line of jurisdiction between neighboring states, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the "mid-channel," and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

It is therefore ordered, adjudged, and declared that the boundary line betwen the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi river; and, as the counsel of the two states both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings—nine in number—cross the Mississippi river, it is further ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two states, such commission, consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make the proper examination, and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action.

(147 U. S. 242)

BERNIER et al. v. BERNIER et al.

(January 16, 1893.)

No. 102.

PUBLIC LANDS—HOMESTEAD ENTRIES—PATENT TO HOMESTEADER'S HEIRS.

Rev. St. §§ 2291, 2292, providing for the issuance of certificates and patents of homestead lands to the heirs of the homesteader, the former naming the "heirs" generally, and the latter referring to "minor heirs" only, must be construed so as to stand together, and, so construed, the latter applies only when there are minor heirs alone, and the former when there are adult heirs, or adult and minor heirs; and a patent issued to minor heirs, when there are also adult heirs, will inure to the benefit of all alike, and the minors will be compelled to convey the proper shares to the adults. 40 N. W. Rep. 50, reversed.

In error to the supreme court of the state of Michigan.

Suit in equity in the circuit court of Chippewa county, Mich., brought by Calixte D. Bernier, George E. Bernier, Louis G. Bernier, Samuel F. Bernier, and William Bernier against Edward Bernier, Matilda Bernier Endriss, and John H. Goff, to have a trust declared in a homestead right, a patent for which had issued to some of the defendants as minor heirs; complainants being heirs of full age at the death of the homesteader. The trial court entered a decree for complainants, but on an appeal to the supreme court of the state this decree was reversed, and the bill ordered dismissed. See 40 N. W. Rep. 50. From that decision, complainants bring error to this court. Reversed.

Statement by Mr. Justice FIELD:

This is a suit in equity to determine the respective rights of the adult and minor heirs of Edward Bernier, at the time of his death, to certain real property in Michigan, held by him under a homestead entry, and to compel the conveyance from the minor heirs, and the defendant who has acquired an interest from one of them, of an undivided half of the premises, to the complainants. It arises out of the following facts:

On the 24th of May, 1875, Edward Bernier made a homestead entry on the lands in controversy under the provisions of the homestead law of the United States. At the time he was a widower, his wife having died in April, 1872. He occupied the premises as a homestead until his death, June 17, 1876. He left 10 children surviving him, 5 of whom were at the time over 21 years of age, and they are the complainants in this case; and 5 were at the time under 21 years of age, and they, with one John H. Goff, who acquired, in 1885, by a quitclaim deed, the interest of one of them, are the defendants. One of the defendants and minor heirs, Joseph Bernier, before suit, conveyed his interest to his sister and codefendant, and filed a disclaimer. She, representing both his and her own share, was willing to divide the property on the basis claimed by the complainants, and has permitted a decree to pass against her by default. In October, 1876, some months after the death of Edward Bernier, Samuel F. Bernier, one of the adult heirs, on behalf of all the 10 heirs, made the required proof for commuting the homestead entry, paid the minimum price for the land, and received a certificate entitling him to a patent therefor. This certificate was never canceled, nor was any proceeding taken for its cancellation, nor was any notice given of a contest respecting it, nor was any irregularity in its issue alleged. The only proof of occupation and improvement was made by Samuel F. Bernier, and the only sums paid for the land were advanced by him, on behalf of all the heirs. But, notwithstanding these facts, some time in April, 1877, a second certificate was issued to the minor heirs of Edward Bernier, which was made upon the commutation proofs presented by Samuel F. Bernier, as above stated, and on the 25th of the same month a patent was issued to them. The bill alleges that this was issued to them by mistake; that it should have been issued to the heirs of Edward Bernier, and that it was issued to the minors without the knowledge, consent, or procurement of the complainants, and in violation of their legal and equitable rights in the premises, and that by its terms the title in fee simple of the premises is in them; but it claims that they hold the same subject to the rights of the complainants therein.

The bill further alleges that all the steps to change the filing on the lands from a preemption claim to a homestead entry, and in commuting the homestead entry and securing a patent for the lands were taken through an attorney at law, who was acting for the said Edward Bernier's heirs; that when he received the patent he supposed the same ran to those heirs, and, without examining it or discovering his mistake, he placed the same on record, and the mistake was only recently discovered; that, for many years previous to such discovery, all the heirs, including the minors, treated the lands as their joint property, but that since the discovery of the mis-

*244 take, and only since, the minor heirs pretend to claim that they are the sole and only heirs, and that the complainants have no interest, right, or title in the lands, which claim and pretense, the complainants charge, are a fraud upon their rights, and work a manifest wrong and injury to them. Hence the institution of this suit.

The circuit court in Michigan which heard the case decided in favor of the complainants, and adjudged that the defendants execute, acknowledge, and deliver to them a sufficient deed or deeds to convey and vest in each one an undivided tenth part of the lands and premises. On appeal, the supreme court of the state reversed the decree, and ordered the bill to be dismissed. 40 N. W. Rep. 50. From the latter decree, the case is brought by writ of error to this court.

J. C. Donnelly, for plaintiffs in error. J. H. Goff, for defendants in error.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.

It would seem that the patent to the minor heirs was issued without the knowledge or consent of any of the heirs, and that their attention was first brought to it when the defendant Goff obtained the interest of one of the defendants, in 1886. The property was always treated as a part of the estate of Edward Bernier, deceased. It was assessed as such from his death until 1885; and George E. Bernier, one of the heirs, took charge of the whole estate, including the land in controversy, paid taxes thereon, and took care of the minors. He remained in possession of the premises in controversy until this suit was brought. All the parties, of course, claim through a common source; and the question for decision is whether all the heirs of the deceased took this land jointly, and are equally entitled to it, or whether the whole of the land went to the minor heirs of the deceased. And this question depends for its solution upon the construction given to the provisions of the homestead act, contained in sections 2291 and 2292 of the Revised Statutes of the United States, which *245 embody the provisions of the act of congress, on that subject, of May 20, 1862, and of subsequent acts which have any bearing upon the question. After providing for the entry of lands, which, under other provisions of law, might be afterwards commuted into a homestead, section 2291 declares that "no certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisee; or, in case of a widow making such entry, her heirs or devisee, in case of her death, —proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section 2288, and that he, she, or they will bear true allegiance to the government of the United States, then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." Section 2292 provides that "in case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the state in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified."

The contention of the complainants is that under section 2291 the whole premises which the deceased, Edward Bernier, died claiming as his homestead, upon the completion of the proofs required, passed equally to the 10 children, as his heirs. On the other hand, it is insisted by the defendants that, under section 2292, when the father and mother both died, the fee of the land inured to the minor children, to the exclusion of those who had attained their majority, and that they alone were entitled to the certificate and patent.

We are of opinion that the construction claimed by the complainants is the true one. Section 2291 provides that the certificate and patent, in case of the death of father and mother, shall, upon the proofs required being made, be issued to the heirs of the deceased party making the entry,—a provision which embraces children that are minors, as well as adults. Section 2292, in providing only for minor heirs, must be construed, not as repealing the provisions of section 2291, but as in harmony with them, and as only intended to give the fee of the land to the minor children exclusively when there are no other heirs. This construction will give effect to both sections; and it is a general rule, without exception, in construing statutes, that effect must be given to all their provisions, if such a construction is consistent with the general purposes of the act, and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act. The object of the sections in question was, as well observed by counsel, to provide the method of completing

the homestead claim, and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entry man's estate. They point out the conditions on which the homestead claim may be perfected and a patent obtained, and these conditions differ with the different positions in which the family of the deceased entry man is left upon his death. If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs, and both parents are deceased. In the one case the proof is to extend to that of residence upon the property, or its cultivation for the term of five years, and show that no part of the land has been alienated except in the instances specified, and the applicant's citizenship and loyalty to the government of the United States; but in the other case, where there are no adult heirs, and only minor heirs, and both parents are deceased, the requirements exacted in the first case are omitted, and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants. The fact of their being infant children, and the death of their parents, is all that is required to establish their right and title to the premises, and to a patent.

Section 2292 was, in our judgment, only intended to give to infant children the benefit of the homestead entry, and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in the previous section, and to allow a sale of the land within a prescribed period for their benefit.

We are of opinion, therefore, that the right to the premises in controversy, covered by the homestead entry, vested in all the heirs of Edward Bernier at his death,—the adult as well as the minor heirs,—and that the subsequent patent issued to the latter should have been issued to them all jointly, or a separate patent should have been issued for an undivided tenth to each heir. The minor heirs holding under the patent issued, and the defendant Goff, who received a quitclaim for an interest from one of them, should, therefore, be required to execute proper conveyances to the complainants, so as to transfer to them an undivided half interest in the whole, or to each complainant an undivided tenth interest in such lands. This is in conformity with the well-settled law that where a patent for land is issued, by mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him. Stark v. Starrs, 6 Wall. 402, 419.

The decree of the supreme court of Michigan must therefore be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

(147 U. S. 14)

MORRISON v. DISTRICT COURT OF UNITED STATES FOR SOUTHERN DISTRICT OF NEW YORK et al.

(No. 9, Original.)

SAME v. DISTRICT COURT OF UNITED STATES FOR DISTRICT OF MASSACHUSETTS et al.

(No. 8, Original.)

(January 3, 1893.)

MANDAMUS — WRIT OF PROHIBITION — DISTRICT COURT—ADMIRALTY JURISDICTION—COLLISION—LIMITATION OF LIABILITY — STIPULATION — APPRAISEMENT.

1. The owners of a steamship which had collided with and sunk a steam yacht instituted proceedings in the district court for Massachusetts for limitation of liability in accordance with Rev. St. § 4284, and an order issued restraining the prosecution of suits by damage claimants "except in these proceedings." Thereafter the master of the steam yacht libeled the steamship company and the steamship in the district court of the southern district of New York, which court dismissed the libel as "improperly filed." *Held*, that the libel was dismissed after a hearing on the merits, and that the supreme court would not by mandamus direct the district court to vacate the order of dismissal, to reinstate the cause, and to proceed on the libel, since the decision of the lower court could not be controlled by mandamus, nor could mandamus be used as a writ of error.

2. Mandamus should not be granted in such a case, since the libelant had a remedy, by direct appeal to the supreme court on the question of jurisdiction, under act of March 3, 1891, c. 517, § 5, (26 St. p. 827,) if the jurisdiction of the district court was in issue in that court, or by appeal to the circuit court of appeals, under section 6, if such jurisdiction was not in issue.

3. Where a district court has jurisdiction of the premises, a writ of prohibition will not be issued to restrain it from proceeding in the exercise of such jurisdiction.

4. A district court has jurisdiction, under admiralty rule 57, of proceedings by libel and petition for limitation of liability by the owner of a steamship which has collided with and sunk a steam yacht, where such proceedings are instituted while the steamship is in the district, and subject to control of the court for the purposes of the case, as provided in admiralty rules 54, (11 Sup. Ct. Rep. iv., 137 U. S. 711,) and 55 and 56, (13 Wall. xiii.,) and before the steamship is libeled for damages by the collision or suit is commenced against the owner.

5. In order to sustain the proceeding for limiting liability, it is not necessary that the owner and captain of the steam yacht, who were damaged by the collision, should be personally served with notice within the district, or that the steamship should be taken and held by the court until the owner or captain of the steam yacht appears in the cause.

6. The district court does not lose jurisdiction by allowing the steamship, after giving a stipulation for her value under admiralty rule 54, to go into another district in the ordinary course of her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight.

7. The filing of the libel and petition by the owner of the steamship, with the offer to give a stipulation, confers jurisdiction on the court, which no subsequent irregularity of procedure can take away.

8. In proceedings for the limitation of liability under admiralty rule 54, prior notice to damage creditors of an appraisement is not necessary, and an ex parte appraisement is not void.

9. The making of an ex parte appraisement and the taking of a stipulation thereon under admiralty rule 54 are at most irregularities which the district court can correct, since the stipulation stands in place of the vessel and her freight, and the court can stay further proceedings, deny all relief, and dismiss the libel and petition on failure of the owner to comply with an order to give a new stipulation on a further appraisement.

10. The giving by the owner of a stipulation for the value of his interest in a vessel and her freight under admiralty rule 54, without a judicial determination of such value after a hearing of the persons interested, is equivalent to a "transfer" of his interest in the vessel and her freight to a trustee for the benefit of claimants, under Rev. St. § 4285.

Petition by Henry Morrison for a writ of mandamus to the district court of the United States for the southern district of New York and the Honorable Addison Brown, judge of the said court, to vacate an order (52 Fed. Rep. 598) dismissing a libel by Morrison against the Metropolitan Steamship Company, the H. F. Dimock, William K. Vanderbilt, and others, to reinstate the cause, and to proceed on the libel. Denied.

Petition by Henry Morrison for a writ of prohibition to restrain the district court of the United States for the district of Massachusetts and the Honorable Thomas L. Nelson, judge of the said court, from proceeding further upon a libel and petition filed in that court by the Metropolitan Steamship Company for limitation of liability for collision. Denied.

Elihu Root, Harrington Putnam, and Saml. B. Clarke, for petitioner on both petitions. R. D. Benedict, for respondents in No. 8, original. John Lowell, John Lowell, Jr., and W. D. Sohier, for respondents in No. 9, original.

*Mr. Justice BLATCHFORD delivered the opinion of the court.

On the 24th of July, 1892, between 8 and 9 o'clock A. M., a collision took place between the steam yacht Alva, at anchor on Nantucket shoals, in Vineyard sound, and owned by William K. Vanderbilt, of the city of New York, and the freight steamship H. F. Dimock, running regularly between Boston and the city of New York, and belonging to the Metropolitan Steamship Company, a Massachusetts corporation. The collision occurred during a thick fog, and, as a consequence of it, the Alva sank.

On the 16th of August, 1892, the steamship company filed a libel and petition in the district court of the United States for the district of Massachusetts against Vanderbilt, as owner of the Alva, in a case of limitation of liability, civil and maritime. It set forth the particulars of the collision and the sinking of the Alva, denied that there was any want of care on the part of the Dimock, and averred that the collision, and the damage occasioned thereby, were caused by the carelessness and incompetence of those in charge of the Alva, and their negligence in anchoring where they did; that the Alva was claimed to be worth over $250,000, which was greatly in excess of the value of the Dimock and the latter's freight then pending,—that being less than $150,000; that the petitioner denied and contested its liability and that of the Dimock for any loss or damage suffered by the Alva or her owner, or by any persons on board of her, but feared that suits or libels might be brought against the petitioner or the Dimock, and damages be claimed in excess of the value of the Dimock and her freight then pending; that the petitioner claimed the benefit of the limitation of liability provided for in sections 4283, 4284, c. 6, tit. 48, of the Revised Statutes of the United States; and that, if the court decided that any damage was occasioned by the negligence of the Dimock, or those in charge of her, for which the Dimock was liable, the petitioner claimed that its liability as her owner should be limited to the value of the vessel and her freight pending at the time of the collision.

The prayer of the libel and petition was (1) that the court would cause due appraisement to be had of the value of the Dimock on the 24th of July, 1892, and of her freight then pending, and would make an order for the giving of a stipulation, with securities, for the payment of the same into court whenever it should be ordered; (2) that the court would issue a monition against all persons claiming damages for loss occasioned by said collision, citing them to appear before the court and make due proof of their respective claims before a day to be named in the monition; (3) that the court would designate a commissioner, before whom such claims should be presented in pursuance of the monition, to make report thereof to the court; and that the petitioner might be at liberty to contest its liability and the liability of the Dimock for all such loss, independently of the limitation of liability claimed; (4) that the court would make an order restraining all persons from prosecuting suits against the petitioner and the Dimock, except before such commissioner, and in the proceeding thus instituted; and that if, upon the coming in of the report of the commissioner and its confirmation, it should appear that the petitioner and the Dimock were not liable for such loss, it might be so decreed; (5) that, if the court should decree that any person or persons were entitled to maintain claims against the petitioner or the Dimock on account of any loss by the collision, it would also decree that the liability of the petitioner should in no event exceed the value of the Dimock and her freight pending at the time of the collision, and that the petitioner and the vessel should be forever exempt from all further liabilities in the premises; that the moneys secured to be paid into court, after paying costs and expenses, should be divided pro rata among the several claimants in proportion to the amount of their respective

claims; and that in the mean time, and until the final judgment of the court, it would make an order restraining the further prosecution of any suits against the petitioner or the Dimock in respect of any such claims; and (6) for other relief.

On the 25th of August, 1892, the libel and petition was amended by adding an averment that, at the time it was filed, the Dimock was, and ever since has been, lying in the port of Boston, and within the admiralty jurisdiction and process of the district court.

On the 16th of August, 1892, the district court for Massachusetts issued a warrant to the marshal of the district, directing him to cause the Dimock and her pending freight to be appraised on oath by three appraisers named in the warrant, to be duly sworn. The appraisers made oath before the clerk of the court that they would appraise the vessel and her pending freight according to their best skill and judgment. On the 17th of August, 1892, the three appraisers reported to the court that, after a strict examination and careful inquiry, they estimated and appraised the Dimock at $80,000, and her freight pending at the time of the collision at $2,395.33.

On the latter day the court made an order setting forth that, whereas it appeared that "due appraisement" had been had of the amount or value of the interest of the petitioner in the Dimock and her pending freight at the time alleged in the petition, and the value thereof had been found to be as stated in the report, and ordering that the petitioner give proper stipulation, with sureties, for the payment into court of the sums named, whenever the same should be ordered. On the same day a stipulation was filed, signed by the petitioner and by two sureties, each of whom justified in the sum of $200,000, which stipulation stated that the petitioner and the two sureties, "submitting themselves to the jurisdiction of this court," bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of $82,395.33, unto William K. Vanderbilt, owner of the Alva, and all other persons claiming damages in the proceedings; that the petitioner should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of its final decree, and all sums that the petitioner should be ordered to pay by such final decree, whether in the district court or any appellate court; and that, unless it should do so, the signers consented that execution should issue against them, their heirs, executors, and administrators, jointly and severally, and their lands, goods, and chattels, wherever found, to the value of the sum above mentioned, without further notice or delay.

On the same day, the district court issued a monition to the marshal, commanding him to give notice to Vanderbilt, and to all persons concerned, of the filing of the libel or petition, and of its substance; to cite Vanderbilt and all persons claiming damages for any loss occasioned by said collision to appear before the court, at Boston, on or before November 25, 1892, and make due proof of their respective claims in the premises; to serve a copy of the monition on Vanderbilt, if he should be found within that district; to give further notice by advertising the same in a specified newspaper published at Boston at least 60 days before such return day, and to post a copy of the notice at the courthouse in Boston. The marshal made return on September 2, 1892, that he had advertised the monition three times—on August 19th and 26th, and September 2d—in the designated newspaper, had posted a copy of it in the courthouse at Boston on August 19th, and on the same day had given a further notice to Vanderbilt, by mailing to him an attested copy of the monition, by registered letter, to his house at Newport.

On the 17th of August, 1892, the district court also made an order enjoining Vanderbilt and all persons claiming damages for any loss arising out of the matters and acts alleged in said libel and petition from prosecuting any suit or suits against the libelant or petitioner, as owner of the Dimock, or against that vessel, in respect to any claim or claims arising out of said collision, "except in these proceedings." On the 20th of August, 1892, a deputy of the United States marshal for the district of Massachusetts mailed an attested copy of such restraining order to Root & Clarke, attorneys for Vanderbilt, at New York.

On the 30th of September, 1892, Henry Morrison, who was the master of the Alva, and on board of her at the time of the collision, filed a libel in the district court of the United States for the southern district of New York against the Metropolitan Steamship Company, the Dimock, Vanderbilt, and all persons claiming damages against that company or the Dimock by reason of said collision, in a cause civil and maritime, of apportionment of limited liability, pursuant to section 4284 of the Revised Statutes. The libel set forth the particulars of the collision, and averred that it was not caused by any neglect or fault of the libelant, or of any of the persons on board of and having charge of the Alva, but was wholly due to the fault of those in charge of the Dimock, in seven specified particulars. It averred that by the collision the Alva and the personal effects of Vanderbilt on board of her were totally lost; that Vanderbilt had sold the wreck at public auction for $3,500; that immediately prior to the collision the yacht was of the value, at least, of $300,000, and the personal effects of Vanderbilt so lost were of the value of more than $5,000; that Vanderbilt had notified the steamship company that he would hold it responsible for the loss and damage so suffered by him; that at the time of the collision the libelant had on board of the Alva personal effects of his own, of which a list was given,

amounting in value to over $1,300, which were wholly lost; that divers other persons had suffered losses and destruction of property on board of the Alva by such collision; that all of such loss and damage was without the privity or knowledge of the steamship company, and by law its liability did not exceed the value of its interest in the Dimock and her freight then pending; that the whole value of the Dimock, and her freight for the voyage she was making, was not sufficient to make compensation to the persons who suffered loss by such collision, and they were by law entitled to receive compensation from the owner of the Dimock only in proportion to their respective losses; that the value of the Dimock at the time of the collision, and at the termination of the voyage she was then making, exceeded $200,000, and her freight then pending exceeded $2,300; that the amount to be apportioned among the several persons who so suffered loss by such collision exceeded $202,300; that the Dimock had not been libeled or arrested in any court to answer for such loss, and her owner had not theretofore been sued in that behalf; and that the Dimock was then within the southern district of New York, and subject to the control of the court for the purposes of the proceeding.

The prayer of the libel was that the court would proceed to establish the loss suffered in the premises by all persons who might make any claim of liability therefor against the Dimock or her owner, and would proceed in due course to ascertain the value of the Dimock and her freight then pending, and the proportionate amount of compensation for said matters which the libelant was entitled to receive from the owner of the Dimock, and to decree the payment thereof against either the Dimock or her owner, or both, as might be lawful and proper, and for further relief; that process might issue against the Dimock, and she be condemned and sold to pay said damages; and that the steamship company, Vanderbilt, and all persons claiming to have suffered loss by such collision, might be cited in due form to appear and answer, and to prove their claims in that behalf.

Under process duly issued on that libel, the Dimock was attached by the marshal on September 30, 1892, in the southern district of New York, and on the 1st of October, 1892, in that district, process of monition was duly served by him on the steamship company; and on the same day proctors for Vanderbilt duly entered their appearance for him in the suit.

On the 1st of October, 1892, on an affidavit, and on all the pleadings and proceedings, the district court of the United States for the southern district of New York made an order for Morrison to show cause why his libel should not be dismissed as to the Dimock and the steamship company, and the process issued against the Dimock be set aside, and the steamship company have such other or further relief as might be just. The motion of the steamship company to that effect was heard on the papers mentioned, on additional affidavits on behalf of that company, on a copy of the record of the district court in Massachusetts, and on affidavits on the part of the libelant; and on the 7th of October, 1892, the district court, held by Judge Brown, made an order directing that the process issued on Morrison's libel be vacated; that the service thereof on the steamship company be set aside; that the Dimock be released and set free from the attachment; and that the libel be dismissed. The order further said: "This order is made upon the grounds and for the reasons stated in the opinion filed this day, to which reference is hereby made as a part hereof."

In the opinion of Judge Brown, so referred to, (The H. F. Dimock, 52 Fed. Rep. 598,) it was held that Morrison had notice, before his libel was filed, of the proceedings in the district court in Massachusetts, and of the injunction order issued by that court on August 17, 1892. The opinion considered the contention of Morrison that the district court in Massachusetts never acquired jurisdiction or authority to issue the restraining order, on the grounds that the Dimock had never been arrested by or surrendered to that court, nor had any stipulation been given for her proper value, as a substitution for her, under rule 54, 11 Sup. Ct. Rep. iv., of this court in admiralty, and because the appraisement proceeding was ex parte, and without any notice of it, or of the application for it, having been given, or attempted to be given, to Vanderbilt or any other creditor; and because the appraisement was for less than one half of the value of the vessel, and that, therefore, the appraisement was not a "due appraisement," within rule 54. The district court in New York held that the original ex parte appraisement and stipulation were not a finality, incapable of subsequent inquiry or correction by the court on due application; that it was competent for the district court in Massachusetts to order a reappraisement and further security, upon application by any creditor, showing that the previous appraisement was mistaken and inadequate, and that the duty of the appraisers had been performed inadequately; that the matter fell within the domain of practice, to be regulated by that district court, in the absence of any express rule of this court, as the interests of justice seemed to demand; that, as rule 54 of this court did not in terms require any notice to creditors of the original appraisement and stipulation, the district court was not prepared to hold that the "due appraisement" provided for by that rule might not be, in the first instance, an ex parte one, to be supplemented thereafter, if unsatisfactory, by further inquiry on the application of a creditor; that the want of notice did not constitute a jurisdictional defect in the ap-

praisement and stipulation, so as to render void the order for a motion and other subsequent steps in the cause, including the injunction against all other suits, provided for by rule 54; that the prior proceeding in the district court in Massachusetts was valid, and the libel of Morrison was improperly filed: and that it should be dismissed.

On the 17th of October, 1892, Morrison presented to this court a petition for a writ of mandamus directing the district court for the southern district of New York, and Judge Brown, notwthstandng the matters contained in the moving affidavits before that court, and notwithstanding the proceedings in the district court of the United States in Massachusetts, to vacate the order of October 7, 1892, and to reinstate Morrison's libel, and proceed thereon according to law. Accompanying the petition are copies of all the papers in the suit of Morrison and of all the papers constituting the record in the suit in the district court in Massachusetts. Judge Brown has made return to the order to show cause, and the case has been orally argued here by the counsel for both parties, and full briefs have been submitted to this court.

The district court in New York disposed of the question before it on the merits, and dismissed the libel. Although, in its opinion, the court said that Morrison's libel was "improperly filed," yet the court did not refuse jurisdiction of that libel. On the contrary, it said that the proceeding by Morrison to limit liability was in accordance with the provisions of section 4284 of the Revised Statutes. What it did was to hold that the libel must be dismissed on the ground that there was a valid defense to it in the prior proceedings instituted in the district court for Massachusetts, which court had full jurisdiction of the cause. What it said was that Morrison's libel was improperly filed, because it was filed in violation of a valid restraining order, issued on the 17th of August, 1892, by the district court for Massachusetts.

The district court in New York having dismissed the libel out of court, on a hearing of the case on the merits, we are now asked to direct it to vacate its order of dismissal, and to reinstate the cause, and to proceed upon the libel. This is, in effect, asking us to direct the district court to decide in a particular way the matter heard before it, which is never the office of a mandamus. Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. Rep. 825; Ex parte Brown, 116 U. S. 401, 6 Sup. Ct. Rep. 387.

Moreover, the present attempt is one to use a mandamus as a writ of error, which cannot be done. Ex parte Railway Co., 103 U. S. 794, 796; Ex parte Baltimore & O. R. Co., 108 U. S. 566, 2 Sup. Ct. Rep. 876; Ex parte Pennsylvania Co., 137 U. S. 451, 453, 11 Sup. Ct. Rep. 141.

In addition to this, a mandamus is never granted where the party asking it has another remedy. Ex parte Pennsylvania Co., supra. In the present case, it is claimed by Morrison that the jurisdiction of the district court in New York was in issue before that court. If so, the remedy of Morrison was by an appeal from the district court directly to this court, on the question of jurisdiction, under section 5 of the act of March 3, 1891, c. 517, (26 St. p. 827.) If the question of the jurisdiction of the district court was not in issue before that court, then the remedy of Morrison, as against the order of the district court dismissing his libel, was by an appeal to the circuit court of appeals for the second circuit, under section 6 of the same act.

For the foregoing reasons, the prayer of the petition for a mandamus in No. 8, original, must be denied.

In No. 9, original, the question involved is as to the validity of the proceedings in the district court for Massachusetts. Morrison applies to this court for a writ of prohibition to the district court for Massachusetts from proceeding further upon the libel and petition filed in that court by the Metropolitan Steamship Company. The district judge has made a return to the order to show cause, issued on the petition for prohibition, setting forth in full the proceedings before recited, and stating that due appraisement was made of the Dimock and her freight, "according to the usual course and practice of the said district court in such cases, by three persons known to me to be persons of integrity, and of skill and experience in such matters; and such appraisement was duly made and returned."

It is urged for Morrison that, in the libel and petition filed by the Metropolitan Steamship Company in the district court for Massachusetts, the company did not ask for the appointment of a trustee, or convey, or offer to convey, its interest in the Dimock and her pending freight to a trustee, pursuant to section 4285 of the Revised Statutes of the United States; that it did not allege, in its original libel and petition, that the vessel was within the district of Massachusetts, nor pray any process against her, nor in any way surrender her to the custody of the said district court; that it did not offer, in case the court should adjudge the company to be liable to any extent for the collision, to pay the value of the vessel and freight into court for distribution; that it did not allege that any person except Vanderbilt suffered loss by the collision; that the order issued by the district court in Massachusetts, on August 17, 1892, was not a mere temporary restraining order, to last only until a hearing could be had, but was an absolute injunction, which contained no provision for a hearing of the damage claimants on the matter thereof, and did not purport to be made on notice and an opportunity to be heard, given to any person interested adversely to the steamship company; that the amendment to the libel was not made until August 27, 1892; that the Dimock was never attached by any process is-

sued out of the district court for Massachusetts, and that court never took her into its custody or assumed control of her; that it appeared by affidavit that, after the libel in Massachusetts was amended, and before Morrison's libel was filed in the southern district of New York, the Dimock departed from the district of Massachusetts, and was no longer in that district, or subject to the control of the court for that district, or within the reach of the process of that court, such departure being without any obligation to return the vessel into that district, and without any leave of that court obtained or sought; that the only thing left within the Massachusetts district to be divided among damage claimants, and subject to be disposed of by the decree of the court for that district in the proceeding there pending, was the stipulation so given; that no notice of the appraisement proceedings, or of the stipulation proceedings, or of the injunction proceedings, was required by the court to be given to any damage claimant, and neither Morrison nor any other damage claimant had in fact any notice thereof, or any opportunity to be heard thereon; that neither Morrison nor Vanderbilt nor any damage claimant had been served personally with process in the Massachusetts district, or had entered any appearance in the Massachusetts court; that Vanderbilt had received a copy of the monition and of the injunction order, but not within the district of Massachusetts, and not until after August 17, 1892; and that Morrison had not been served with any paper in the Massachusetts proceedings, either within or without the Massachusetts district.

It is further contended that Morrison and Vanderbilt have been deprived of their remedy against the Dimock and her owners, and are confined to a proceeding to obtain a share of the amount mentioned in the stipulation; that no court has power to give relief beyond a share in that amount, because the Dimock departed from the jurisdiction of the district court for Massachusetts, and her owners never submitted themselves to the jurisdiction of that court by any offer to pay any sum in excess of that amount; that that result had been accomplished by a proceeding wholly ex parte, without actual or constructive notice, and without any opportunity for a hearing on the part of Morrison, or Vanderbilt, or any other person adversely interested; that the appraisement, stipulation, and injunction proceedings in the Massachusetts court, having been taken without any notice or opportunity to be heard given to the damage sufferers, were wholly without effect upon the rights of the latter, and did not destroy Morrison's capacity to sue, and did not discharge the steamship company or the Dimock from liability to be sued; that Morrison acquired by the collision a right to recover damages to some extent against the company owning the Dimock, personally, in any district court which could obtain personal jurisdiction of that company; that he acquired a right also to recover damages to some extent against the vessel in any district court which could obtain jurisdiction in rem against her; that his right against the vessel is not a right of action merely, but is a jus in re, and a property interest in her, of which he cannot be deprived without due process of law; that the limited liability act did not take away or affect any such rights ex proprio vigore, as an exercise of the legislative power of the United States, but left such rights to be limited and qualified judicially by the courts; that after the collision, and before the company filed its libel in Massachusetts, Morrison, by virtue of that statute, had a right to prosecute an apportionment suit in any district court which could acquire jurisdiction in rem of the Dimock and in personam of her owner and of all known damage claimants, and the further right to have any such court adjudicate upon the questions (1) whether the company and the Dimock were liable to any extent,—that is to say, whether the collision was caused by fault on the part of the Dimock; (2) if so, how much was the value of the company's interest in the Dimock and her freight for the voyage? (3) whether the aggregate losses of all the damage sufferers exceeded that value; and (4) if they did, how, or in what proportions, the amount of that value ought to be divided among the sufferers; and that the only ways in which the Massachusetts proceedings could have affected such statutory right of Morrison were (1) by destroying his personal capacity to sue; (2) by releasing the company and the Dimock from liability to be sued; and (3) by conferring upon the court in Massachusetts exclusive jurisdiction to determine those four questions, which were presented alike by the company's libel and by Morrison's libel.

It is contended also that the "due process of law" guarantied to every person by article 5 of the amendments to the constitution of the United States implies, with reference to proceedings under the judicial power of the United States, notice of some kind, and opportunity to be heard, not only as a requisite, but as a prerequisite; that the rights of the damage claimants had never been submitted or subjected in any form to the Massachusetts court; that proceedings in court, of which the persons whose rights purported to be affected thereby had no actual or constructive notice, and in which they had no opportunity to be heard, were ineffective, and were not judicial proceedings; that it could not be said that an opportunity to be heard would necessarily, and as matter of law, have been of no advantage to the damage claimants, for they might have convinced the court (1) that the appraisement ought to have been made on sworn testimony, with an opportunity to both sides to produce and cross-examine witnesses; or (2) that the experts selected were not competent or were

not impartial; or (3) that the appraisers' report ought to have been rejected, because it did not show the plans on which they proceeded, or as of what time the value of the Dimock was taken, or because the appraisers did not personally examine her; or (4) that the stipulation should have been broad enough to cover not merely what the appraisers estimated to be the value of the company's interest in the Dimock and her freight, but also what the damage claimants asserted the value of such interest to be, so that if, on final hearing, the issue tendered in the company's libel and petition as to such value was determined in favor of the damage claimants, the court would have some means of compelling the company to pay the adjudicated value into court for distribution; or (5) that the sureties on the stipulation were insufficient; or (6) the court might have been convinced that, for the reasons above stated, no injunction ought to issue, or else only on condition that the company bound itself, with sureties, to pay into court the value of its vessel and freight, as finally adjudicated; or that the rights of the parties could be more conveniently and justly determined by permitting the damage claimants to assert their claims in their own way, and allowing the steamship company to set up the apportionment proceedings as a plea, or that no injunction ought to issue until the value of the vessel and freight had been adjudicated, and paid into court, or secured to be paid.

*31 *It is further urged that the proceedings in Massachusetts were not, as matter of law, equivalent to a transfer of the Dimock and her freight by the company to a trustee under section 4285 of the Revised Statutes; that they were very far from being an equivalent in fact; that there is nothing in the statute which authorizes the owner of a vessel, at his option, either to transfer his interest in the vessel and freight to a trustee, or to pay into court the value thereof as determined by an ex parte appraisement, or which declares that it shall be a sufficient compliance with the statute on the part of the owner if he pays or secures to be paid into court the value so appraised, or which provides that after such payment all suits and proceedings against the owner shall cease; and that the act leaves the creation of a substitute in lieu of a transfer to a trustee, to a court which proceeds judicially.

It is further contended that the rights of the damage claimants against the company and the Dimock, arising out of the collision, remained precisely as they were before the company filed its libel and petition in Massachusetts; that those rights were never transferred from the company and the vessel to the fund represented by the stipulation; that said fund cannot be regarded as the fund to be apportioned among the damage claimants, as it had never been adjudicated or judicially established to be such; that if Morrison's right to proceed against the company and the vessel in the southern district of New York had been taken away or suspended by the proceeding in Massachusetts, it must be for some other reason than (1) that the court in Massachusetts had adjudicated that damage claimants ought to be enjoined from proceeding in any other court; or (2) that such claimants had been incapacitated or rendered personally incompetent to sue; or (3) that the company and the Dimock had been released and discharged from liability to be sued; and that the only other way in which Morrison's right to proceed in New York could have been affected was that the jurisdiction of the court in Massachusetts over the subject-matter had somehow become exclusive, so that Morrison could proceed against the company and the vessel only in that forum.

It is also contended that the court in Massachusetts was not *competent to adjudicate* the question whether or not the collision was caused by fault on the part of the Dimock, because it did not acquire personal jurisdiction of one or more of the damage claimants or jurisdiction in rem of the Dimock; that the fund represented by the stipulation had not been judicially substituted for the Dimock, and she had not been discharged from liability for the collision; that, as she still remained liable for it, nothing but possession and control of her would authorize any court to pronounce a judgment in rem as to her liability; that the court in Massachusetts had never actually assumed possession and control of her by the officers of the court, by seizure or otherwise, or jurisdiction of her; that, whatever jurisdiction that court acquired of her by her having been within the district when the company's libel and petition was filed, was lost, and all the rights of the company arising therefrom were abandoned, by the company's having taken the Dimock before the return day of the monition, out of the district, to the port of New York, without leave of the court or procuring any release or discharge of her, or entering into any obligation to bring her back; that the court in Massachusetts never acquired personal jurisdiction over Morrison or any other damage claimant; that, there having been no voluntary appearance of any damage claimant, service of process within the Massachusetts district was essential; and that no process had been served on Morrison or Vanderbilt within that district.

It is further contended that the court in Massachusetts did not acquire jurisdiction to determine any of the other questions presented by the two libels; that what the steamship company ought to have done was to make in its libel an unconditional offer, substantially in the terms of the statute, to pay into court for partition among the damage sufferers whatever the court should determine was the value of the company's interest in the Dimock and her freight; that the only offer which could be implied from the libel was one to pay or secure to be paid

the amount at which the court might cause the value of the vessel and her freight to be duly appraised; that such offer was insufficient, because it did not mean the amount which the court should adjudicate, after hearing the parties adversely interested, to be such value; that, such offer of the company having been complied with to the expressed satisfaction of the court, no power was left to that court to compel the company to pay anything more than the appraised amount, even if the court should find, on the proofs, that the value of the Dimock and her freight was greater; that, as the vessel had been taken out of the Massachusetts district, there was nothing left within the reach or control of the Massachusetts court, except the stipulation for an amount which Morrison and Vanderbilt allege was less than one half the true amount; and that, even if they should appear in the Massachusetts court, and establish by proof that the liability of the company was not less than $200,000, that court could do nothing against the will of the company.

We are of opinion that none of the views above stated are sufficient to show that this is a proper case for a writ of prohibition. The only question involved is that of the jurisdiction of the district court of Massachusetts. Ex parte Gordon, 104 U. S. 515; Ex parte Ferry Co., Id. 519; Ex parte Slayton 105 U. S. 451; Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. Rep. 570; Ex parte Garnett, 141 U. S. 1, 11 Sup. Ct. Rep. 840; Ex parte Cooper, 143 U. S. 472, 495, 12 Sup. Ct. Rep. 453.

Under rule 57 in admiralty, prescribed by this court, (130 U. S. 705, 9 Sup. Ct. Rep. iii.,) the Dimock not having been libeled to answer for the loss resulting from the collision, and no suit therefor having been commenced against her owner, the proceedings were instituted lawfully in the district court in Massachusetts, that being the district in which the vessel was at the time the proceedings were instituted, and she being at that time subject to the control of that court for the purposes of the case, as provided by rule 54, (137 U. S. 711, 11 Sup. Ct. Rep. iv.,) and rules 55 and 56, (13 Wall. xiii.)

As to the contention that, in order to retain jurisdiction, the Massachusetts court should have kept possession of the Dimock until Morrison or Vanderbilt, or both of them, should have chosen to appear in the cause, and that, by allowing her to go to New York, in the ordinary course of her business, after the stipulation had been given, the district court in Massachusetts lost such jurisdiction as it had acquired, there are several sufficient answers:

(1) The proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee; but is an equitable action.

(2) It was not necessary, in order to sustain the proceeding for limiting liability, that Morrison or Vanderbilt should have been personally served with notice thereof within the district of Massachusetts, or that the Dimock should have been taken and held by the court. The decisions of this court have established the power of congress to pass the statute, and of the courts of admiralty jurisdiction to enforce it; and its enforcement would be impracticable under the restrictions which Morrison seeks to impose. Norwich Co. v. Wright, 13 Wall. 104; The Benefactor, 103 U. S. 239; Providence & N. Y. S. S. Co. v. Hill Manuf'g Co., 109 U. S. 578, 3 Sup. Ct. Rep. 379, 617; The City of Norwich, 118 U. S. 468, 6 Sup. Ct. Rep. 1150; The Scotland, 118 U. S. 507, 6 Sup. Ct. Rep. 1174; Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. Rep. 612.

(3) The filing of the libel and petition of the steamship company, with the offer to give a stipulation, conferred jurisdiction upon the court, and no subsequent irregularity in procedure could take away such jurisdiction.

(4) Although some prior notice of the holding of the appraisement might very well have been served upon Vanderbilt, even if he was out of the jurisdiction of the Massachusetts court, he having been named in the libel and petition as a respondent, yet the appraisement ex parte was not void, because rule 54 does not require prior notice of the appraisement to be given to any one, and only requires a monition to be issued after a stipulation has been given or a transfer has been made to a trustee.

(5) The making of the appraisement ex parte, and the taking of the stipulation thereupon, were at most an irregularity which the district court could correct. The Thales, 3 Ben. 327, 330, 10 Blatchf. 203; The Benefactor, 103 U. S. 239, 247. The stipulation stands in the place of the vessel and her freight, leaving to the court its usual power to act, on proper application, in respect to giving a new or further stipulation. The Wanata, 95 U. S. 600, 611; U. S. v. Ames, 99 U. S. 35, 36; The City of Norwich, 118 U. S. 468, 489, 6 Sup. Ct. Rep. 1150. The district court for Massachusetts has the whole matter within its control, for the steamship company, by its libel and petition, has submitted itself to the jurisdiction of that court; and, if it should fail to comply with a future order of that court in respect to giving a new or further stipulation, on a further appraisement, that court could stay its further proceedings, deny it all relief, and dismiss its libel and petition.

Section 4285 of the Revised Statutes provides that it shall be deemed a sufficient compliance on the part of the owner of a vessel with the requirements of the statute relating to his liability for loss, if he shall transfer his interest in the vessel and freight for the benefit of the claimants to a trustee, and that, after such transfer, all claims and proceedings against the owner shall cease. Rule

54 of the rules in admiralty prescribed by this court provides that when a libel or petition is filed in the proper district court, as provided by rule 57, claiming a limitation of liability, and praying proper relief in that behalf, the court, having caused due appraisement to be had, shall make an order for the payment of the amount into court, or for the giving of a stipulation, with sureties, to pay the same into court whenever ordered, or, if the owner so elects, make an order, without such appraisement, for the transfer by the owner of his interest in the vessel and freight to a trustee to be appointed by the court, and, upon compliance with such order, issue a monition notifying all persons claiming damages to make proof of their claims, and also make an order restraining the further prosecution of all suits against the owner in respect of any such claims.

The validity of the provision for a stipulation has been upheld by this court in Providence & N. Y. S. S. Co. v. Hill Manuf'g Co., 109 U. S. 578, 600, 3 Sup. Ct. Rep. 379, 617, in which it said: "The operation of the act in this behalf cannot be regarded as confined to cases of actual 'transfer,' (which is merely allowed as a sufficient compliance with the law,) but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as, where the value of the owners' interest is paid into court, or secured by stipulation, and placed under its control, for the benefit of the parties interested." To the same effect, see The City of Norwich, 118 U. S. 468, 502, 6 Sup. Ct. Rep. 1150.

In fact, it is stated in the brief for Morrison that his counsel do not doubt that the operation of the limited liability act cannot be regarded as confined to cases of actual transfer to a trustee, but must be regarded as extending to cases in which what is done is tantamount to such transfer; as, when the value of the owner's interest is paid into court, or secured by stipulation, and placed under its control for the benefit of the parties interested. But what they contend for is that the value of such interest cannot be regarded as paid into court, or secured by stipulation, until such value has been judicially ascertained, after a hearing of the persons interested, and that only such a judicial ascertainment is equivalent to a transfer of the vessel and her freight to a trustee.

As the district court for Massachusetts has jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition will be issued only in case of a want of jurisdiction either of the parties or of the subject-matter of the proceeding. Ex parte Fassett, 142 U. S. 479, 486, 12 Sup. Ct. Rep. 295.

The foregoing views sufficiently dispose of the points urged in behalf of the writ. Both writs denied.

(147 U. S. 59)

LYTLE v. TOWN OF LANSING.

(January 3, 1893.)

No. 79.

RAILROAD COMPANIES — MUNICIPAL AID BONDS — CANCELLATION — FEDERAL COURTS — FOLLOWING STATE DECISIONS.

1. A judgment of the supreme court of New York, holding certain town bonds in aid of a railroad invalid as between the railroad and the town, can be avoided in a federal court, in a collateral proceeding by the town to cancel the bonds, only by showing a total lack of jurisdiction in the state court.

2. A county judge, assuming to act under Act N. Y. May 18, 1869, permitting municipal corporations to aid in the construction of railroads, rendered a judgment appointing commissioners to execute bonds of a town. The bonds were accordingly executed and delivered to the railroad company, but before delivery a writ of certiorari issued from the supreme court to review the judgment, which was afterwards reversed. *Held*, in an action against a transferee of the bonds to compel their surrender for cancellation, that defendant had the burden of showing that he, or some one under whom he claimed, was a bona fide holder for value. 38 Fed. Rep. 204, affirmed.

3. The pledgee of such bonds, with authority from the railroad to sell them, though he would be protected to the amount of his advances, to secure which the bonds were pledged, is not such a bona fide holder as to entitle his transferee to recover upon the bonds.

4. Such a transferee took up the loan made by the first pledgee, and stood in the same position. Subsequently he sold the bonds, paid his loan out of the proceeds, and credited the railroad company with the balance. He never took title himself. *Held*, that he was not a bona fide holder, so as to entitle his transferee to recover on the bonds.

5. The next holder who appeared was one S., a resident of New Orleans. It was not shown how he became possessed of the bonds, nor was any effort made to secure his deposition. The sale by the second pledgee was at an enormous discount, and this holder had failed to recover in a suit on overdue coupons, previously brought. *Held*, that he was not a bona fide holder, so as to entitle his transferee to recover on the bonds in a subsequent suit. 38 Fed. Rep. 204, affirmed.

6. The next holder, B., a resident of Texas, appeared from the testimony to have gone through the form of buying the bonds from S., giving a check for $50,000 therefor, the par value of the bonds being $75,000, besides $26,000 dishonored coupons. The check was produced, not by the drawee, but by the bank on which it was drawn, five or six years after the transaction, and the payee named therein was James J. S., instead of John J. S., from whom the bonds were purchased. B. did not look at the bonds, nor notice whether they were signed or sealed, nor make any inquiries as to the responsibility of the town, the circumstances of the issue, or the title of the seller. He made the purchase on the recommendation of a friend in New York, and testified that he was at the time uncertain as to whether the purchase was made on his own account or for his friend. *Held*, that he was not a bona fide holder, so as to entitle his transferee to recover on the bonds. 38 Fed. Rep. 204, affirmed.

7. One L. claimed to have purchased the bonds from B. He gave a carelessly worded and inaccurate receipt, did not look at the bonds, nor make any inquiries about them, but was thereafter informed by his attorneys in New York of some difficulty concerning them, and learned from the seller that the latter had a suit pending about some of the coupons. He nevertheless, without further inquiry, and without any complaint that he was misled by the

seller, transferred the consideration for the bonds. *Held*, that he had notice at least before consummating the sale, and that such notice was equivalent to notice before the sale, and barred his recovery upon the bonds. 38 Fed. Rep. 204, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit by the town of Lansing against John T. Lytle, brought in the supreme court of the state of New York, for cancellation of certain bonds. The defendant removed the cause to the circuit court of the United States, and filed a cross bill. Decree for complainant. 38 Fed. Rep. 204. Defendant appeals. Affirmed.

Statement by Mr. Justice BROWN.

This was an appeal from a decree requiring the appellant to surrender for cancellation 75 bonds, of $1,000 each, purporting to have been executed by the town of Lansing, and dismissing a cross bill filed by Lytle to compel the payment of the overdue coupons attached to such bonds.

By an act of the legislature of New York, passed in 1869, it was provided that whenever a majority of the taxpayers of any municipal corporation, owning or representing a majority of the taxable property, should make application to the county judge, stating their desire that such corporation should issue its bonds to an amount not exceeding 20 per cent. of the taxable property, and invest the same in the stock or bonds of such railroad company as might be named in the petition, it became the duty of such county judge to order a notice of such petition to be published, and to take proof as to the number of taxpayers joining in the petition, and the amount of taxable property represented by the petitioners. In pursuance of this act, in December, 1870, petitions of certain taxpayers of the town of Lansing were presented to the county judge of Tompkins county, who caused the proper notice to be published, proceeded to take proofs, and on March 20, 1871, adjudged and determined that the petition was duly signed by a majority of the taxpayers of the town of Lansing; that the petitioners represented a majority of the taxable property; that the sum of $75,000, mentioned in the petition, did not exceed 20 per cent. of the whole taxable property of the town; and that all the requirements of law respecting the issuing of town bonds to the amount of $75,000, and for the investment of the same in the stock or bonds, or both, of the "Cayuga Lake Railroad Company," had been fully complied with. He thereupon appointed three freeholders and taxpayers of said town as commissioners, whose duty it would be to execute such bonds, and to discharge all such other duties as should be required of them as such commissioners. On March 27, 1871, a writ of certiorari was sued out of the supreme court to review these proceedings, and in May, 1872, the general term of such court ordered and adjudged that all the proceedings in relation to the issuing of these bonds should be reversed, annulled, and held for naught, for the reasons that the Cayuga Lake Railroad Company was not a legal corporation; that the articles of association failed to state the name of each county through or into which the road was intended to be made; that no valid charter was produced before the county judge; that the petition did not direct whether the money was to be invested in stock or bonds; and that it was not shown that a majority of the taxpayers had signed the petition. People v. Van Valkenburgh, 63 Barb. 105.

In some way—though exactly how did not 101
clearly appear—the railroad company induced the commissioners to issue and deliver to them these bonds, for which they received a certificate for an equivalent amount of railroad stock. The allegation of the bill in this connection was that the officers of the railroad company fraudulently, and by false pretenses, procured the commissioners to deliver the bonds, by representing and inducing them to believe that their action would not in any way injure or affect the town, and also by presenting to them an undertaking of the company to indemnify and save them harmless from the consequences of their act. It was further alleged that the stock of the company received in exchange for these bonds was of no value, that the company had ceased to do business, and was insolvent, and that the town was ready to deliver up the stock in exchange for the cancellation of the bonds.

It appears that these bonds, when delivered to the railroad company, were pledged by it to Leonard, Sheldon & Foster, a banking firm in New York city, as collateral security for a loan of $50,000 to the railroad company; that this loan was afterwards transferred to Elliott, Collins & Co., bankers at Philadelphia, to whom the bonds were also turned over as collateral; that this latter company also had authority from the railroad company to sell them for the company at the price of from 70 to 80 cents on the dollar; and that in February, 1873, the firm sold them, deducted from the proceeds the amount of their loan, and left a balance of $4,745.83 to the credit of the railroad company. It did not appear to whom Elliott, Collins & Co. sold the bonds, but subsequently an action was brought in the United States circuit court against the town upon these bonds by one John J. Stewart, in which action a verdict was rendered on December 19, 1878, for the defendant. The judgment in favor of the town was afterwards, and on June 30, 1882, affirmed by this court. Stewart v. Lansing, 104 U. S. 505. In February, 1882, the bonds appear to have been sold by Stewart to one Brackenridge, who afterwards, and in May, 1884, sold them to Lytle, the plaintiff in this suit, for an interest in a ranch.

*This action was begun by the town of Lan- 102

sing in the supreme court of the state of New York in May, 1887, for the purpose of obtaining the annulment and cancellation of the bonds, compelling the defendant, Lytle, to deliver them up for cancellation, and also enjoining him from transferring them pending the suit. Lytle removed the action to the circuit court of the United States, and filed a cross bill to compel the payment of the bonds. In March, 1889, the court rendered a decree in favor of the town of Lansing, (38 Fed. Rep. 204,) from which Lytle took an appeal to this court.

T. G. Shearman and E. P. Wheeler, for appellant. H. V. Howland, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

As the bonds in this case, though good upon their face, were undoubtedly void as between the railroad company and the town of Lansing, it is incumbent upon the defendant, Lytle, to show that he, or some one through whom he obtained title to them, was a bona fide purchaser for a valuable consideration. Orleans v. Platt, 99 U. S. 676.

The judgment of the supreme court of the state of New York, holding these bonds to be invalid, must be respected by this court, not only because it passed upon the validity of acts done in alleged pursuance of a statute, but because in a collateral proceeding of this kind its binding effect could only be avoided by showing a total lack of jurisdiction on the part of the court. When these bonds were before this court in the case of Stewart v. Lansing, 104 U. S. 505, it was held that the judgment of the supreme court reversing and annulling the order of the county judge invalidated them, that if they had not been delivered before, they could not be afterwards, and that the judgment of reversal was equivalent between those parties to a refusal by the county judge to make the original order. It was further held that, the actual illegality of the paper being established, it was incumbent upon the plaintiff to show that he occupied the position of a bona fide holder before he could recover. In such a case, however, the plaintiff fulfills all the requirements of the law by showing that either he, or some person through whom he derives title, was a bona fide purchaser for value without notice. Commissioners v. Bolles, 94 U. S. 104; Montclair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. Rep. 391; Scotland Co. v. Hill, 132 U. S. 107, 10 Sup. Ct. Rep. 26.

We proceed to examine the title of the several holders of these bonds from the time they were delivered to the railroad company, which, of course, was not a bona fide holder, to the time they came into possession of the plaintiff.

1. Leonard, Sheldon & Foster. These were New York bankers, to whom the bonds were pledged as security for a loan of $50,000 to the railroad company. They also received them with power and instruction from the company to sell them. It is sufficient to say, in this connection, that this firm never purchased the bonds, that they continued to be the property of the railroad company while in their hands, and that while, doubtless, they would have been protected as bona fide holders to the amount of their advances, they never took title to the bonds, and when they transferred them to Elliott, Collins & Co., and received from them the amount of their advances, they transferred them as the property of the railroad company, and their interest in them from that time wholly ceased.

2. Elliott, Collins & Co. took up the loan of the prior firm upon the written order of the treasurer of the company, and stood in the same position they had occupied. They subsequently sold the bonds for the railroad company for $54,337.50, paid their loan to the amount of $49,591.67, and credited the company with a balance of $4,745.83. It does not appear to whom they sold them, but it does appear that they never took title to themselves. It is significant, in this connection, that in the suit of Stewart v. Lansing Mr. Elliott, the senior member of the firm, stated: "We did not sell the bonds at all. * * * They were negotiated by Mr. Delafield [the treasurer of the company] either personally or by letter."

*3. John J. Stewart appears as the next holder of these bonds. There is no evidence whatever to show how Stewart, who lived in New Orleans, became possessed of them, or even that he paid value for them, or that he took them without notice of their original invalidity. It does appear, however, that a suit against the town was brought in his name to recover the amount of certain overdue coupons, that judgment went for the defendant, and that such judgment was affirmed by this court in Stewart v. Lansing, 104 U. S. 505. It was held by this court in that case that it was clearly shown that, although Elliott, Collins & Co. "parted with" the bonds, they did not sell them, nor was the sale negotiated by the firm, and that the bonds only passed through their hands upon terms which had been agreed upon by others; that Stewart, the plaintiff, was not known to any of the witnesses examined; that no one had ever seen him; and that the sale, if actually made, was at an enormous discount. Under these circumstances, it was held that there was no such evidence of bona fide ownership in the plaintiff as would require the case to be submitted to the jury.

The only additional testimony in this case with regard to the ownership of Stewart tends to show that he was an actual person, well known in New Orleans, and living there. Although he appears to have been living when the testimony was taken, no effort seems to have been made to secure his deposition. There is nothing tending to show

that he was a bona fide purchaser for value.

4. George W. Brackenridge, president of the National Bank of San Antonio, Tex., claims to have purchased these bonds of John J. Stewart, giving him therefor a check for $50,000 on the Louisiana National Bank. It is somewhat singular that this check was payable to and indorsed by James J. Stewart, and no explanation is given why, if the sale were made by John, the consideration was paid to James. Nor was the check produced by the witness himself, but by the cashier of the bank upon which it was drawn. In the ordinary course of business, checks are returned by the bank to the drawer; but in this case the check was produced by the bank five or six years after it was drawn. Mr. Brackenridge says there was no special agreement for the purchase of the bonds; that he understood they were for sale, and had been notified that he could purchase them; that at the time he gave the check the bonds were delivered to him in Stewart's office, in New Orleans; that the conversation with Stewart made very little impression upon him at the time; and that he had not the slightest idea that the bonds were invalid, and believed "they were like some San Antonio bonds that were held void in the state courts, but when sued on in the federal courts they were declared legal and valid." He further stated that he had dealt heavily in Texas bonds, but had never bought any municipal bonds from other states until he bought these, and that he was not acquainted in Tompkins county before he purchased them. He was not able to state even the year he bought them of Stewart. He swears he did not open the package in which they were delivered to him, even after he had returned with them to San Antonio, and that he supposes the coupons were attached to the bonds. He subsequently cut off some of the coupons, and two actions appear to have been brought by him upon them. Upon his examination in one of these prior cases he stated that he purchased them upon the recommendation of Mr. Stillman, of New York, and that at the price at which they were offered he thought they were a good purchase; that he did not know whether, in recommending the bonds, Stillman was serving himself or was serving him, and did not know whether they belonged to him or some one else; that his correspondence with Stillman was by letters, which he was unable to produce; that he gave $50,000 for the $75,000 of bonds, with $26,000 of dishonored coupons attached; and that he thought he was buying a bond that was perfectly good in the federal courts, but that recovery in the state courts would be doubtful. Upon this examination he stated that he left the bonds in the Louisiana National Bank for several months; then took them out personally, carried them to New York, took them to Mr. Stillman, who had recommended him to buy them, to know whether he bought them for his (Stillman's) account, or for his own. "At the time I bought them I did not know whether it was for my account, or whether he wanted some interest in them." Stillman assured him the bonds were perfectly good, but would not say positively whether he should keep them for his own account or not. He says he wanted a definite understanding on the subject, but does not seem to have secured it. He subsequently put them in the hands of attorneys in New York to whom he had been recommended by Stillman.

The substance of this testimony is that Mr. Brackenridge went through the form of purchasing these bonds of Stewart, and gave him a check for $50,000 for them; but the testimony leaves but little doubt that the purchase was a mere form, and was made upon the advice of Stillman, and in pursuance of correspondence, which was not produced. It is incredible that a man should purchase this large amount of bonds for half their face value without looking at them, or even noticing whether they were signed or sealed, without making any inquiries with regard to the responsibility of the town, or the circumstances under which the bonds were issued, the nonpayment of the overdue coupons, or the title of the person—to him an entire stranger—through whom he purchased them. His subsequently taking them to New York, and asking Stillman whether he purchased them for his (Stillman's) account, or on his own, indicates very clearly that this was never intended as a bona fide investment by Brackenridge. If the bonds were valid at all, he must have known they were worth very nearly, if not quite, their face value; and the very fact that bonds to this large amount were offered for sale at this large discount, at a place 2,000 miles from where they were issued, was of itself a circumstance calculated to arouse suspicion of their validity in the mind of any person of ordinary intelligence.

5. John T. Lytle, the plaintiff. Lytle purchased the bonds of Brackenridge. He is, and has been since 1860, a stock raiser in Medina county, Tex., and prior to May, 1884, had acquired a tract of 40,000 acres of land on the Frio river, where he pastured some 2,500 cattle. The tract was worth $4 per acre, and he owned a half interest with one McDaniel. He had been intimately acquainted with Brackenridge since 1871, and, in a conversation in 1884, agreed to sell him one third of his interest in the Frio property for these $75,000 of bonds. He made no inquiry with regard to the bonds, but was told by Mr. Brackenridge that they were good. The bonds were delivered to him at the San Antonio National Bank, and Lytle gave him a receipt for the one-third interest in the property. This was six or eight weeks after the agreement was made. He cut off the July coupons in time for presentation for payment, and the January coupons as they became due, and sent them to the attorneys in New York to whom Mr. Stillman had recommended Mr.

Brackenridge. This was the last time he saw the bonds. The Frio property was subsequently conveyed to the San Antonio Ranch Company. It does not appear upon what day the deed was made, but, as the company was not organized or chartered until January 29, 1883, it must be presumed that it was not before that time. One third of the stock in this company was issued to Mr. Brackenridge, who was made president. Brackenridge, he says, retained no interest in the bonds.

Upon cross-examination he says the bargain was consummated at the first interview; that 10 or 15 days thereafter he gave Brackenridge a receipt for the bonds in payment for the one-third interest in the ranch, and they were then transferred to his credit, though not actually produced. Upon the same day, and some two or three hours thereafter, he saw the bonds for the first time. There were coupons upon them, but none that were matured. He gave them to the cashier, and told him to take care of them for him, and he has not seen them since he cut off the coupons for transmission to his attorneys. In the summer or fall of 1884 he received a letter from his attorneys, informing him of some difficulty with regard to the bonds, when Mr. Brackenridge told him he had a suit pending about the coupons. He says he first learned that the town claimed to have a defense to these bonds at the time he cut off the coupons, which was about six weeks or two months after the bonds were delivered to him by Brackenridge. He further states that Brackenridge had an interest with him in another ranch, or rather cattle, worth $180,000, the title to which stood in the name of Lytle & Co., a partnership. The Frio ranch cost Lytle and McDaniel $66,000, and was deeded to the San Antonio Ranch Company, a corporation with a capital stock of $500,000, of which Brackenridge took one third, less $60,000, which was taken out in the matter of the purchase of the property that belonged to Lytle and McDaniel before the formation of this company, in which Brackenridge had no interest.

Mr. Brackenridge swears that he wanted an interest in the Frio ranch, as it was one of the best in the country, and told plaintiff it would be better for him to take a third interest, and offered to give him these bonds; that he considered them good, and worth as much as the property. He finally accepted the proposition. He gave practically the same account of what took place at the time that the plaintiff did; that the property was subsequently turned over to the San Antonio Ranch Company, in which he received stock to the amount of $60,000. His testimony also indicates that, prior to the purchase of the Frio property, he had a third interest in cattle worth $180,000, having assisted Lytle and McDaniel to purchase the same by a contribution of $60,000. These cattle, as well as the Frio ranch, made up the capital of the ranch company, which was valued at $500,000.

In view of the fact that a prior suit was brought upon coupons of these bonds, which was unsuccessful, and that an effort has undoubtedly been made by some one who is or was interested in them to get them into the hands of a bona fide purchaser, it is natural that their alleged ownership should be looked upon with some suspicion, and the circumstances under which they came into the hands of the present holder should be critically examined, and all the testimony upon the subject of his bona fides carefully scanned. It is certainly an unusual proceeding for a stock farmer to trade the bulk of his property for bonds about which he knows nothing, and which he does not take the trouble to look at, upon the bare assurance of his vendor that they are good, though such vendor be his own banker, with whom he had been on intimate terms for years. According to his story, the sale was merely an offhand affair, not preceded by any of the negotiations which usually accompany purchases of large amounts of land; the whole thing being a mere suggestion on the part of Brackenridge that he would like an interest in the ranch, and an instant acceptance of the proposition by Lytle. In his own words: "He said he had so many bonds. He said he had $75,000 of bonds that he would give me for a third interest in my ranch,—in the Frio ranch. He said the bonds were good. I told him all right; I would sell him the third interest. He said 'all right; consider it a trade.' That was all that was said."

It is significant of the carelessness with which the trade was conducted that a receipt was given for "county bonds" as "part payment for a one-third interest in our Frio ranch and stock, located on the Frio river," and was signed by "Lytle and McDaniels," when the bonds were not county bonds, the payment was in full, the sale did not include the stock, and the transaction was with Lytle alone. After he had cut the coupons off, he returned the bonds to the bank, where he supposed they remained ever since, though at the time he was sworn in New York they were produced by his attorneys, and identified by him.

Granting that all these peculiarities may be explained by the confidence which an inexperienced farmer might repose in a friend of long standing, his own testimony shows that in the latter part of the summer or in the fall of 1884 he heard from his attorneys in New York that there was some difficulty about the bonds, and that he then talked the matter over with Mr. Brackenridge, who told him that he had a suit pending about some of the coupons. And, again, he says: "We have talked the matter over, as I have said, at different times. I expect he explained it all to me." While he does not state fully the scope of his information, he was undoubtedly apprised of the fact that the town claimed a

defense to the bonds, and that a suit upon the coupons was being contested.

It is singular as matter of fact, and fatal to a recovery as matter of law, that the plaintiff did not act upon the information thus received, and at once repudiate the transaction, and refuse to consummate the sale by a deed of the property to the ranch company. Instead of that, he seems to have received the announcement with the utmost unconcern, as if it were a matter in which he had no interest, and, some time subsequent to the 28th of January following, he made a deed of the property to the ranch company. He made no complaint of having been misled by Brackenridge, although no court, under the circumstances, would have enforced the contract of May 24, 1884, even if it were valid under the statute of frauds.

As early as 1823 it was held by this court in Wormley v. Wormley, 8 Wheat. 421, 449, to be "a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract of conveyance, but at the time of the payment of the purchase money." Such is undoubtedly the law. Swayze v. Burke, 12 Pet. 11; Tourville v. Naish, 3 P. Wms. 306; Paul v. Fulton, 25 Mo. 156; Dugan v. Vattier, 3 Blackf. 245; Patten v. Moore, 32 N. H. 382; Blanchard v. Tyler, 12 Mich. 339; Palmer v. Williams, 24 Mich. 328; Jackson v. Cadwell, 1 Cow. 622. It is insisted, however, that this principle has no application to the purchase of negotiable instruments like the bonds in question. We know of no such distinction, however, and in the case of Dresser v. Construction Co., 93 U. S. 92, the rule was expressly applied to a purchaser of negotiable paper. In that case the plaintiff purchased the notes in controversy, and paid $500 as part of the consideration, before notice of any fraud in the contract; and it was held that if, after receiving notice of the fraud, he paid the balance due upon the notes, he was only protected pro tanto,—that is, to the amount paid before he received notice; citing Weaver v. Barden, 49 N. Y. 286; Crandall v. Vickery, 45 Barb. 156; Allaire v. Hartshorne, 21 N. J. Law, 665.

While the notice received by the plaintiff may not have gone to the extent of informing him of the particular facts showing the invalidity of the bonds, he was informed that the town was contesting its liability, and that Brackenridge himself was in litigation with it over the payment of the coupons. Receiving this information as he did, not only from his vendor, but from his own attorneys, from whom he could have learned all the facts by inquiry, it is mere quibbling to say that he had no notice that the bonds were invalid. While purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities, it has never been doubted, as was said in Scotland Co. v. Hill, 112 U. S. 183, 185, 5 Sup. Ct. Rep. 93, that those who buy such securities from litigating parties, with actual notice of a suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. Under the circumstances, it was bad faith or willful ignorance, under the rule laid down in Goodman v. Simonds, 20 How. 343, and Murray v. Lardner, 2 Wall. 110, to forbear making further inquiries. No rule of law protects a purchaser who willfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it.

Upon the whole, it is impossible to avoid the conclusion that the purchases of these bonds by Brackenridge and Lytle were never made in good faith, but were merely fictitious, and that their real ownership is still in some one, who is affected with notice of their invalidity, and has endeavored by feigned transfers to get them into the hands of some one who can pose before the court as a bona fide purchaser.

The judgment of the court below is therefore affirmed.

(146 U. S. 513)

MITCHELL v. NEW YORK, L. E. & W. R. CO.

(December 12, 1892.)

No. 71.

CARRIERS—INJURY TO TRESPASSER — NEGLIGENCE.

Plaintiff's intestate, without permission, and without paying fare, climbed upon a coal train to ride through a tunnel, placing himself upon the end of a car, with his feet hanging between that and the adjoining car. From this position he was thrown between the cars by a sudden jerk, and received injuries from which he died. *Held*, that the railroad company was not liable in damages.

In error to the circuit court of the United States for the southern district of New York.

Action by John Mitchell, as administrator of Lawrence Mitchell, his deceased son, against the New York, Lake Erie & Western Railroad Company, to recover damages for causing the death of the said Lawrence Mitchell through the alleged negligence of defendant and its servants. The accident occurred about half past 9 o'clock in the evening of November 15, 1887. The plaintiff's son, a lad about 16 years old, with his brother and several others, was returning to Jersey City from the country. A train of coal cars was standing at the entrance of the Bergen tunnel, and the boys climbed upon it, intending to ride through the tunnel, (which is about a mile long,) into Jersey City. Each boy was upon a different car, sitting on the coal. Plaintiff's son sat on top, at the end of the car, his feet hanging down over between the cars. The boys were not ordered to get off of the train, although the evidence tended to show that at least one of them was seen by a brakeman of the company. As the train approached First street there was a sudden jerk, and plaintiff's son was seen to fall down between the cars. He was found lying along

the side of the track, with one leg off, and died two days afterwards from the effect of the injury. There was evidence tending to show that it was a frequent occurrence for people to ride through this tunnel on coal trains, without objection from the company's servants. Upon these facts the court directed a verdict for the defendant, saying: "I think it cannot be maintained, on the evidence in this case, that the railroad company was under a carrier's obligation towards the deceased, as a passenger. It only owed him the duty of exercising ordinary care, which every person must exercise, not to inflict unnecessary injury upon another. In this case there is no evidence of negligence whatever. If the deceased had been a passenger, towards whom the obligation of a carrier is almost that of an insurer,—that is, the obligation to take the utmost care of which human skill and intelligence is capable,—you might say that, from the circumstances of the injury, there was a presumption of negligence. Here there was a sudden jerk of the train, which we all know is a very common occurrence with trains of this kind, and the deceased fell off. He had put himself where he was exposed to just that hazard. I don't think there is any case of negligence on the part of the defendant, and I think, in the case of a young man of sixteen or seventeen years old,—a bright, intelligent young fellow like the deceased,—you cannot apply to the facts here any different rule of obligation or of contributory negligence than would be applied towards an adult. You cannot term him an infant of tender years, and I see no possible theory upon which you can recover.

"I will direct a verdict for the defendant, on the ground that there is not sufficient evidence to justify a recovery upon the case, as it stands. There is not sufficient evidence of negligence on the part of the defendant, and the evidence proves concurring negligence on the part of the deceased."

Hermon H. Shook, for plaintiff in error.
Charles Steele and William D. Guthrie, for defendant in error.

*514 *THE CHIEF JUSTICE. A verdict for the defendant was directed in this case on the ground that there was not sufficient evidence to justify a recovery. We concur in that view, and therefore affirm the judgment.

Judgment affirmed.

(146 U. S. 619)

BROWN v. MARION NAT. BANK OF LEBANON.

(December 19, 1892.)

No. 1,123.

APPEAL—FINAL JUDGMENT.

A judgment of the highest court of a state, reversing a judgment on appeal, affirming it on a cross appeal, and remanding the cause for further proceedings, is not a "final judgment," from which an appeal will lie to the supreme court of the United States.

In error to the court of appeals of the state of Kentucky.

Action in the circuit court of Marion county, Ky., by John Q. Brown, assignee for the benefit of creditors of Lafayette Baxter and E. B. Baxter, joining with him his assignors, against the Marion National Bank of Lebanon, Ky., to recover certain payments of usurious interest. The assignee had previously instituted a suit in equity in the same court for the settlement of his trust, and for distribution of the assets among creditors, in which the defendant had presented and filed the notes mentioned for payment. These two cases were consolidated below. The notes on which the usury was paid bore interest at 7 per cent., the legal rate in Kentucky being 6 per cent., and had been many times renewed, accrued interest being added to the principal. The judgment was, in substance, for twice the amount of $297.25, made up of the following recited sums paid as interest on two notes within two years prior to the institution of the first-mentioned action at a greater rate than 6 per cent., to wit: On a note for $4,500, $160 paid November 1, 1889, and $107 paid May 4, 1890, and on a note for $650, $15 paid January 24, 1890, and $15 September 30, 1890. It was at the same time further adjudged that the entire interest carried by the several notes filed should be forfeited, and that only the principal was payable out of the trust estate. The judgment was at the time excepted to by plaintiff, because—First, $160.25, interest paid April 29, 1889, on the note for $4,500, was not included; second, only interest on the several notes was adjudged forfeited, whereas, all that had accrued previous to the respective dates of, and included in the amounts of, them should have been. On these grounds plaintiff appealed to the court of appeals of the state. The defendant also, by a cross appeal, sought a reversal on the ground that it was entitled to interest at 6 per cent. from the date of the judgment, and that the judgment failed to provide therefor. In the court of appeals an opinion was delivered, (18 S. W. Rep. 635,) in w hich, among other things, it was said: "Although there were four notes, upon each of which a greater rate of interest than allowed in this state, which is 6 per cent., is alleged to have been paid, judgment was rendered for that charged by and paid to appellee on two only; but as no exception was taken, nor any complaint is now made of the apparent omission, we must assume there is no error on that account. We think, however, appellant is entitled to judgment for twice the amount of $160.25 paid April 29, 1889, on the note for $4,500, in addition to the sums recited; for the action appears to have been commenced April 25, 1891, within two years after the payment, and it is expressly admitted in the answer of appellee. But the other exception seems to us not well

taken; for, according to the evident meaning of the section quoted, [Rev. St. U. S. § 5198,] taking, receiving, or charging by a national bank, in this state, a rate of interest greater than 6 per cent., is to be deemed a forfeiture of the entire interest which an existing note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; not such interest as may have been carried with or agreed to be paid on a note already canceled, either by payment or by renewal, whereby what was before interest has become interest-bearing principal." "By the judgment, appellee was authorized to prove and present against the estate held by appellant in trust the demands of which the notes in question are evidence, and to receive pro rata the amount thereof, less interest. Such demands, when evidenced by judgment therefor, or, what is equivalent, when reported to court and allowed, of course, bear interest, but not before; and, as the judgment in this case is not inconsistent with such view, it must be affirmed on cross appeal, but, for the reason indicated, reversed on the appeal, and remanded for further proceedings." The court of appeals therefore entered the following judgment: "It is therefore considered that said judgment be reversed on the original appeal, and affirmed on the cross appeal, and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court." From this judgment the plaintiff sued out a writ of error to this court. Writ dismissed.

T. L. Burnett and H. M. Lane, (Rives & Spalding, on the brief,) for plaintiff in error.
W. J. Lisle, for defendant in error.

*THE CHIEF JUSTICE. The writ of error is dismissed, upon the authority of Meagher v. Manufacturing Co., 145 U. S. 608, 12 Sup. Ct. Rep. 876; Rice v. Sanger, 144 U. S. 197, 12 Sup. Ct. Rep. 664; Johnson v. Keith, 117 U. S. 199, 6 Sup. Ct. Rep. 669.

(147 U. S. 101)

LAKE SHORE & M. S. RY. CO. v. PRENTICE.

(January 3, 1893,)

No. 58.

CARRIERS — WRONGFUL ARREST OF PASSENGER — PUNITIVE DAMAGES — FOLLOWING STATE DECISIONS.

1. The question whether a railroad corporation can be charged with punitive damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger is a question, not of local law, but of general jurisprudence, upon which the judgment of the supreme court of the United States, in the absence of express statute regulating the subject, is not controlled by decisions of state courts.

2. For wrongful arrest of a passenger on a railway train by the conductor, the railroad company is not liable to punitive damages, in addition to such damages as will compensate the passenger for his outlay and injured feelings, merely on the ground that the conductor's illegal conduct was wanton and oppressive, where it is not shown that he was known to the company to be an unsuitable person, or that it participated in, approved, or ratified his treatment of the passenger.

In error to the circuit court of the United States for the northern district of Illinois.

Action by Chalmer M. C. Prentice against the Lake Shore & Michigan Southern Railway Company to recover damages for unlawful arrest of plaintiff, while a passenger, by the conductor of one of the company's trains. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Statement by Mr. Justice GRAY:

This was an action of trespass on the case, brought October 19, 1886, in the circuit court of the United States for the northern district of Illinois, by Prentice, a citizen of Ohio, against the Lake Shore & Michigan Southern Railway Company, a corporation of Illinois, to recover damages for the wrongful acts of the defendant's servants.

The declaration alleged, and the evidence introduced at the trial tended to prove, the following facts: The plaintiff was a physician. The defendant was engaged in operating a railroad, and conducting the business of a common carrier of passengers and freight, through Ohio, Indiana, Illinois, and other states. On October 12, 1886, the plaintiff, his wife, and a number of other persons were passengers, holding excursion tickets, on a regular passenger train of the defendant's railroad, from Norwalk, in Ohio, to Chicago, in Illinois. During the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train, learning this, and knowing that the plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employe of the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff, and rudely searched him for weapons, in the presence of the other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating him with his fellow passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where's your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and, in the presence of the passengers and others, ordered him to be taken to the station house, and he was forcibly taken there, and detained until the

conductor arrived; and, knowing that the plaintiff had been guilty of no offense, entered a false charge against him of disorderly conduct, upon which he gave bail and was released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged.

The declaration alleged that all these acts were done by the defendant's agents in the line of their employment, and that the defendant was legally responsible therefor; and that the plaintiff had been thereby put to expense, and greatly injured in mind, body, and reputation.

At the trial, and before the introduction of any evidence, the defendant, by its counsel, admitted "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor;" but afterwards excepted to each of the following instructions given by the circuit judge to the jury:

"If you believe the statements which have been made by the plaintiff and the witnesses who testified in his behalf, (and they are not denied,) then he is entitled to a verdict which will fully compensate him for the injuries which he sustained, and in compensating him you are authorized to go beyond the amount that he has actually expended in employing counsel; you may go beyond the actual outlay in money which he has made. He was arrested publicly, without a warrant, and without cause; and if such conduct as has been detailed before you occurred, such as the remark that was addressed by the conductor to the wife in the plaintiff's presence, in compensating him you have a right to consider the humiliation of feeling to which he was thus publicly subjected. If the company, without reason, by its unlawful and oppressive act, subjected him to this public humiliation, and thereby outraged his feelings, he is entitled to compensation for that injury and mental anguish."

"I am not able to give you any rule by which you can determine that; but, bear in mind, it is strictly on the line of compensation. The plaintiff is entitled to compensation in money for humiliation of feeling and spirit, as well as the actual outlay which he has made in and about this suit."

*104 "And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' if you are satisfied that the conductor's conduct was illegal, (and it was illegal,) wanton, and oppressive. How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant."

"If a public corporation, like an individual, acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power."

The jury returned a verdict for the plaintiff in the sum of $10,000. The defendant moved for a new trial, for error in law, and for excessive damages. The plaintiff thereupon, by leave of court, remitted the sum of $4,000, and asked that judgment be entered for $6,000. The court then denied the motion for a new trial, and gave judgment for the plaintiff for $6,000. The defendant sued out this writ of error.

Geo. C. Greene, for plaintiff in error. W. A. Foster, for defendant in error.

*Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court. *103

The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers,—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment,—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states. Railroad Co. v. Lockwood, 17 Wall. 357, 368; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. Rep. 469; Myrick v. Railroad Co., 107 U. S. 102, 109, 1 Sup. Ct. Rep. 425; Hough v. Railway Co., 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment, under general warrants of the secretary of state, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the chief justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the fu- *105

ture, and as a proof of the detestation of the jury to the action itself." Wilkes v. Wood, Lofft, 1, 18, 19, 19 Howell, St. T. 1153, 1167, See, also, Huckle v. Money, 2 Wils. 205, 207; Sayer, Dam. 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559; Day v. Woodworth, 13 How. 363, 371; Railroad Co. v. Quigley, 21 How. 202, 213, 214; Railway Co. v. Arms, 91 U. S. 489, 493, 495; Railway Co. v. Humes, 115 U. S. 512, 521, 6 Sup. Ct. Rep. 110; Barry v. Edmunds, 116 U. S. 550, 562, 563, 6 Sup. Ct. Rep. 501; Railway Co. v. Harris, 122 U. S. 597, 609, 610, 7 Sup. Ct. Rep. 1286; Railway Co. v. Beckwith, 129 U. S. 26, 36, 9 Sup. Ct. Rep. 207.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of The Amiable Nancy, 3 Wheat. 546.

In that case, upon a libel in admiralty by the owner, master, supercargo, and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story, speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them; and, if this were a suit against the original wrongdoers, it might be proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. Manufacturing Co. v. Fiske, 2 Mason, 119, 121. In Keene v. Lizardi, 8 La. 26, 33. Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are The State Rights, Crabbe, 42, 47, 48; The Golden Gate, McAll. 104; Wardrobe v. Stage Co., 7 Cal. 118; Boulard v. Calhoun, 13 La. Ann. 445; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Grund v. Van Vleck, 69 Ill. 478, 481; Becker v. Dupree, 75 Ill. 167; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. Rep. 93; Kirksey v. Jones, 7 Ala. 622, 629; Pollock v. Gantt, 69 Ala. 373, 379; Eviston v. Cramer, 57 Wis. 570, 15 N. W. Rep. 760; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. Rep. 488; McCarthy v. De Armit, 99 Pa. St. 63, 72; Clark v. Newsam, 1 Exch. 131, 140; Clissold v. Machell, 26 U. C. Q. B. 422.

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances. Railroad Co. v. Quigley, 21 How. 202, 210; Bank v. Graham, 100 U. S. 699, 702; Salt Lake City v. Hollister, 118 U. S. 256, 261, 6 Sup. Ct. Rep. 1055; Railway

Co. v. Harris, 122 U. S. 597, 608, 7 Sup. Ct. Rep. 1286.

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. Railroad Co. v. Derby, 14 How. 468; Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. Rep. 1039; Howe v. Newmarch, 12 Allen, 49; Ramsden v. Railroad Co., 104 Mass. 117. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. Railroad Co. v. Quigley, 21 How. 202, 211; Salt Lake City v. Hollister, 118 U. S. 256, 262, 6 Sup. Ct. Rep. 1055; Reed v. Bank, 130 Mass. 443, 445, and cases cited; Krulevitz v. Railroad Co., 140 Mass. 573, 5 N. E. Rep. 500; McDermott v. Journal, 43 N. J. Law, 488, and 44 N. J. Law, 430; Bank v. Owston, 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now chief justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." Lothrop v. Adams, 133 Mass. 471, 480, 481.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In Detroit Daily Post Co. v. McArthur, in Eviston v. Cramer, and in Haines v. Schultz, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in Haines v. Schultz the supreme court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground,—wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive, cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine respondeat superior." 50 N. J. Law, 484, 485, 14 Atl. Rep. 488. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and, where it has been held that he can, it is admitted to be an anomaly in the criminal law. Com. v. Morgan, 107 Mass. 199, 203; Reg. v. Holbrook, 3 Q. B. Div. 60, 63, 64, 70, 4 Q. B. Div. 42, 51, 60.

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. Railroad Co. v. Quigley, Railway Co. v. Arms, and Railway Co. v. Harris, above cited; Caldwell v. Steamboat Co., 47 N. Y. 282; Bell v. Railway Co., 10 C. B. (N. S.) 287, 4 Law T. (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. Rep. 696; Meagher v. Driscoll, 99 Mass. 281, 285; Smith v. Holcomb, Id. 552; Hawes v. Knowles, 114 Mass. 518; Campbell v. Car Co., 42 Fed. Rep. 484.

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor," the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that, "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called 'smart money,'" if they were "satisfied that the conductor's conduct was illegal, wanton, and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents.

In Railroad Co. v. Derby, which was an action by a passenger against a railroad corporation for a personal injury suffered through the negligence of its servants, the jury were instructed that "the damages, if

any were recoverable, are to be confined to the direct and immediate consequences of the injury sustained;" and no exception was taken to this instruction. 14 How. 470, 471.

In Railroad Co. v. Quigley, which was an action against a railroad corporation for a libel published by its agents, the jury returned a verdict for the plaintiff under an instruction that "they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to the plaintiff, and act as an adequate punishment to the defendant." This court set aside the verdict, because the instruction given to the jury did not accurately define the measure of the defendant's liability; and, speaking by Mr. Justice Campbell, stated the rules applicable to the case in these words: "For acts done by the agents of the corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants." 21 How. 210, 213, 214.

In Railway Co. v. Arms, which was an action against a railroad corporation, by a passenger injured in a collision caused by the negligence of the servants of the corporation, the jury were instructed thus: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give the plaintiff punitive or exemplary damages." This court, speaking by Mr. Justice Davis, and approving and applying the rule of exemplary damages, as stated in Quigley's Case, held that this was a misdirection, and that the failure of the employes to use the care that was required to avoid the accident, "whether called 'gross' or 'ordinary' negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury." 91 U. S. 495.

In Railway Co. v. Harris, the railroad company, as the record showed, by an armed force of several hundred men, acting as its agents and employes, and organized and commanded by its vice president and assistant general manager, attacked with deadly weapons the agents and employes of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury "were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff." This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in Quigley's Case, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610, 7 Sup. Ct. Rep. 1286.

The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards chief justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such willfulness, reck-

lessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." Hagan v. Railroad Co., 3 R. I. 88, 91.

The like view was expressed by the court of appeals of New York, in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages, but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury "such sum for exemplary damages as the case calls for, depending in a great measure, of course, upon the conduct of the defendant," entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless, and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." Cleghorn v. Railroad Co., 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas, and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the western and southern states. But of the three leading cases on that side of the question, Hopkins v. Railroad Co., 36 N. H. 9, can hardly be reconciled with the later decisions in Fay v. Parker, 53 N. H. 342, and Bixby v. Dunlap, 56 N. H. 456; and in Goddard v. Railway Co., 57 Maine, 202, 228, and Railway Co. v. Dunn, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedg. Dam. (8th Ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict

was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

Mr. Justice FIELD, Mr. Justice HARLAN, and Mr. Justice LAMAR took no part in this decision.

(147 U. S. 91)

KNOX COUNTY v. NINTH NAT. BANK OF CITY OF NEW YORK.

(January 3, 1893.)

No. 78.

RAILROAD COMPANIES—MUNICIPAL AID—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

1. The question whether certain county bonds in aid of a railroad were issued under authority of Acts Mo. 1865, p. 86, § 13, and therefore payable only by levy of the tax thereby authorized to a limited amount each year, or under Gen. St. Mo. 1866, c. 63, § 17, in which case they would be payable without restriction as they fall due, is properly determinable in a suit on the bonds, and one to be finally settled by the judgment therein. Harshman v. Knox Co., 7 Sup. Ct. Rep. 1171, 122 U. S. 306, followed.

2. A recital on the face of county bonds that they are "issued under and pursuant to order of the county court * * * for subscription to the stock of the M. & M. R. R. Co., as authorized by an act * * * entitled 'An act to incorporate the M. & M. R. R. Co., approved Feb. 20, 1865,'" although it may estop the county in favor of the bondholder, is not conclusive in favor of the county, and the bondholder may introduce evidence to prove that the bonds were issued under authority of another statute. 37 Fed. Rep. 75, affirmed.

3. A county court, in an order for an election on the question of the issue of county bonds in aid of a railroad, directed that notice of the election be given through a certain newspaper for five weeks. The period between the date of the order, February 6th, and the date of the election, March 12th, excluding the former and including the latter day, according to the rule prescribed in Gen. St. Mo. 1866, p. 84, § 6, lacked one day of five full weeks, but the notice was not prescribed by statute. *Held*, that the order should be construed so as to make, if possible, a valid election, i. e. as requiring advertisement in five weekly issues of the paper.

4. The election was held, the votes canvassed by the proper officers, and an order made by the county court for the subscription in accordance with the terms of the order for the election. *Held*, that it might be presumed that proper notices of the election were given, under the rule that where the performance of a prior act is necessary to the legality of a subsequent act proof of the latter carries with it a presumption of the due performance of the former.

5. In a suit on county bonds in aid of a railroad, where the question is under which of two statutes they were issued, their validity being admitted, it is unnecessary to prove every separate step which otherwise might be required in order to show the legality of the issue under the statute for which the plaintiff contends. Any statement on the records of the county may be competent evidence, and from all the facts and circumstances it is to be determined under which statute the county proceeded.

6. Decisions of the supreme court of Missouri to the effect that under Gen. St. Mo. 1866, c. 63, § 17, the assent of two thirds of all the registered voters is necessary to render valid an issue of county bonds in aid of a railroad, are not binding upon a federal court so as to require it to declare invalid an issue of bonds made before such decisions were rendered, and approved by two thirds of those actually voting, being a less number than two thirds of the registered voters.

7. In a suit on county bonds in aid of a railroad, where the question involved is under which of two statutes the bonds were issued, the whole conduct of the county, both before, at the time, and after the issue of the bonds, may be shown to aid in determining the question, and the bondholder may offer in evidence tax levies for several years after the issue of the bonds, entries on the bond register of the county, and a financial statement of the county, published by the direction of the county court.

8. Under Gen. St. Mo. 1866, c. 63, § 17, an issue of bonds in aid of a railroad pursuant to a vote wherein merely the route of the railroad is designated, is valid, the county authorities having the right to select the particular corporation to be the recipient of the subscription. 37 Fed. Rep. 75, affirmed. Commissioners v. Thayer, 94 U. S. 631; Scipio v. Wright, 101 U. S. 665,—followed.

9. Const. Mo. adopted July 4, 1865, art. 11, § 14, provided that the legislature should not authorize any county to loan its credit in aid of any corporation unless two thirds of the qualified voters should assent, and a general law to carry out this provision was enacted. Prior to the adoption of the constitution a special act had authorized county courts to loan the credit of counties in aid of a certain railroad without the assent of the voters, and in 1867 the state supreme court decided in State v. Macon County Court, 41 Mo. 453, that this prior act was not repealed by the constitution. Before this decision, the question being a doubtful one, a county court had ordered an election, and issued bonds in aid of a railroad pursuant to a two-thirds vote of the people assenting thereto, but the bonds bore on their face a recital that they were issued under authority of the special act. *Held*, that the bondholder had a right to treat the bonds as if issued under authority of the general act, and was entitled to all the remedies given thereby. 37 Fed. Rep. 75, affirmed.

In error to the circuit court of the United States for the eastern district of Missouri.

Action by the Ninth National Bank of the city of New York against Knox county, in the state of Missouri, to recover upon certain county bonds and coupons. Verdict and judgment for plaintiff. New trial denied. 37 Fed. Rep. 75. Defendant brings error. Affirmed.

Statement by Mr. Justice BREWER:

On February 20, 1865, the legislature of the state of Missouri passed an act to incorporate the Missouri & Mississippi Railroad Company. Sess. Acts 1865, p. 86. Section 7, prescribing the route of said road, reads:

"Sec. 7. Said board of directors shall have full power and authority to survey, mark out, locate, and construct a railroad from the town of Macon, in the county of Macon, in the state of Missouri, through the town of Edina, in the county of Knox, in said state, and thence to or near the northeast corner of said state, in the direction of Keokuk, in Iowa, or Alexandria, Missouri."

By section 13 it was provided:

"Sec. 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and they may issue bonds therefor and levy

a tax to pay the same, not to exceed one twentieth of one per cent. upon assessed value of taxable property for each year."

Chapter 63 of the General Statutes of Missouri of 1866 is a general statute in reference to railroad companies. Section 17 of that chapter is as follows:

"Sec. 17. It shall be lawful for the county court of any county, the council of any city, or the trustees of any incorporated town, to take stock for such county, city, or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the state: provided, that two thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription." Gen. St. Mo. 1866, p. 338; 1 Wag. St. 1870, p. 305.

On October 1, 1867, and on February 1, 1868, the county of Knox issued $100,000 in 10-year bonds to the Missouri & Mississippi Railroad Company. The body of the bond is in these words:

"Know all men by these presents, the county of Knox, state of Missouri, acknowledges itself indebted to the Missouri and Mississippi Railroad Company (organized by an act of the general assembly of the state of Missouri) or bearer, in the sum of $500.00, which said sum the said county promises to pay at the National Bank of Commerce in the city of New York, * * * with interest at 7 per cent. per annum, which interest shall be payable annually on presentation of the coupon hereto annexed at said National Bank of Commerce in the city of New York; this bond being issued under and pursuant to order of the county court of Knox county, for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the general assembly of the State of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865."

On June 14, 1884, the defendant in error, claiming to be the owner of certain of these bonds, brought suit in the circuit court of the United States for the eastern district of Missouri. In the petition it was alleged that "all of said bonds and coupons were authorized, issued, and negotiated by said defendant county under and by authority of orders of the county court of said county, duly entered on the records of said court, and under and by the authority of a special election of the qualified voters of said Knox county, duly ordered and held under and according to the laws of Missouri, in said county, on the 12th day of March, 1867, at which election five hundred and ten votes were duly and legally cast in favor of making the subscription to the said company, and of issuing therefor the bonds herein described, and only ninety-eight votes were cast against the said subscription and issue of bonds." The answer admitted the issue of the bonds, but alleged that they were issued under the authority conferred upon the county court of Knox county by the thirteenth section of the act incorporating the Missouri & Mississippi Railroad Company, and expressly denied that they were "issued to said Missouri & Mississippi Railroad Company in payment of said subscription in compliance with a vote of the people of said county, as alleged in said petition." Upon these pleadings the case went to trial before a jury, which resulted in a verdict and judgment on March 7, 1888, in favor of the plaintiff for the amount due on the bonds and coupons, and an adjudication "that the bonds and coupons sued upon by plaintiff were duly issued by the defendant county under and by authority of order of the county court for that purpose, and under and by authority of a special election of the qualified voters of said county, duly ordered and held in said county for that purpose, at which more than two thirds of such qualified voters voting at said election voted for the subscription of stock and issue of said bonds and coupons, as charged in plaintiff's petition; and, further, said bonds and coupons, together with the subscription aforesaid, were duly authorized by a vote of the qualified voters of said county, taken according to the laws of the state of Missouri." To reverse which judgment the county sued out this writ of error.

Robt. G. Mitchell and B. R. Dysart, for plaintiff in error. John B. Henderson, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

No question arises in this case as to the amount of the judgment, or as to the validity of the bonds as obligations of Knox county. The answer in terms admitted the indebtedness, and the only question which was litigated was whether the bonds were issued solely under and by virtue of section 13 of the act incorporating the Missouri & Mississippi Railroad Company, or were supported by a vote of the people under the general railroad law. The difference between the two consists in this: If the bonds were issued under the general statute, and in pursuance of the vote of the people, they are payable without restriction as they fall due, and mandamus will lie to compel a levy sufficient to pay the judgment; if issued only under section 13 of the Missouri & Mississippi Railroad Company act, a special levy of not exceeding one twentieth of 1 per cent. of the assessed valuation for each year is all that can be enforced. U. S. v. County of Macon, 99 U. S. 582.

That this was a matter properly determinable in a suit on the bonds, and one to be finally settled by the judgment therein, is clear from the case of Harshman v. Knox Co., 122 U. S. 306, 7 Sup. Ct. Rep. 1171.

While the bonds on their face recite that

they are "issued under and pursuant to order of the county court of Knox county for subscription to the stock of the Missouri & Mississippi Railroad Company, as authorized by an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865," and while such a recital may be invoked by the holder of the bonds as an estoppel against the county, it is not conclusive in its favor as to the act under which the bonds were in fact issued. Commissioners v. January, 94 U. S. 202. The questions, therefore, to be considered are those which arise in respect to the admission of testimony, its sufficiency, and the instructions of the court. In reference to the former, it may be remarked that several witnesses were called, among them two who were county judges at the time the bonds were issued; that all were asked as to the talk which took place at the time the bonds were issued, and the county judges as to which act they relied upon in the issue of the bonds, and what they thought and intended in the matter. It is unnecessary to express an opinion as to the competency of this testimony, for no exceptions were taken to that which was offered by the plaintiff, and of course the defendant cannot allege error in the admission of that which it offered.

The record evidence consisted, among other things, of these matters: An order of the county court of Knox county, on February 6, 1867, upon a petition therefor, directing a special election to be held on the question of subscribing $100,000 to the stock of a railroad company constructing a road through Knox county, (no particular company was mentioned in the order, and three different lines of road were described, one of them similar to that named in the charter of the Missouri & Mississippi Railroad Company;) a record of the canvass of the votes at such election, showing 510 votes for and 98 votes against the subscription; and an order of the county court of May 13, 1867, authorizing the presiding justice of the court to subscribe in the name of the county of Knox for $100,000 of the capital stock of the Missouri & Mississippi Railroad Company. The terms of this subscription, as prescribed in this order, were the same as those in the order for an election, to wit, that the bonds should be used for work actually done on the road within the limits of Knox county. The plaintiff also introduced the orders of the county court with respect to the levy of taxes to pay the interest on these bonds for the years from 1868 to 1875, inclusive, which ranged from 30 to 75 cents on the $100, until the year 1875, when it was only 5 cents, or one twentieth of 1 per cent. It was admitted that in May, 1874, a decision of the supreme court of the state of Missouri was announced, (State v. Shortridge, 56 Mo. 126,) by which the power of county courts to levy taxes for the payment of bonds issued to the Missouri & Mississippi Railroad Company was limited to one twentieth of 1 per cent., as prescribed in section 13 of its charter, and that the order made by the county court of Knox county on the 23d of April of that year, levying 75 cents on the $100, was on the 1st day of June set aside, and a levy of 5 cents ordered. There was also offered in evidence a certified copy of certain leaves of the bond register of Knox county, showing a statement of the bonded debt outstanding January 1, 1874, on which is a minute that $100,000 of the bonds issued to the Missouri & Mississippi Railroad Company were "ordered by an election held 12th of March, 1867;" also a statement of the financial condition of the county, published in a county newspaper by order of the county court, in which was a substantially similar statement.

Upon this we notice two or three of the principal points made by counsel for plaintiff in error. The order for the election directed that notice thereof "be given through the Missouri Watchman for five weeks, and by printed handbills, publicly exposed through out the county." It also named the second Monday in March as the day for the election. No evidence was offered of any printed handbills, or of the publication of notice in the Missouri Watchman. It is insisted that, in the absence of evidence, there can be no presumption that notice was given either by handbills or in the newspaper; and, secondly, that between the date of the order (February 6th) and the date of the election (March 12th) it was not possible to make the prescribed publication, because, excluding the day of the order and including the day of the election, there would be only thirty-four days, or one day lacking the five full weeks. The statutes of Missouri at that time in force provided, in accordance with the general rule in respect to such matters, that "the time within which an act is to be done shall be computed by excluding the first day and including the last." Gen. St. Mo. 1866, p. 84, § 6. But the notice required for this election was not prescribed by statute. It was fixed by order of the county court, and, there being but thirty-four days between the day of the order and that named for the election, it must be presumed that what was intended was not a publication for five full weeks of seven days each, but a publication in each of the five weeks, which could easily be made in the thirty-four days. It cannot be supposed that the county court directed a notice which it was impossible to give, or that it was putting the people to the annoyance and the county to the expense of an election which was necessarily void by reason of an inability to comply with the terms of the order. The order must be construed so as to make possible a valid election, and that is accomplished by construing it, and in a reasonable way, as requiring advertisement in five successive weekly issues of the paper named.

Again, the election was held, the votes cast

at that election were canvassed by the proper officers, and an order made by the county court for a subscription in accordance with the terms of the order for the election. From these facts it may be presumed that proper notices of the election were given, for it is a rule of very general application that, where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act. In Bank v. Dandridge, 12 Wheat. 64, 70, it was said: "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office. Acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. * * * If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. * * * In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty."

But, further, the validity of the bonds is admitted by the answer, and therefore it is unnecessary to prove every separate step which otherwise might be required in order to show the legality of this issue. The inquiry here is, under what act and by what authority the county court issued them; and in determining that question any statement on the records of the county may be competent evidence, and from all the acts and circumstances it is to be determined under which act the county was proceeding. Suppose the bonds contained no recitals, but simply an acknowledgment of indebtedness, and in a suit on them their validity was admitted, and there were two statutes, under either of which the bonds might have been issued, a single entry on the records of the county might be sufficient, in the absence of all other testimony, to support a finding that the bonds were issued under one, rather than the other, statute. All that can be said from the omission to introduce in evidence a full recital of all the steps necessary to make a perfect proceeding under the general statute is that such omission detracts from the force of the testimony from the records and proceedings actually produced. In this respect it will be noticed that there is a marked difference between an omission to prove one step in a prescribed course of proceeding and evidence that such step was not taken, for, if it were established that one essential step in a course of proceeding required by one statute was not taken, it might well be held that the bonds admitted to be valid were in fact issued under the other statute.

This brings us to notice a point made in reference to the instructions. There was testimony tending to prove that a registration had been made of the qualified voters of the county, and that it showed over 1,000 such voters. The vote cast at the election was, for the subscription, 510, and against, 98; that is, more than two thirds of those who actually voted assented to the subscription, but not two thirds of the qualified voters, as shown by the registration. Several decisions of the supreme court of Missouri are cited, the latest being that of State v. Harris, 96 Mo. 29, 8 S. W. Rep. 794, in which that court has held that two thirds of those actually voting is not sufficient, and that it must appear that two thirds of the qualified voters, as ascertained by the registration, assented to the subscription; and it is said that this court follows the settled construction placed upon its statutes by the supreme court of a state. This question has been thoroughly discussed in this court, and it is unnecessary to enter into any re-examination of it. These decisions were made after the issue of the bonds, and cannot be deemed controlling. Cass Co. v. Johnston, 95 U. S. 360; Daviess Co. v. Huidekoper, 98 U. S. 98; Douglass v. Pike Co., 101 U. S. 677; Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. Rep. 539.

Another matter is this: It will be remembered that the court permitted the plaintiff to offer in evidence the tax levies for several years after the issue of the bonds; a copy of the entries made on the bond register of the county in 1874, showing the bonded indebtedness of the county; and a financial statement of the county, published by direction of the county court. It also instructed the jury that they might consider these matters in determining what was the intent of the county court in issuing the bonds; "that is to say, whether they intended to act exclusively under the railroad charter, or under authority conferred by a popular vote, or under both powers." It was not said by the court that these matters created an estoppel upon the county, or concluded it as to the question, but simply that they were matters to be considered. It is a familiar rule that the interpretation given to a contract by the parties themselves is competent, and oftentimes very weighty, evidence in determining its meaning and force. So in a matter of this kind, the whole conduct of the county, both before, at the time, and after the issue of the bonds, may be shown to aid in determining under what statute and by what authority the county proceeded in the issue of these bonds. Chicago v. Sheldon, 9 Wall. 50, 54; Steinbach v. Stewart, 11 Wall. 566, 576; Canal Co. v. Hill, 15 Wall. 94; Merriam v. U. S., 107 U. S. 437, 2 Sup. Ct. Rep. 536; U. S. v. Gibbons, 109 U. S. 200, 3 Sup. Ct. Rep. 117.

Again, it is urged that the order for the

election was invalid, inasmuch as no corporation was named as the proposed recipient of the subscription; but it has been held to the contrary, and that it is sufficient if the route is designated, leaving to the county authorities the selection of the particular corporation to be the recipient of the subscription. Commissioners v. Thayer, 94 U. S. 631; Scipio v. Wright, 101 U. S. 665.

Another matter requires notice, and it is of great significance: The constitution of the state of Missouri, adopted July 4, 1865, article 11, § 14, provided that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two thirds of the qualified voters of such county, city, or town, at a regular or special election, to be held therein, shall assent thereto." At the October term, 1867, of the supreme court of Missouri, the case of State v. Macon County Court, 41 Mo. 453, was decided, in which it was held that the constitution had no retroactive effect upon statutes passed before its adoption, and that, therefore, under the Missouri & Mississippi Railroad Company act, passed February 20, 1865,—a few months before the adoption of the constitution,—there was power in the county authorities to subscribe without the assent of the voters. It may well be believed, as asserted by counsel for defendant in error, that, until that decision was announced, the understanding that the prohibition in the constitution superseded all unexecuted authority given by prior charters was so general that no county court would have dared to subscribe stock and issue bonds without the assent of two thirds of the qualified voters. This subscription was made, some of the bonds issued, as well as the vote held, before the decision in the Macon County Court Case, and it is difficult to believe that the county court did not issue these bonds in reliance upon the authority given them by the vote of the people, in pursuance of the general laws of the state, although referring on the face of the bonds to the Missouri & Mississippi Railroad Company act, which specially authorized the company to receive, and the counties through which it ran to make, subscriptions. It is very likely that the county court had in mind the special act creating the Missouri & Mississippi Railroad Company, as well as the general law, and the vote of the people under it, and that it meant to exercise all the authority conferred by both. It is enough for this case that the vote of the people authorizing this issue of bonds was given, and that the county court acted in reliance thereon, for by assent, through their vote, to such issue of bonds, the people, in the way prescribed by the statutes of the state, in effect consented that a levy beyond the meager one provided for by the Missouri & Mississippi Railroad Company act might be resorted to for the payment of these bonds.

These are the substantial matters involved in this litigation. We find no error in the proceedings of the circuit court, and its judgment is affirmed.

(147 U. S. 165)

NOBLE et al. v. UNION RIVER LOGGING R. CO.

(January 9, 1893.)

No. 1,157.

EXECUTIVE DEPARTMENTS—INJUNCTION AND MANDAMUS — PUBLIC LANDS — RAILROAD RIGHT OF WAY.

1. While the head of a governmental department is not subject to mandamus or injunction in any matter involving the exercise of discretion, these writs may yet be issued against him in relation to matters wherein he performs a mere ministerial duty, or is without power to act at all.

2. The secretary of the interior has no authority to annul the action of his predecessor in office approving the location of a railroad right of way over public lands, under the act of March 3, 1875, (18 St. at Large, p. 482,) on the ground that such approval was obtained by misrepresentation and fraud, and that the railroad was not used as a common carrier for hire, but merely to carry property belonging to its owners; for the existence of the railroad with the duties of a common carrier was a quasi jurisdictional fact, which the prior secretary had authority to determine, and his action therein is not subject to collateral attack.

3. The grant of a right of way under the said statute is a grant in praesenti, which became vested on the identification of the lands by the location of the road and the approval thereof by the secretary; and the attempt of the present secretary to annul the approval was an attempt to deprive the company of its property without due process of law, was entirely without authority, and the secretary was therefore subject to an injunction.

Appeal from the supreme court of the District of Columbia. Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity by the Union River Logging Railroad Company to enjoin the secretary of the interior and the commissioner of the general land office from executing a certain order revoking the approval of the plaintiff's maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an act of congress.

The bill averred, in substance, that the Union River Logging Railroad Company was organized March 20, 1883, under chapter 185 of the Territorial Code of Washington, authorizing the formation of "corporations for * * * the purpose of building, equipping, and running railroads," etc. The articles declared the business and objects of the corporation to be "the building, equipping, running, maintaining, and operating of a railroad for the transportation of saw logs, piles, and other timber, and wood and lumber, and to charge and receive compensation and tolls therefor, * * * from tide water in Lynch's cove, at the head of Hood's canal, in said Mason county, and running thence in a general northeasterly direction, by the most practicable route, a distance of about

*166 ten miles, more or less," etc. The capital stock of the company being subscribed, the company proceeded by degrees to construct and equip a road extending from tide water in Lynch's cove, about four miles along the line above mentioned, to transport saw logs and other lumber and timber. On August 17, 1888, amended articles of incorporation were filed, "to construct and equip a railroad and telegraph line" over a much longer route, with branches, and "to maintain and operate said railroad and branches, and carry freight and passengers thereon, and receive tolls therefor." Also "to engage and carry on a general logging business, and provide for the cutting, hauling, transportation, buying, owning, acquiring, and selling of all kinds of logs, piles, poles, lumber, and timber."

In the spring of 1889, plaintiff proceeded to extend its line of road for three miles beyond the point to which it had previously extended it. It located at intervals a better line of road; made and ballasted a new roadbed of standard gauge; and substituted steel rails and another locomotive in place of those rails and equipments which had been sufficient for its limited purposes, as specified in the original articles. In January, 1889, the company desiring to avail itself of an act of congress of March 3, 1875, (18 St. p. 482,) granting to railroads a right of way through the public lands of the United States, filed with the register of the land office at Seattle a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys. These papers were transmitted to the commissioner of the land office, and by him to the secretary of the interior, by whom they were approved in writing, and ordered to be filed. They were accordingly filed at once, and the plaintiff notified thereof.

On June 13, 1890, a copy of an order by the appellant, successor in office to the secretary of the interior by whom the maps were approved, was served upon the plaintiff, requiring it to show cause why said approval should not be revoked and annulled.

*167 This was followed by an order of the acting secretary of the interior, annulling and canceling such maps, and directing the commissioner of the land office to carry out the order.

The answer admitted all the allegations of fact in the bill, and averred that it became known to the defendants that the plaintiff was not engaged in the business of a common carrier of passengers and freight at the time of its application, but in the transportation of logs for the private use and benefit of the several persons composing the said company, and that, being advised that a railroad company carrying on a merely private business was not such a railroad company as was contemplated by the act of congress, deemed it their duty to vacate and annul the action of Mr. Vilas, then secretary of the interior, approving plaintiff's maps of definite location, and to that end caused the notice complained of in the bill to be served. They further claimed it to be their duty to revoke and annul the action of the former secretary of the interior as having been made improvidently, and on false suggestions, and without authority under the statute.

Upon a hearing upon the bill, answer, and accompanying exhibits, the court ordered a decree for the plaintiff, and an injunction as prayed for in the bill. Defendants appealed to this court.

Asst. Atty. Gen. Maury, for appellants. Fredric D. McKenney and Saml. F. Phillips, for appellee.

*170 *Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves not only the power of this court to enjoin the head of a department, but the power of a secretary of the interior to annul the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation.

1. With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of Marbury v. Madison, 1 Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been; but with respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the courts. The principle of this case was applied in Kendall v. U. S., 12 Pet. 524, and the action of the circuit court sustained in a proceeding where it had commanded the postmaster general to credit the relator with a certain sum awarded to him by the solicitor of the treasury under an act of congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. In Decatur v. Paulding, 14 Pet. 497, a mandamus was refused upon the same principle, to compel the secretary of the navy to allow to the widow of Commodore Decatur a certain pension and arrearages. Indeed, the reports of this court abound with authorities to the same effect. Kendall v. Stokes, 3 How. 87; Brashear v. Mason, 6 How. 92; Reeside v. Walker, 11 How. 272; Commissioner v. Whiteley, 4 Wall. 522; U. S. v. Seaman, 17 How. 231; U. S. v. Guthrie, Id. 284; U. S. v. Commissioner, 5 Wall. 563; Gaines v. Thompson, 7 Wall. 347; Secretary v. McGarrahan, 9 Wall. 298; U. S. v. Schurz, 102 U.

S. 378; Butterworth v. Hoe, 112 U. S. 50, 5 Sup. Ct. Rep. 25; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. Rep. 12. In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.

We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in Board v. McComb, 92 U. S. 531, 541: "But it has been well settled that when a plain, official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other."

2. At the time the documents required by the act of 1875 were laid before Mr. Vilas, then secretary of the interior, it became his duty to examine them, and to determine, among other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road. Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. Rep. 1141.

The position of the defendants in this connection is that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

It is true that, in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common-law action, (D'Arcy v. Ketchum, 11 How. 165; Webster v. Reid, Id. 437; Harris v. Hardeman, 14 How. 334; Pennoyer v. Neff, 95 U. S. 714; Borden v. Fitch, 15 Johns. 141;) the seizure and possession of the res within the bailiwick in a proceeding in rem, (Rose v. Himely, 4 Cranch, 241; Thompson v. Whitman, 18 Wall. 457;) a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged, (Galpin v. Page, 18 Wall. 350; Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. Rep. 512.) So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, (Griffith v. Frazier, 8 Cranch, 9,) or condemns as lawful prize a vessel that was never captured, (Rose v. Himely, 4 Cranch, 241, 269,) or a court-martial proceeds and sentences a person not in the military or naval service, (Wise v. Withers, 3 Cranch, 331,) or the land department issues a patent for land which has already been reserved or granted to another person, —the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

There is, however, another class of facts which are termed "quasi jurisdictional," which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged, and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally, (Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. Rep. 217; In re Sawyer, 124 U. S. 200, 220, 8 Sup. Ct. Rep. 482;) the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy, (Michaels v. Post, 21 Wall. 398; Betts v. Bagley, 12 Pick. 572;) the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate, (Comstock v. Crawford, 3 Wall. 396; Grignon's Lessee v. Astor, 2 How. 319; Florentine v. Barton, 2 Wall. 210;) the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors, (Thompson v. Tolmie, 2 Pet. 157;) and others of a kindred nature, where the

want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are: Hudson v. Guestier, 6 Cranch, 281; Ex parte Watkins, 3 Pet. 193; U. S. v. Arredondo, 6 Pet. 691, 709; Dyckman v. City of New York, 5 N. Y. 434; Jackson v. Crawfords, 12 Wend. 533; Jackson v. Robinson, 4 Wend. 436; Fisher v. Bassett, 9 Leigh, 119, 131; Wright v. Douglass, 10 Barb. 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding; and, even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. Simms v. Slacum, 3 Cranch, 300.

This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases it is held that, if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the land department had no jurisdiction over it, and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may *175 be shown to be so in any collateral proceeding. Polk's Lessee v. Wendell, 9 Cranch, 87; Patterson v. Winn, 11 Wheat. 380; Jackson v. Lawton, 10 Johns. 23; Minter v Crommelin, 18 How. 87; Reichart v. Felps, 6 Wall. 160; Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. Rep. 566; U. S. v. Southern Pac. Ry. Co., 146 U. S. 570, 13 Sup. Ct. Rep. 152.

Upon the other hand, if the patent be for lands which the land department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in Smelting, etc., Co. v. Kemp, 104 U. S. 636, 640: "In that respect they [the officers of the land department] exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment." In French v. Fyan, 93 U. S. 169, it was held that the action of the secretary of the interior identifying swamp lands, making lists thereof, and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 530; Steel v. Smelting, etc., Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389; Quinby v. Conlan, 104 U. S. 420; Vance v. Burbank, 101 U. S. 514; Hoofnagle v. Anderson, 7 Wheat. 212; Ehrhardt v. Hogaboom, 115 U. S. 67, 5 Sup. Ct. Rep. 1157. In Moore v. Robbins, 96 U. S. 530, it was said directly that it is a part of the daily business of officers of the land department to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary of the interior, if taken in time; "but, if no such appeal be taken, and the patent, issued under *176 the seal of the United States and signed by the president, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all the authority of control of the executive department over the land, and over the title which it has conveyed. * * * The functions of that department necessarily cease when the title has passed from the government."

We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands, subject to the operation of the statute; and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the secretary of the interior to decide, and, when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is "that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory," etc. The uniform rule of this court has been that such an act was a grant in praesenti of lands to be thereafter identified. Railway Co. v. Alling, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. Rep. 10; U. S. v. Minor, 114 U. S. 233, 5 Sup. Ct. Rep. 836. A revocation of the approval of the secretary of the interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice Grier in U. S. v. Stone, 2 Wall. 525, 535: "One officer of the land office is not competent to

cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." Moore v. Robbins, 96 U. S. 530. The case of U. S. v. Schurz, 102 U. S. 378, is full authority for the position assumed by the plaintiff in the case at bar. *In this case the relator had been adjudged to be entitled to 160 acres of the public lands; the patent had been regularly signed, sealed, countersigned, and recorded; and it was held that a mandamus to the secretary of the interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice Miller: "Whenever this takes place, [that is, when a patent is duly executed,] the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away." *177

It was not competent for the secretary of the interior thus to revoke the action of his predecessor, and the decree of the court below must therefore be affirmed.

(147 U. S. 177)

MILES v. CONNECTICUT MUT. LIFE INS. CO.

(January 9, 1893.)

No. 92.

LIFE INSURANCE — SURRENDER FOR PAID-UP POLICY — FORFEITURE FOR NONPAYMENT OF PREMIUM.

A policy of insurance payable to the wife of the insured provided that failure to pay any premium subsequent to the first should forfeit the policy, and also provided for the issuing of a paid-up policy, after payment of two or more annual premiums. After payment for eight years, and before the next premium became due, the insured, without the knowledge of the beneficiary, informed the company of his inability to pay further premiums, and requested a paid-up policy, but, at the company's suggestion, he released a portion of the amount insured, surrendered the policy, and received in its stead a policy for a less amount, having, as a prerequisite, delivered to the company a receipt and release as to the amount of reduction, purporting to be signed by his wife, but in reality forged by him. A year later, on his statement of inability to pay the premium on the second policy, and at his request, that policy was surrendered, and a paid-up policy issued in lieu thereof, on delivery by him to the company of a similar forged receipt and release. *Held*, that there was nothing in these facts to excuse a failure to pay the premiums on the original policy, or to prevent a forfeiture thereof by reason of such nonpayment, and the beneficiary could not recover thereon. Insurance Co. v. Smith, 5 N. E. Rep. 417, 44 Ohio St. 156; Whitehead v. Insurance Co., 6 N. E. Rep. 267, 102 N. Y. 143; Garner v. Insurance Co., 18 N. E. Rep. 130, 110 N. Y. 266; Hight v. Insurance Co., 10 Ins. Law J. 223; Pilcher v. Insurance Co., 33 La. Ann. 322; Schneider v. Insurance Co., 4 N. Y. Supp. 797, 52 Hun, 130,—distinguished. Mr. Justice Brown dissenting.

In error to the circuit court of the United States for the eastern district of Pennsylvania. Affirmed.

R. P. White, for plaintiff in error. Hunn Hanson, for defendant in error.

Mr. Justice BLATCHFORD delivered the opinion of the court.

*This is an action at law, brought by Sarah G. Miles against the Connecticut Mutual Life Insurance Company, in the court of common pleas No. 3 for the county of Philadelphia, state of Pennsylvania, and removed by the defendant, a Connecticut corporation, into the circuit court of the United States for the eastern district of Pennsylvania. *178

The suit was brought to recover $5,000, with interest, on a policy of insurance issued by the defendant on June 20, 1877. The policy set forth that, in consideration of the representations and declarations made to the corporation in the application for the insurance, and the annual premium of $140.20, to be paid to it on or before June 20th in every year, it insured the life of John S. Miles (the insured) for the term of his natural life, in the sum of $5,000, for the sole use and benefit of Sarah G. Miles, (the assured,) the wife of the insured. It was provided in the policy that, if any premium thereon, subsequent to the first, was not paid when due, "then this policy shall cease and determine." *179

All of the premiums paid on the policy were paid by John S. Miles with his own money. The policy was made at his instance. It remained continuously in his possession, and during the entire time it was in force his wife had nothing to do with it.

The sixth condition in the policy, being one of the express conditions and agreements upon which it was issued and accepted, was as follows: "(6) That if, after the payment of two or more annual premiums upon this policy, the same shall cease and determine by default in the payment of any subsequent premium when due, then this company will grant a paid-up policy, payable as above, for such amount as the then present value of this policy will purchase, as a single premium: provided, that this policy shall be transmitted to and received by this company, and application made for such paid-up policy, during the lifetime of the said insured, and within one year after default in the payment of premium hereon shall first be made."

In June, 1886, John S. Miles called at the office of the company in Philadelphia, where all the preceding premiums had been paid, and said that he was unable to pay the premium then coming due, and on that account desired to give up the policy for $5,000, and take a paid-up policy under the sixth condition above set forth. He was told by the company the disadvantages of doing so, and was advised by it that a plan more beneficial would be to have so much of the $5,000 released as would enable him, with the sum allowed by the company for such release, to pay what would be due as a premium on the remaining sum under the policy. The clerk of the company calculated the amount, and, finding that if $700 were released, an allowance would be made by the company of $82.39, which was very nearly what would then

*180 be due as premium on the $4,300 remaining, Mr. Miles decided to adopt that course. He procured from the company the requisite papers for the signature of his wife, and afterwards delivered such papers to the company, with her name, purporting to be signed to a receipt, dated June 20, 1886, for $82.39, "as a full consideration and satisfaction for all claims and demands" on account of $700 of the amount of the $5,000 policy, "released, quitclaimed, surrendered, and discharged to said company;" the $82.39 "having been applied as follows: In part payment of 1886 premium on the remaining $4,300 of said policy." Thereupon Mr. Miles received from the company its policy for $4,300 upon his life for his wife's benefit. That policy was executed and dated June 28, 1886, and stipulated for an annual premium of $120.57. It bore the same number as the $5,000 policy.

In June, 1887, Mr. Miles again visited the office of the company at Philadelphia, and said that he could not pay the premium on the $4,300 policy, and insisted upon taking out a paid-up policy, though again advised by the defendant against doing so. He was given the requisite receipt to procure the signature of his wife to it, and returned it to the company with what purported to be her signature. This receipt was dated June 20, 1887, and set forth that she had received from the company $583.24 "as a full consideration and satisfaction for all claims and demands" on account of policy No. 145,756, "released, quitclaimed, surrendered, and discharged to said company, said amount having been applied as follows: In payment of a premium on a participating paid-up policy" for $1,195. Mr. Miles received from the company, on July 9, 1887, a policy of that date for $1,195, on his life, payable to his wife.

Mrs. Miles testified that her name on both receipts had been written by her husband, without her assent; but it also appeared that her name to the application for the $5,000 policy was written by him, and that in his dealings with two other insurance companies he had signed her name.

Mr. Miles died in February, 1888, of pulmonary consumption, and his wife testified that a year before his death he was in very poor health. He was able, however, to attend to his business affairs within three *181 months of his death, and there was no evidence that in June, 1886, he was otherwise than in good health.

In the affidavit of defense put in by the defendant in the state court there were set forth the issuing of the policy for $4,300 and of the policy for $1,195, the discharge of the company from all liability on the policies for $5,000 and $4,300, and the fact that no premium had been paid on the $5,000 policy after June 28, 1886. The defendant pleaded non assumpsit.

The case was tried before Judge Butler and a jury, in April, 1889. At the trial, the plaintiff asked the court to charge the jury: "(1) That, if the company united with the agent, and accepted the surrender of the policy in suit from him when he had no authority to make such surrender, and did this without notice to or knowledge of the plaintiff, they cannot complain of the nonpayment of premium after such surrender and acceptance." To that point the court answered: "The futile attempt to surrender the policy (and the transaction referred to was nothing more in legal contemplation) had no effect whatever on the rights or obligations of either party. The defendants were not required to notify the plaintiff of the transaction, but they were fully justified in believing, by the conduct and representations of her agent and husband in presenting the paper, which purported to be signed by her, that she knew of and authorized the transaction. There is nothing in what is stated in the point sufficient to excuse her failure to pay the premium when it became due."

The plaintiff also asked the court to charge the jury: "(2) If the surrender was made without authority, it was a wrongful act on the part of both the company and the agent, and the nonpayment of the premium is not a bar to the recovery." The court disaffirmed that point.

The plaintiff also asked the court to charge the jury: "(3) The jury are the sole judges of the credibility of the statement of the witnesses as to what took place at the time of the surrender." To that point the court answered: "It is true, as a general proposition, that the jury are the judges of the credibility of the witnesses, but the jury are not at liberty to disbelieve the witnesses without finding something in their conduct or statements, or in other evidence in the cause, tending to discredit them, and such finding, under the circumstances, would be unjustifiable. Furthermore, if these witnesses were disbelieved and disregarded, the result would not be varied. No conclusion that would justify the nonpayment of the premiums would be permissible under the evidence, even in the absence of their testimony."

The plaintiff also asked the court to charge the jury: "(4) If the company accepted the surrender without taking due steps to ascertain whether Mrs. Miles had authorized it, this was such negligence as amounts to evidence of collusion." The court disaffirmed that point.

The court, in respect to the defense that the $5,000 policy was annulled by surrender, charged the jury that that defense was not sustained; that the policy was not annulled; and that the transaction between the plaintiff's husband, who was her agent, and the defendant, respecting it, was not authorized by the plaintiff, and therefore had no effect on her rights or obligations under the contract.

As to the defense that the premiums due on the $5,000 policy were not paid, the court charged the jury that that defense was sus-

tained, and was fatal to the plaintiff's claim; and the court further charged the jury as follows: "The premiums, the payment of which was necessary to keep the policy alive, were not paid, and nothing has been shown, in the judgment of the court, which excuses or tends to excuse the failure to pay them. Whether the failure resulted from the agent's inability to pay or his unwillingness to pay is unimportant. He did not pay, and the principal must bear the consequences of his failure. It was her duty to have the payments made, and, failing in this, she cannot recover." The court also charged the jury as follows: "As I have already charged you, gentlemen, there is nothing here to justify a failure to pay the premiums, and, in consequence of that failure, the plaintiff cannot recover, and your verdict must be for the defendant."

The plaintiff excepted to the direction to find a verdict for the defendant; to the refusal of the court to affirm the plaintiff's points 1, 2, 3, and 4; to the answer to each of those points; and to the instruction of the court that, as the evidence showed that the premiums were not paid, and nothing had been shown to excuse such nonpayment, the plaintiff could not recover.

The plaintiff moved the court for a new trial, which was denied, the court holding that, as the papers purporting to be signed by the plaintiff were forged, the act of the defendant in accepting the attempted surrender of the $5,000 policy was procured by fraud, and was no more binding on it than the husband's dishonest act was binding on the plaintiff; that there was no justification in the evidence for the position that the act of the defendant seduced the husband from his duty as her agent, and created an interest or motive in him hostile to its discharge, or for the contention that, if the company had not allowed the husband to do what he did, he would have paid the premium on the $5,000 policy, or would have informed his wife that he had not done so; that the defendant was not required to notify the plaintiff of the situation; that it believed, and was justified in believing, that she knew all about it; that she could justly demand no more than that the transaction (of the surrender) should be treated as if it had not occurred, leaving her rights unaffected; that if she was injured, it was by the faithlessness of her agent and her own failure to supervise his acts, and without any fault of the defendant; that the cases cited by the plaintiff did not rule this case; that Whitehead v. Insurance Co., 102 N. Y. 143, 6 N. E. Rep. 267, was readily distinguishable; and that, if it were identical, it could not be followed, because it would not be a sound exposition of the law. The jury having found a verdict for the defendant, a judgment for it was entered thereon, and the plaintiff has brought the case here by a writ of error.

The circuit court held that the $5,000 policy was not surrendered or canceled by the transaction between the defendant and Mr. Miles, but it further held that, although the surrender was void, the policy was forfeited, because no premium was paid on it after the attempted surrender.

It is contended that the court erred in not charging the jury in accordance with the plaintiff's requests numbered 1, 2, 3, and 4; that it erred also in making the charges to which the plaintiff excepted, as before stated; that the defendant, having been guilty of a wrongful act in canceling the $5,000 policy, and having thus declared its intention not to be bound by such policy, cannot take advantage of a failure on the part of the plaintiff to make a tender of a premium which, by its own act, it gave notice it would not receive; that, as Mr. Miles was the messenger of his wife to pay the premiums on the $5,000 policy, the defendant, when it dealt with him in another character, and for another purpose, made him its agent, and acted upon his report at its peril; that the declaration by the defendant that the $5,000 policy was at an end, before there had been any default on the part of the plaintiff, was a distinct breach of contract, for which it thereupon became liable, and from which it can take no advantage; that the defendant put into the hands of Mr. Miles the means by which he could evade the performance of his duty, and it cannot now set up as a defense his failure to perform that duty; that the $5,000 policy was canceled before the day when the premium was due on it in 1886 had ended, so that the plaintiff was in no default when the defendant annulled its contract; that the plaintiff is entitled to the presumption that, if the defendant had not canceled the $5,000 policy, Mr. Miles would either have paid the premium himself or would have notified the plaintiff of his inability to do so, and she would have paid it; that there was nothing in the transaction but the act of the defendant in unlawfully annulling the $5,000 policy; that the case, therefore, is the ordinary one of the rescission of a contract by one party, relieving the other party from performance or tender of performance; and that the plaintiff was entitled to go to the jury upon the question whether the action of the defendant in accepting a surrender of the $5,000 policy was in good faith.

The plaintiff relies on three cases in particular, namely: Insurance Co. v. Smith, 44 Ohio St. 156, 5 N. E. Rep. 417; Whitehead v. Insurance Co., 102 N. Y. 143, 6 N. E. Rep. 267; and Garner v. Insurance Co., 110 N. Y. 266, 18 N. E. Rep. 130. But we think those cases are distinguishable from the one before us.

In Insurance Co. v. Smith, a policy had been issued by the company upon the life of Smith, in favor of his wife. She was entitled, by the policy, to participate in the profits, a portion of which, in the form of dividends, was to be applied each year to reduce the premium. It had been the uniform prac-

lice of the company to give timely notice of the amount of premium, the amount of dividends, and the balance to be paid in cash. The company neglected to give such notice, although having knowledge of the residence of the wife, and by reason thereof a premium was not paid at the time specified in the policy. It was held that the company could not set up the failure to pay the premium as a defense to a recovery upon the policy, although by the terms thereof it was to be forfeited in case of failure to pay a premium on any of the dates stipulated therein. The company had uniformly sent such notices to the husband, and he had made payment of the premiums from year to year; but it appeared that the company was informed by the husband that he and his wife had separated, she having commenced a proceeding against him for alimony, and that he was desirous of having the policy changed, and made payable to his estate; and it was held that after that the company was not justified in treating him as her agent for the purpose either of receiving notice for her of the amount of premium, the amount of dividends, and the balance payable in cash, or of making a surrender of the policy. It was further held that, under those circumstances, an attempt by the husband, without the knowledge of the wife, to surrender the policy to the company, was inoperative, and the rights of the wife were not thereby impaired. It was manifestly held in that case that the wife was entitled to know what amount of premium was due, and when it was due, and that a notice thereof to the husband was not sufficient, because the company knew that the husband was not acting as agent for the wife, but in hostility to her interests, and against her. Moreover, in that case it does not appear that the husband informed the company that he could not pay the premium, whereas in the present case Mr. Miles did so inform the defendant, before attempting any surrender.

*180 In Whitehead v. Insurance Co., a husband insured *his life for the benefit of his wife, upon three policies, the money being payable, in the event of the death of the wife, to her children. She died before the husband, and he, without the knowledge of the children, surrendered the policies to the company, and received the surrender value of them. At the time of the surrender, the premium upon one of the policies was past due, while the other two policies were in full force. Suit being brought by the children upon the three policies, the court held that there could be no recovery on the policy on which the premium was due and unpaid, but that upon the other two policies there should be a recovery, on the ground that, by canceling the policies, the company placed itself in a position of giving no notice of premiums due, and that, if such notice had been given, it might have resulted in payment. In that case the amount of the premium was fixed. It does not appear that the father was able to pay the premiums on the two policies, but he did not inform the company that he was not able. In the present case Mr. Miles informed the defendant that he was not able to pay the premium, and that statement was not discredited at the trial. In view of the distinction between the two cases, we do not feel called upon to express an opinion as to the soundness of the decision in the New York case.

In Garner v. Insurance Co., the insured was a father, who was made by the policy trustee for the beneficiaries, who were his children. A premium fell due on September 24th. It was not paid; and four days later the father surrendered the policy, and received a new one for the benefit of his second wife, who was not the mother of the beneficiaries in the first policy. The new policy was for the same amount as the first one, and stipulated for the payment of a like annual premium. In a suit by the children upon the first policy, the defense was taken that it was determined by the failure to pay the premium; but the court held that the new policy was only a continuation or renewal of the one surrendered, and that, therefore, the company waived any failure to pay the premium due September 24th. It is manifest that the decision in that case has no application to the case before us.

*181 *The case of Hight v. Insurance Co., 10 Ins. Law J. 223, cited by the plaintiff, was a case where the company deliberately violated its contract, by refusing to accept a note in part payment of the premium, as it had done before, in accordance with the terms of the policy, and by requiring the payment of the full premium in cash. In Pilcher v. Insurance Co., 33 La. Ann. 322, also cited by the plaintiff, the company, for the purpose of defeating the right of the beneficiary, became a party to an agreement by which the policy lapsed. The case of Schneider v. Insurance Co., 52 Hun, 130, 4 N. Y. Supp. 797, was decided on the authority of Whitehead v. Insurance Co., before referred to.

In the present case, the husband went to the office of the defendant, when the premium was coming due in 1886, and stated to it his inability to pay that premium, before he offered to surrender the $5,000 policy, or the defendant agreed to accept the same. There is nothing to show that the defendant connived at the nonpayment of the premium, or that Mr. Miles had been furnished with or had money to pay it. The circuit court was correct in charging the jury that nothing had been shown which excused or tended to excuse the failure to pay the premiums; and it is entirely manifest that Mr. Miles assured the defendant that he could not pay the premium before he offered to surrender the $5,000 policy, or the defendant accepted a release of it. In June, 1886, the defendant induced Mr. Miles to abandon his purpose of taking a paid-up policy, and in 1887 urged him in vain not to take one. The law imposed

no duty on the defendant to inquire into the ability of the plaintiff to procure money to pay the premiums. It had a right to rely on the statement of Mr. Miles, who, in that respect, under the circumstances of the case, was acting within his authority. It had a right to rely upon the assurance of Mr. Miles that he could not pay the premium in 1886, and upon the fact that he did not pay it; and it afterwards acted upon that statement, by inducing him not to take up a paid-up policy, and by giving him a reduced policy in exchange for the $5,000 policy. It acted with entire good faith, and with good sense and kindness and justice.

"We see no error in the action of the circuit court, and its judgment is affirmed.

Mr. Justice BROWN, dissenting.

I am compelled to dissent from the opinion of the court in this case. I think the company is estopped by its own act to set up the nonpayment of the premium as a defense. At the time the original policy was surrendered and the new ones taken out, there had been no failure to pay the premiums as they became due. The surrender was made without the authority or knowledge of the plaintiff, and it is admitted that it was not binding upon her, but it was made by one who did have authority to pay her premiums upon the original policy, and was accepted by the company, and, for the time being, the reduced policies were treated as the only contracts between the parties. In such case the plaintiff was at liberty to ratify the act of her agent or to repudiate it. She took the latter course, and brought suit upon the original policy. Under these circumstances, she ought not to be prejudiced by the fact that the agent whom she had authorized to pay the premiums betrayed his trust, and attempted to cancel her contract, unless she in some way adopted or confirmed his act. So far as the surrender was concerned, the defendant dealt with the insured at its peril, and was bound to ascertain whether his act was authorized or not, and is in no position to claim that the plaintiff should have paid the premium upon the original policy when it had itself treated it as canceled. Having elected to treat the original contract as at an end, it is estopped now to claim that the plaintiff had not performed it. "It is a principle of law that he who prevents a thing from being done shall not avail himself of the nonperformance which he has himself occasioned." 3 Add. Cont. 798.

I think the case of Whitehead v. Insurance Co., 102 N. Y. 143, 6 N. E. Rep. 267, is indistinguishable in principle from this, and is a sound enunciation of the law upon the point involved. In that case the court of appeals of New York held that, where a policy in full force was surrendered by the husband, without the assent of the assured, the subsequent failure to pay the accruing premiums did not alone warrant a forfeiture; that by the agreement of surrender the insurance company did an act the tendency and purpose of which was to prevent future payments by the parties interested, and the company could not defend upon a default to which its own wrongful act contributed, and but for which a lapse might not have occurred. It is true that it did not appear directly in that case that the insured stated that he was unable to pay the premium, but it does not appear that he was able to pay it, and it is safe to infer that he was not, or he would not have taken a policy for a reduced amount. In neither case was there an actual forfeiture by reason of nonpayment of premium before the new arrangement was entered into, though in both cases a forfeiture was probable.

The other authorities cited, though not directly in point, all indicate that, where the original policy is surrendered without authority, and a new one taken out, there can be no forfeiture of the original policy for nonpayment of the premiums, so long as the new policy is outstanding. Insurance Co. v. Smith, 44 Ohio St. 156, 5 N. E. Rep. 417; Garner v. Insurance Co., 110 N. Y. 266, 18 N. E. Rep. 130; Pilcher v. Insurance Co., 33 La. Ann. 322; Schneider v. Insurance Co., 52 Hun, 130, 4 N. Y. Supp. 797.

Inasmuch as no cases are cited of a contrary purport, it seems to me that these authorities settle a principle of law which ought not now to be disturbed.

(147 U. S. 149)

UNITED STATES ex rel. TRASK v. WANAMAKER, Postmaster General.

(January 3, 1893.)

(No. 1,232.)

SUPREME COURT—APPEALS FROM DISTRICT OF COLUMBIA—ALLOWANCE—JURISDICTIONAL AMOUNT.

1. Rev. St. § 706, and Rev. St. D. C. § 847, providing for the allowance of appeals and writs of error by the justices of the supreme court of the United States under special circumstances, are no longer in force. 20 St. at Large, p. 320; 23 St. at Large, p. 443. Railroad Co. v. Grant, 98 U. S. 398; Dennison v. Alexander, 103 U. S. 522; Cross v. Burke, 13 Sup. Ct. Rep. 22, 146 U. S. 82.—followed.

2. On appeal from the supreme court of the District of Columbia in mandamus to compel the postmaster general to readjust a postmaster's salary, the jurisdictional amount must be determined by the amount in controversy in the particular proceeding, and not by the collateral effect of the decision upon claims by other postmasters. Mortgage Co. v. Gay, 12 Sup. Ct. Rep. 815, 145 U. S. 123, and Washington & G. R. Co. v. District of Columbia, 13 Sup. Ct. Rep. 64, 146 U. S. 227, followed.

In error to the supreme court of the District of Columbia.

Petition by Elizabeth Trask for a writ of mandamus to John Wanamaker, postmaster general of the United States. The writ was denied, and a writ of error was taken to this court. Dismissed.

The relator's case, as stated by the court below, was as follows:

"She became postmaster at Emporia, Kan-

sas, on October 1, 1864, and so continued to and including June 30, 1870. During the whole of the biennial term ending June 30, 1866, the returns of the office paid to the United States amounted to $1,567.98; the commissions on which, under the act of April 22, 1854, if allowed, would have amounted to $863.99. The salary allowed for the seven quarters of this period during which the relator was postmaster was $580. During the biennial term ending June 30, 1868, the returns of the office amounted to $2,230.73, besides $73 box rents, commissions upon which, under the said act of 1854, if allowed, would amount to $1,270.37, while relator was paid a salary for the same period of $800. For the biennial term ending June 30, 1870, the returns of the office amounted to $6,312.53, besides $230 box rents, upon which commissions, under said act of 1854, if allowed, would amount to $3,139.33, while the relator was paid the salary for the same biennial term of $1,580.

"The petitioner thereupon claims that it became the duty of the postmaster general, under section 8 of the act of June 12, 1866, to readjust said salary at the end of each biennial term, because the same was ten per cent. less than it would have been in commissions under said act of 1854, and to allow the difference between the salary paid and said commissions.

"The relator further sets forth that on June 9, 1883, and February 17, 1884, the postmasters general of those dates issued orders in which they construed the statutes relating to readjustment of salaries; that they caused to be entered upon the forms described in those orders the sum of $1,567.98 as the amount of the postal receipts at the relator's post office during the biennial term ending June 30, 1866, and the salary of said office for the whole of the said term, computed on the basis of the act of 1854, as $863.99, and the relator's proportion thereof for seven quarters of that term as $755.99; that they caused to be entered on said forms the sum of $2,230.73 as the amount of relator's postal receipts for the biennial term ending June 30, 1868, and the sum of $1,270.37 as relator's salary for the same term; and the sum of $6,312.53 as the amount of relator's postal receipts for the biennial term ending June 30, 1870, and the sum of $3,139.83 as the salary of the relator for the same term; also that the postmaster general prepared and transmitted to the committtee on post offices and post roads a statement of the total amount of the relator's readjusted salary, due and unpaid for the whole time between October 1, 1864, and June 30, 1870, showing the amount so due the relator to be $2,175.57, but afterwards withdrew that statement, and an error therein was corrected, and an entry was made, showing the correct amount due the relator to be $2,206.19.

"The relator states that the postmaster general has refused to report to the auditor for the post-office department for credit in the relator's account the amount found due upon said statement, and concludes with the following prayer:

" 'The relator therefore prays that a writ of mandamus may issue from this honorable court, addressed to John Wanamaker, postmaster general, commanding him to report to the auditor of the treasury for the post-office department that, upon an examination of the relator's quarterly returns as postmaster at Emporia, Kan., during her terms of service between October 1, 1864, and June 30, 1870, and a recomputation of her salary as required by section 8 of the act of June 12, 1866, and the act of March 3, 1883, it is found that the additional salary $2,206.19 is due her, for which she is entitled to be credited in her account.' "

Harvey Spalding, for plaintiff in error.
Maury, Asst. Atty. Gen., for defendant in error.

149 *Mr. Chief Justice FULLER delivered the opinion of the court.

The relator applied for the writ of error herein to one of the justices of this court by a petition, setting up the alleged errors relied on, and stating that the questions of law involved "concern the interest of more than one thousand persons, ex-postmasters, who reside in many different states and territories, and are in like case with herself, and who have presented claims for like relief before the postmaster general, and that all of such claims amount to more than one hundred thousand dollars;" and praying that the writ be allowed "under section 706 of the Revised Statutes." The order was thereupon granted.

Upon an almost identical petition a writ of error was allowed in U. S. v. Vilas, 124 U. S. 86, 8 Sup. Ct. Rep. 422, but no question as to the pecuniary amount involved in its relation to jurisdiction, or as to the repeal of section 706, was suggested by counsel or considered by the court.

150 *Sections 706 of the Revised Statutes of the United States and 847 of the Revised Statutes of the District of Columbia, which provided for the allowance of appeals and writs of error by the justices of this court under special circumstances, are no longer in force. Act Feb. 25, 1879, c. 99, (20 St. p. 320;) Railroad Co. v. Grant, 98 U. S. 398; Dennison v. Alexander, 103 U. S. 522; Act March 3, 1885, c. 355, (23 St. p. 443;) Cross v. Burke, 146 U. S. 82, 87, 13 Sup. Ct. Rep. 22.

The sum in dispute on this record, exclusive of costs, is more than $1,000 and less than $5,000. It is well settled that our appellate jurisdiction, when dependent upon the sum or value really in dispute between the parties, is to be tested without regard to the collateral effect of the judgment in another suit between the same or other parties. It is the direct effect of the judgment that can alone be considered. Mortgage Co. v. Gay, 145 U. S.

123, 12 Sup. Ct. Rep. 815; Washington & G. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. Rep. 64.

This case does not come within either of the sections of the act of March 3, 1885, regulating appeals and writs of error from the supreme court of the District of Columbia, and the writ of error must therefore be dismissed.

(146 U. S. 357)

Ex parte ENGLES.

(December 5, 1892.)

WRIT OF PROHIBITION—ADMIRALTY JURISDICTION.

The supreme court will not issue a writ of prohibition to restrain a district court from taking jurisdiction of a petition for limitation of liability in respect to a barge which was overturned in a squall while having on board a party of excursionists from Brooklyn to Cold Spring Grove, Long Island, thus giving rise to claims for damages for personal injuries and for death by negligence. In re Fassett, 12 Sup. Ct. Rep. 295, 142 U. S. 479, followed.

Petition by Elizabeth Engles for a writ of prohibition commanding the judge of the district court of the United States for the eastern district of New York to proceed no further in the matter of the petition by the Myers Excursion & Navigation Company, as owners of the barge Republic, for a limitation of liability, and requiring him to dismiss the said proceedings. To the petition for the writ there were annexed as exhibits the petition filed in the district court for a limitation of liability, and also an answer thereto, filed by the present petitioner. The petition for a limitation of liability averred that the petitioner, being a corporation organized under the laws of New Jersey, was owner of the barge Republic, and on the 12th day of August, 1891, chartered the same to one George Kemna for the purpose of conveying an excursion party from Brooklyn to Cold Spring Grove, Long Island; that under this charter the barge was taken in tow by a steamboat, and proceeded to Cold Spring Grove with the excursion party on board; that about the time for leaving on the return trip a storm came up, and the barge was overturned by a sudden squall; that 13 persons were killed and many others injured; that several suits had been brought in the state courts of New York for the personal injuries thus sustained, and to recover for the death of those killed; that the said barge was fully manned and equipped, and was seaworthy in all respects; that the loss, damage, injury, and destruction sustained were due to inevitable accident, and occurred without the privity or knowledge of the owners. The answer of the present petitioner averred that she claimed damages against the Myers Excursion & Navigation Company in the sum of $5,000, and had duly presented her claim, pursuant to an order of the district court, to the commissioner, within the time limited and at the place required by the court; and that she was one of the parties named in the schedule attached to the petition for limitation of liability. She denied that the barge was fully manned and equipped and was seaworthy, or that the injury was due to inevitable accident, occurring without the privity or knowledge of the owners; and denied that the barge was a seagoing vessel, or that it was employed in inland navigation. And she submitted that it appeared upon the face of the petition that the petitioners were not embraced within the provisions of Rev. St. §§ 4283–4289. The papers further showed that the present petitioner had moved the district court to dismiss the proceedings for want of jurisdiction, and that such motion was overruled, and it was ordered that the cause proceed.

R. J. Moses, for petitioner.

*359 *THE CHIEF JUSTICE. Leave to file a petition for a writ of prohibition is denied upon the authority of In re Fassett, 142 U. S. 479–484, 12 Sup. Ct. Rep. 295, and cases there cited.

(146 U. S. 354)

CHICAGO & N. W. RY. CO. v. OSBORNE.

SAME v. JUNOD et al.

(December 5, 1892.)

Nos. 1,238, 1,239.

SUPREME COURT—JURISDICTION — CERTIORARI TO CIRCUIT COURT OF APPEALS—FINAL JUDGMENT.

The supreme court will not issue a writ of certiorari to review a judgment of the circuit court of appeals reversing a judgment of the circuit court and remanding the cause for further proceedings; for such a judgment is not final, and the supreme court is therefore without jurisdiction to revise it. McLish v. Roff, 12 Sup. Ct. Rep. 118, 141 U. S. 661; Rice v. Sanger, 12 Sup. Ct. Rep. 664, 144 U. S. 197; Meagher v. Manufacturing Co., 12 Sup. Ct. Rep. 876, 145 U. S. 608,—followed.

Petitions by John Osborne and by H. A. Junod and R. Y. Culbertson for writs of certiorari to the circuit court of appeals for the eighth circuit, commanding that court to certify to the supreme court the records of its proceedings in the causes entitled The Chicago & Northwestern Railway Company, Plaintiff in Error, against John Osborne, Defendant in Error, and Chicago & Northwestern Railway Company, Plaintiff in Error, against H. A. Junod and R. Y. Culbertson, Defendants in error. Writs denied.

The suits below were brought by the petitioners against the railroad company to recover damages for a violation of the "long and short haul" clause of the interstate commerce law, (Act Feb. 4, 1887; 24 St. at Large, p. 379, § 4,) and judgments were recovered by them in each case. See 48 Fed. Rep. 49, and 47 Fed. Rep. 290, for the charges to the juries in these cases, respectively. From these judgments the defendant appealed to the circuit court of appeals, where the two cases were heard together and the judgments were "reversed, and the case remanded for further proceedings." 52 Fed. Rep. 912.

C. C. Nourse, for petitioners. W. C. Goudy, opposed.

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*THE CHIEF JUSTICE. The petitions for writs of certiorari to the circuit court of appeals for the eighth circuit are denied. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118; Rice v. Sanger, 144 U. S. 197, 12 Sup. Ct. Rep. 664; Meagher v. Manufacturing Co., 145 U. S. 608, 12 Sup. Ct. Rep. 876.

(147 U. S. 147)

JENNINGS v. COAL RIDGE IMP. & COAL CO.

(January 3, 1893.)

No. 98.

CONSTITUTIONAL LAW—TAXATION — DUE PROCESS —DISCRIMINATION.

The Pennsylvania statute (Act June 30, 1885, § 4) requiring the treasurer of each private corporation doing business in the state, upon the payment of interest on any bond, etc., issued by such corporation, to assess the state tax of 3 mills upon the "nominal value" of such evidence of debt, deduct the same from the interest paid, and turn it into the state treasury, is not in contravention of the fourteenth amendment to the constitution of the United States, as taking property without due process of law, or as providing for an unjust discrimination in favor of persons owning bonds of foreign corporations, which by the general laws of the state are taxed at their actual value. 17 Atl. Rep. 986, affirmed. Railroad Co. v. Pennsylvania, 10 Sup. Ct. Rep. 533, 134 U. S. 232, followed.

In error to the supreme court of the state of Pennsylvania. Affirmed.

Action by W. W. Jennings, in the court of common pleas of Northumberland county, Pa., against the Coal Ridge Improvement & Coal Company, to recover $600, as 6 months' interest due on $20,000 of its bonds held by him. This interest was due December 1, 1887; and, on demand made therefor, the company sent to Mr. Jennings a certificate of deposit of $570, being the amount of 6 months' interest due December 1st, less $30 for 6 months' taxes at 3 mills per annum, which was deducted under the provisions of the fourth section of the act of June 30, 1885. Mr. Jennings returned the certificate, declining to allow the reduction of 3 mills tax, and claiming that the bonds were not worth more than 75 cents on the dollar of their par value, and that it was unjust to require him to pay a tax on them at their par value, but would consent to a reduction upon the taxes, based upon a fair valuation of the bonds. The treasurer of the company held that the officers of the company had no discretion in the matter, under the requirements of the act of June 30, 1885, and, as the state claimed the tax upon the nominal or par value of the bonds, declined to pay more that $570. In thus deducting the tax, the treasurer was acting under the fourth section of said act, which makes it the duty of the treasurer of each private corporation doing business in the state, "upon the payment of any interest on any scrip, bond, or certificate of indebtedness issued by said corporation, to assess the tax imposed and provided for state purposes upon the nominal value of each and every said evidence of debt," deduct the same from the interest paid, and turn it into the state treasury.

The trial court rendered judgment in favor of plaintiff for the full amount of interest claimed, and in so doing affirmed the following point, which substantially presents the questions now at issue:

"By the first section of the act of 1885, all bonds, mortgages, etc., owned by residents of Pennsylvania, are made taxable at three mills upon their actual value. Under the general laws of the commonwealth, all such property is to be assessed at its actual value, with notice to the owner, and the right of appeal to the county commissioners, whose action is, in turn, reviewed by the state board of revenue commissioners, except as to bonds and mortgages issued by corporations created by or doing business in Pennsylvania, which are, by the provisions of the fourth section of the said act, drawn out from the general plan of assessment, and required to be assessed arbitrarily at their nominal or par value. By reason of the discrimination thus made between the assessment of mortgages issued by corporations of the state of Pennsylvania and those issued by individuals and foreign corporations, and by reason of the arbitrary assessment of bonds and mortgages issued by Pennsylvania corporations, whose actual value is less than their nominal or par value, as in the case of plaintiff, at the same price as other bonds issued by Pennsylvania corporations, whose actual value is much greater than their nominal or par value, the said fourth section is in conflict with section 1 of article 14 of the amendments to the constitution of the United States, which provides that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The defendant took the case to the supreme court of the state, which reversed the ruling below, and accordingly reduced the judgment to $570. See 17 Atl. Rep. 986, 127 Pa. St. 397. To review this judgment, plaintiff sued out a writ of error from this court.

M. E. Olmsted, for plaintiff in error. S. P. Wolverton, for defendant in error.

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*THE CHIEF JUSTICE. The judgment is affirmed, on the authority of Railroad Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. Rep. 533.

(147 U. S. 209)

DE LA VERGNE REFRIGERATING MACH. CO. v. FEATHERSTONE et al.

(January 9, 1893.)

No. 1,009.

PATENTS FOR INVENTIONS — VALIDITY — ISSUANCE TO INVENTOR AFTER DEATH — AMENDMENT OF APPLICATION.

1. Where a patent is issued after the inventor's death upon an application by him, the grant being to the inventor, his "heirs or assigns," according to the language of Rev. St. § 4884, such grant must be construed as running to the inventor, "or his heirs or assigns," and is effective to vest title in his legal representative, whether he be administrator, executor, or assignee. 49 Fed. Rep. 916, reversed.

2. An inventor entered into a contract with a third person, whereby the latter was to furnish money for the purpose of procuring a patent. The inventor died after filing an application, and thereafter the third person entered into an agreement with his widow, who was acting as administrator de son tort, whereby the former was to prosecute the application, and to have a sole interest in the patent after a certain sum had been realized by the widow from the profits made on the machine. Thereafter such third person received temporary letters of administration upon the estate of the inventor, and, while acting thereunder, the patent was issued in the name of the inventor, his "heirs or assigns." *Held*, that such third person had the equitable title to the patent, and the fact that there was no record evidence of these agreements filed in the patent office was immaterial in the absence of any question as to the rights of third parties. 49 Fed. Rep. 916, reversed.

3. The patent was not invalidated by the fact that the specifications originally filed with the application were amended, after the inventor's death, without any new oath, such amendment being within the scope of the original oath and description, and by way of limitation of the claims.

On a certificate from the United States circuit court of appeals for the seventh circuit.

Statement by Mr. Chief Justice FULLER:

This was a bill in equity, charging appellees with infringement of letters patent of the United States No. 175,020, issued to "James Boyle, his heirs or assigns," March 21, 1876, for an improvement in gas-liquefying pumps.

The bill set forth, among other things, a full history of the proceedings before the patent office, and alleged that, shortly after filing his application for the patent, James Boyle died, and that thereafter his administrator, who was also an assignee of a half interest, prosecuted the application, paid the final fee, and took out the patent, it being issued in the name of "James Boyle, his heirs or assigns."

Appellees demurred generally to the bill, and, the cause having been heard by the circuit court thereon, a decision was announced sustaining appellees' demurrer, on the ground that, Boyle having previously died, there was no grantee in being capable of taking at the time the patent was issued, and hence that the patent never had any validity. The opinion will be found reported in 49 Fed. Rep. 916.

A decree was thereupon entered dismissing the bill for want of equity, and complainant appealed to the circuit court of appeals for the seventh circuit, which entered an order certifying several questions or propositions of law upon which it desired the instruction of this court for their proper decision. These questions or propositions of law are as follows:

"I. On October 29, 1875, James Boyle, of Houston, Texas, having made an invention in refrigerating machines, executed an application for a patent therefor in due form, and verified by the proper oath, and appointed Alexander & Mason his attorneys to prosecute the same, which application was filed in the patent office November 24, 1875.

"Thereafter, and on the 27th day of November 1875, and while said application was still pending in the patent office, James Boyle died, leaving him surviving a widow and four children.

"Thereafter the said application was prosecuted by the said attorneys under the direction of Thomas L. Rankin, who had been appointed temporary administrator of the estate of James Boyle, deceased, March 9, 1876, and who obtained the said patent, and paid all the patent office and solicitors' fees therefor. The patent issued March 21, 1876, and the grantees therein expressed were 'James Boyle, his heirs or assigns.'

"On these facts the instruction of the court is desired upon the question:

"(1) Whether the grant to James Boyle, his heirs or assigns, was void because of the death of Boyle before the patent was issued, or whether such grant was valid on the ground that it should be construed in the alternative as a grant to James Boyle or his heirs or assigns, the words 'heirs or assigns' including a grantee or grantees in being capable of taking the patent, and the grant inuring to his or their benefit.

"II. Prior to the aforesaid application of James Boyle for a patent he made a contract with said Thomas L. Rankin, by which Rankin agreed to advance money to apply for and obtain the patent, and Boyle agreed to assign to Rankin one-half interest in the invention and patent.

"On December 2, 1875, after the death of James Boyle, and while the application for the patent was pending in the patent office, Rankin made an agreement with Theresa Boyle, the widow of James Boyle, then acting as executrix de son tort, in the words and figures following:

"'Houston, Texas, December 2, 1875. Article of agreement between T. L. Rankin and Mrs. James Boyle. T. L. Rankin, of the first part, agrees to complete the ice machine commenced by himself and James Boyle, and to provide for Mrs. Boyle while said machine is under construction, until next spring, say May first; and also to press the application for patents on the part of said machine claimed by James Boyle, and, in case said machine is a success, and said patents are obtained, is to use his best efforts to introduce the same, and to divide with Mrs. Boyle the profits of said business until she shall have received five thousand dollars for her share.

after which Mrs. James Boyle agrees to release any further interest in said patents to be obtained and the machines then in use, and from this date agrees that the said T. L. Rankin shall operate and control any interest James Boyle had pertaining to ice machines, together with his interest in the Arctic Ice Company. Stock to vote, proxy of same. T. L. Rankin. Theresa Boyle. Witness: W. T. Scott.'

"After the grant of the patent as above stated, and on the 18th day of July, 1876, the issue of temporary letters of administration to Rankin were superseded by the appointment of the said Theresa Boyle as permanent administratrix. She thereafter filed an inventory of her husband's estate, in which she included the patent in question as held and owned jointly with Thomas L. Rankin.

"Neither Theresa Boyle, nor her children, nor Thomas L. Rankin ever repudiated the proceedings whereby said patent was obtained, but enjoyed the beneficial ownership thereof, and sold their interests therein for a valuable consideration.

"On these facts the instruction of the court is desired as to the following questions:

"(2) Whether the above-quoted instrument should, under the above facts, be construed as an assignment to Thomas L. Rankin.

"(3) Whether the patent should be construed as a grant to Thomas L. Rankin as assignee.

"(4) Whether, under the above-recited facts, the patent should be held to be obtained by the authority of Theresa Boyle as administratrix, as well as of Thomas L. Rankin.

*217 *"III. During the proceedings in the patent office, and after the death of James Boyle, the specification originally filed with said application for a patent was amended within the scope of the original oath and the invention described in said original specification, and by way of limitation of the claims, but without the filing of any new oath or power of attorney.

"(5) Did such amendment render the patent void?

"(6) Is the patent void because no oath was filed after Boyle's death?

"It also appearing that the cause of action below was disposed of upon a demurrer filed to appellant's bill and exhibits, which demurrer the court below sustained, and dismissed the bill, and no witnesses being examined in said cause, it is further ordered that the record as printed in this cause be also certified up as a full statement of facts upon which the questions and propositions stated for the instruction desired from the supreme court of the United States are based; and the clerk of this court is hereby directed to transmit to the clerk of the supreme court of the United States a certified copy of said record, together with this certificate."

Sections 4884, 4886, 4895, and 4896 of the Revised Statutes are as follows:

"Sec. 4884. Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent, and be a part thereof."

"Sec. 4886. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in *public use or on sale for more* than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

"Sec. 4895. Patents may be granted and issued or reissued to the assignee of the inventor or discoverer; but the assignment must first be entered of record in the patent office. And in all cases of an application by an assignee for the issue of a patent the application shall be made and the specification sworn to by the inventor or discoverer; and in all cases of an application for a reissue of any patent the application must be made and a corrected specification signed by the inventor or discoverer, if he is living, unless the patent was issued and the assignment made before the eighth day of July, eighteen hundred and seventy.

"Sec. 4896. When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the heirs at law of the deceased, in case he shall have died intestate; or, if he shall have left a will, disposing of the same, then in trust for his devisees, in as full manner, and on the same terms and conditions, as the same might have been claimed or enjoyed by him in his lifetime; and when the application is made by such legal representatives the oath or affirmation required to be made shall be so varied in form that it can be made by them."

Ephraim Banning, Thos. A. Banning, and Edmund Wetmore, (Charles H. Aldrich, of counsel,) for appellant. L. L. Bond and C. E. Pickard, for appellees.

*220 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The grant was to "James Boyle, his heirs or assigns," and in this followed the language of section 4884 of the Revised Statutes. But,

although Boyle made the application, he was dead at the time the patent issued, and it was therefore held by the circuit court that the patent was utterly void for want of a grantee.

The reasoning of the court was that all the rights and remedies of inventors to the exclusive property in their inventions come from the statute, and that, under sections 4886, 4895, and 4896, only three classes of persons are recognized to whom a patent for an invention can issue, namely: The inventor himself; the assignee of the inventor, when the assignment is made before the issue of the patent; and the executor or administrator of the inventor, if he dies before the patent is granted. That a patent for an invention is a grant for the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention; and that, just as the term was originally used in England to describe written instruments emanating from the king, sealed with the great seal, whereby lands, honors, or franchises were conferred upon individuals, so it is used in this country as descriptive of an instrument whereby some exclusive right is granted by the sovereign power to the person named therein. Hence, continued the court, a patent for an invention is a grant, and must have a grantor and a grantee. It must grant the franchise or monopoly to a person named, and who is capable of taking; and in this respect a patent does not differ from a patent or deed for lands. And as a deed to a person not then living and his heirs would be void, since, the word "heirs" being one of limitation, and not of purchase, there is no person to take under it, so a patent for an invention to a dead man is wholly inoperative, and such must be the construction of a patent issued under section 4884 to the patentee, his heirs or assigns, when the patentee thus named is dead at the date of the grant.

The conclusion reached rests upon the assumption that the form of grant specified in section 4884 can only be pursued when the inventor is living, and that the intention of congress was that the personal representatives of the inventor could not be treated as grantees under that section.

We are to remember that it is to be assumed that James Boyle had made a useful invention, and taken all the necessary steps to secure the benefits to be derived therefrom, and that, in view of the policy of the government to encourage genius and promote the progress of the useful arts, by securing to the inventor a fair and reasonable remuneration, a liberal construction in favor of those who claim under him must be adopted in the solution of the principal question before us.

It is also to be observed that under the practice of the patent office a considerable time necessarily elapses after a patent for an invention is allowed before it actually issues; that the applicants often reside at a great distance; that the cases when an inventor dies between the date of the application and the allowance and the allowance and the issue must be of frequent occurrence, and that this may happen when neither the office nor the inventor's solicitors are aware of the death. The reflection is a natural one that congress, which, in framing the provisions of the patent laws, must be presumed to have had these possible occurrences in mind, did not contemplate that all patents issued under such circumstances should be invalidated by the death of the inventor.

What, then, was the intention of congress in providing for a grant to the "patentee, his heirs or assigns?" Must it be construed as merely a personal grant to the individual, or may his personal representatives be treated as grantees?

"The words 'heirs' and 'heirs of his body,'" says Mr. Williams, "are quite inapplicable to personal estate; the heir, as heir, has nothing to do with the personal property of his ancestor. Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence a gift of personal property to A. simply, without more, is sufficient to vest in him the absolute interest. Whilst, under the very same words, he would acquire a life interest only in real estate, he will become absolutely entitled to personal property." Pers. Pr. 297.

The privileges granted by letters patent are plainly an instance of an incorporeal kind of personal property, which, as personalty, in the absence of context to the contrary, would go to the executor or administrator in trust for the next of kin. Williams, Ex'rs, p. 817; Schouler, Ex'rs, § 200; Williams, Pers. Pr. 271; Patterson v. Kentucky, 97 U. S. 501; Millar v. Taylor, 4 Burrows, 2303; Shaw Relief Valve Co. v. New Bedford, 19 Fed. Rep. 753.

The rule in Shelley's Case was that when an estate of freehold is limited to a person for life, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation, and the grantee takes the whole estate, either in fee tail or fee simple. This is a rule of law, and not a rule of construction. Evans v. Evans, [1892,] 2 Ch. 173, 184, 188. It applies to nothing but real estate, and, if resorted to in connection with personal estate, it is only by way of analogy, and as a rule of construction, in order to promote the intention.

We do not perceive any sound reason for holding that the word "heirs" in a patent for an invention should be regarded as a definition of the extent of the patentee's own interest in the patent. There is nothing technical in the word as used. It indicates persons who are to have the benefit in the event of death, but the absolute character of the interest of the patentee is not attributable to it. The words in the statute, "the patentee, his heirs or assigns," whether construed

cording to the rules of grammar or to the evident intent of congress, mean "the patentee or his heirs or assigns." They comprehend the legal representatives, assignees in law and assignees in fact, and the phraseology raises no limitation in the sense of the strict common-law rule applied to realty.

It is said that if the word "heirs" were not used in the grant, the patent would end with the life of the patentee, and would have no descendible or inheritable quality; but we are not persuaded that this would be so, any more than that the omission of the word from any transfer of personal property would have that effect. The exercise of the right vested is not, in its nature, dependent upon the continued existence of the person whose merit earned the reward. The statute has long been that "the patentee" may obtain an extension in certain cases, without adding that his executors or administrators may do this, (Act 1836, § 18, 5 St. pp. 117, 124; Act 1870, § 63, 16 St. p. 208; Rev. St. § 4924;) yet it was decided that an executor or administrator can obtain an extension, (Wilson v. Rousseau, 4 How. 646;) and that the extended term is assignable, although not expressly so provided, (Pavement Co. v. Jenkins, 14 Wall. 452; Railroad Co. v. Trimble, 10 Wall. 367;) and so, that a patent issued to an inventor, after an assignment of his entire interest has been entered of record, immediately and by operation of law inures to the benefit of his assignee, (Gayler v. Wilder, 10 How. 477.)

If the patent had issued to Boyle when living, although an assignment of his entire interest had been recorded before, the patent would have inured to the benefit of the assignee; and it is difficult to see why, if Boyle died prior to the issue of the patent, and after he had made the application and assigned his interest, the assignee should lose the benefit of the assignment because of the death.

Under section 4896, when the inventor dies before the patent is granted, the right of applying for and obtaining the patent devolves upon his executor or administrator, in trust for his heirs at law or legatees; and doubt has been suggested as to the applicability of the section when the death transpires after the application has been filed, but the rulings and practice of the patent office are to the effect that in the latter contingency no new application need be made, or new fee be paid, but the executor or administrator may file his letters, and the case be disposed of as if the applicant had not died. Rice v. Burt, Dec. Com. Pat. 1879, p. 291; Ex parte Smith, Id. 1888, p. 24.

Neither this section nor section 4895, providing that patents may be granted and issued or reissued to the assignee of the inventor or discoverer, prescribe any form of grant, which is alone to be found in section 4884. The statute does not require the patent to issue, under section 4896, to the executor or administrator; and, inasmuch as a patent is personal property, and, as such, goes to the executor or administrator, in trust for the next of kin, it would appear that this result would follow where the grant is to the patentee, his heirs or assigns.

Sections 4895 and 4896 cover cases where the application is made by the legal representatives or assignees; but where the application is made by the inventor, and he dies, a grant in the terms stated apparently accomplishes all the objects aimed at by both these sections.

Section 1 of the act of 1790 provided for a grant to "the petitioner or petitioners, his, her, or their heirs, administrators, or assigns," (1 St. pp. 109, 110;) and the act of Feb. 21, 1793, was in the same language, (1 St. pp. 318, 321.) Section 5 of the act of 1836 reads that the patent should, "in its terms, grant to the applicant or applicants, his or their heirs, administrators, executors, or assigns," etc. 5 St. pp. 117, 118. The statute of 1870 required the patent to contain "a grant to the patentee, his heirs or assigns," (16 St. pp. 198, 201,) which is carried forward into section 4884 of the Revised Statutes.

As remarked by Judge Lowell in Shaw Relief Valve Co. v. New Bedford, ubi supra, the omission of the word "executors," prior to 1836, did not affect the title of the executors; nor did the omission of "administrators and executors" from the act of 1870 make any difference. "The law was not changed by it." Taking the sections together, the legislative intent seems to have been that a grant to the patentee, his heirs or assigns, should vest title in the executor or administrator, where the death occurred pending the application. If there be no executor or administrator, or letters of such are not recorded, still the general form of grant prescribed in section 4884 is applicable, and the patent may run to "the patentee, his heirs or assigns." The statute does not make it imperative that the patent shall issue in the name of the executor or administrator, the grant under section 4884 being sufficient to vest title in the patentee's legal representative, whether he be administrator, executor, or assignee. If there are adverse claims of heirs and legatees, they may be left to be determined by the courts in whose jurisdiction they arise, rather than by the patent office. It is enough if it is found that the patent is proper to be granted, and it is so granted to the personal representatives of the deceased.

Sections 4895 and 4896 designate who should make the oath in case of death or assignment; but where the application has been made in the lifetime of the inventor, and remains, in effect, unchanged, there is no necessity for a new application or oath, except, of course, in the case of a reissue; and, as we have seen, a grant to the patentee, his heirs or assigns, sufficiently designates in whom the title to the patent shall vest in case of assignment or death.

In view of these considerations, as the language of the statute admits of a construction which, in sustaining the grant, effectuates the settled policy of the government in favor of inventors, our judgment is that that construction should be adopted, and that the statute should be read in the alternative, and the grant be treated as made to the patentee or his heirs or assigns. This conclusion is supported by the practice advisedly adopted in the land office (another branch of the executive department known as that of the interior) of using disjunctive terms for the purpose of preventing the defeat of grants by the death of the original grantee. In Hogan v. Page, 2 Wall. 605, the court, speaking through Mr. Justice Nelson, said:

"A difficulty had occurred at the land office, at an early day, in respect to the form of patent certificates and of patents, arising out of applications to have them issued in the name of the assignee, or present claimant, thereby imposing upon the office the burden of inquiring into the derivative title presented by the applicant. This difficulty also existed in respect to the boards of commissioners under the acts of congress for the settlement of French and Spanish claims. The result seems to have been, after consulting the attorney general, that the commissioner of the land office recommended a formula that has since been very generally observed, namely, the issuing of the patent certificate, and even the patent, to the original grantee, or his legal representatives; and the same has been adopted by the several boards of commissioners. This formula, 'or his legal representatives,' embrace representatives of the original grantee in the land, by contract, such as assignees or grantees, as well as by operation of law, and leaves the question open to inquiry in a court of justice as to the party to whom the certificate, patent, or confirmation should inure."

And see Carpenter v. Rannels, 19 Wall. 138; Bowman v. Long, 89 Ill. 19; Warnecke v. Lembca, 71 Ill. 91; Ready v. Kearsley, 14 Mich. 225; Railroad & Banking Co. v. Bryan, 8 Smedes & M. 234.

The action spoken of by Mr. Justice Nelson was evidently taken in order to prevent hardships occurring under the old form of land grants, as indicated in Galloway v. Finley, 12 Pet. 264, and other cases; but no such action was considered necessary in reference to invention patents, although the same reason might have existed if the same form had originally been prescribed.

It appears from the certificate that James Boyle died on November 27, 1875, and that the application was thereafter prosecuted by the attorneys who had been previously appointed by him for that purpose, under the direction of Thomas L. Rankin, who had been appointed temporary administrator of Boyle's estate March 9, 1876, and who obtained the patent, and paid all the patent-office and solicitors' fees therefor. It is also stated that prior to Boyle's application he had made a contract with Rankin, by which it was agreed that the latter should advance the money to apply for and obtain the patent, and Boyle should assign to Rankin a one-half interest in the invention and patent; and that on December 2, 1875, Rankin made an agreement with Theresa Boyle, the widow of James Boyle, "then acting as executrix de son tort," by virtue of which Rankin was to acquire the right to the whole patent. Under the statutes of Texas a temporary administrator possesses the rights and powers of a general administrator so far as expressly confided to him by the order of appointment. 1 Sayles' Civil St. Tex. p. 584.

The failure to record the title papers in the patent office, it appearing that the administrator and equitable owner in part obtained the patent, cannot, in the view we take of the case, make the patent void. The identity of the grantee might be determined by extrinsic testimony. If the grant be construed as made directly to the heirs, executors, administrators, or assigns of Boyle, there can be no doubt as to its validity, even though, when the patent issued, it was not made to appear who they were.

The case of Eagleton Manuf'g Co. v. West, Bradley & Carey Manuf'g Co., 111 U. S. 490, 4 Sup. Ct. Rep. 593, is cited to the proposition that, where the inventor dies, a patent is invalid when not issued upon the application and oath of his personal representative; but in that case the application was so amended, after the inventor's death, that it was equivalent to a new application; yet none such had been made, nor had the administratrix made the oath rendered necessary under such circumstances. In the case at bar the application remained in substance unchanged, and no new application or oath was essential to jurisdiction.

We ought, perhaps, to add that, in our opinion, the patent would not be absolutely void even if the objections taken by appellees were better founded than we hold they are. If the proceedings in the patent office may be considered as analogous to the condition of a pending suit at law upon the death of the plaintiff, the great weight of authority in this country is to the effect that, where the court has acquired jurisdiction of the subject-matter and the person during the lifetime of a party, a judgment for or against a dead man is not wholly void, or open to collateral attack. It is very rarely that proceedings are wholly void and without force or effect as to all persons and for all purposes, and therefore incapable of being or being made otherwise; and we are entirely clear that this patent cannot be treated as falling within that class.

The record shows, as we have said, the existence of a contract between Rankin and Boyle, by which the former was to advance the money to apply for and obtain the patent for a half interest, and that Rankin carried

out the contract on his part. The agreement between Rankin and the widow, then acting as having a colorable right to administer, is also set out, under which Mrs. Boyle agreed that, as soon as she should receive $5,000 in the way specified, she would "release any further interest in said patents to be obtained and the machines then in use." Rankin was appointed temporary administrator March 9, 1876, and on July 18, 1876, the temporary letters of administration issued to Rankin "were superseded by the appointment of the said Theresa Boyle as permanent administratrix. She thereafter filed an inventory of her husband's estate, in which she included the patent in question as held and owned jointly with Thomas L. Rankin. Neither Theresa Boyle, nor her children, nor Thomas L. Rankin ever repudiated the proceedings whereby said patent was obtained, but enjoyed the beneficial ownership thereof, and sold their interest therein for a valuable consideration."

When Mrs. Boyle took out the letters of administration, her prior acts, presumably, upon this record, beneficial to the estate, and certainly not such as appellees have any right to complain of, should be viewed in the same light as though she had been made administratrix upon the death of her husband; and upon the facts stated, without discussing the particular nature of the instrument of December 2, 1875, we conclude that Rankin acquired under the two contracts the equitable title to the patent; and the circumstance that there was no record evidence of the transaction in the patent office made no difference, in the absence of question as to the rights of third parties. The patent, therefore, inured to his benefit. Hartshorn v. Day, 19 How. 211; Day v. Rubber Co., 20 How. 216; Gayler v. Wilder, 10 How. 477.

Boyle made the oath to the application filed in his lifetime in accordance with section 4892 of the Revised Statutes, and the certificate states that after his death "the specification originally filed with said application for a patent was amended within the scope of the original oath and the invention described in said original specification, and by way of limitation of the claims, but without the filing of any new oath or power of attorney." In Eagleton Manuf'g Co. v. West, Bradley & Carey Manuf'g Co., 111 U. S. 490, 498, 499, 4 Sup. Ct. Rep. 593, 597, before referred to, the patent was held invalid because the authority given to Eagleton's attorneys ended at his death, and the patent was granted upon amendments made by the attorneys without any new oath by the administratrix. And Mr. Justice Blatchford, speaking for the court, said that the file wrapper showed "beyond doubt that there was no suggestion, in the specification signed and sworn to by Eagleton, of the invention described in the amendment;" and that "in view of the entire change in the specification, as to the invention described, the patent, to be valid, should have been granted on an application made and sworn to by the administratrix. The specification, as issued, bears the signature of Eagleton, and not of the administratrix; and it is sufficiently shown that the patent was granted on the application and oath of Eagleton, and for an invention which he never made."

In the case at bar there was not only no amplification of the original application by the amendment, but it was within the scope of the original specification, and a limitation and narrowing of the original claim, so that it was the identical invention sworn to by Boyle; and there was no more reason for requiring a new oath from his administratrix than there would have been for requiring it from Boyle himself. The attorneys who had acted for Boyle continued to act under Rankin's direction, and, although it is not shown that their authority was conferred in writing, by a power of attorney executed and filed in accordance with the rules of the office, that is not a fatal objection, since the attorneys had authority in fact, and their acts were subsequently ratified by Rankin and by Mrs. Boyle.

We are of opinion that the grant was not void because of the death of Boyle before the patent was issued, and that it should be construed in the alternative as a grant to James Boyle, or his heirs or assigns, which would include a grantee or grantees in being capable of taking the patent, and to whose benefit the grant would inure; that the patent should be construed as a grant to Thomas L. Rankin as assignee, and held to have been obtained by the authority of Mrs. Boyle as administratrix, as well as of Rankin; and that the amendment did not render the patent absolutely void, nor did the fact that no oath was filed after Boyle's death.

These conclusions answer the questions propounded, and will be certified accordingly.

(147 U. S. 150)

HOLMES et al. v. GOLDSMITH et al.

(January 9, 1893.)

No. 93.

CIRCUIT COURT—JURISDICTION—DIVERSE CITIZENSHIP—ACTION BY INDORSEE OF ACCOMMODATION NOTE—PAROL EVIDENCE — RES GESTÆ —PROOF OF HANDWRITING BY COMPARISON — HARMLESS ERROR.

1. Under Act Aug. 13, 1888, (25 St. at Large, p. 434,) restricting the jurisdiction of circuit and district courts over suits by assignees to cases where such suit might have been prosecuted if no assignment or transfer had been made, the circuit court has jurisdiction of an action on a promissory note, by the indorsee against the maker thereof, although the payee is a citizen of the same state as the maker, where it appears that the note was made for the accommodation of the payee, and that he is, in legal effect, a maker or original promisor, and therefore did not, by his indorsement, assign or transfer any right of action held by him against the accommodation maker. 36 Fed. Rep. 484, affirmed.

2. To sustain the jurisdiction of the court

in such a case, parol evidence showing the real relations of the parties, notwithstanding the terms of the note, is admissible, as it does not vary the contract. 36 Fed. Rep. 484, affirmed.

3. Where the execution of an accommodation note is put in issue in an action thereon by the indorsee against the makers, testimony as to the relations between the makers and the nominal payee, and as to the use to which the latter wanted to put the money borrowed on the note, is admissible.

4. Where the nominal payee of an accommodation note has died before trial of an action thereon by the indorsee against the makers, testimony of a witness as to letters and conversations between him and such payee prior to the making of the note, tending to show the relations of the parties and the circumstances in which the note was made, is admissible as part of the res gestae.

5. Where the execution of a note sued on is put in issue in the circuit court, the introduction of papers, not otherwise competent, for the purpose of enabling the jury to make a comparison of handwriting, is warranted by a state statute, (1 Hill's Ann. Laws Or. § 765,) which provides that "evidence respecting the handwriting may also be given by comparison, made by a witness skilled in such matters, or the jury with writings admitted or treated as genuine by the party against whom the evidence is offered."

6. Where, on a question of the genuineness of the signatures of makers of a note, a witness testifies to his acquaintance with the handwriting of one or more of the makers, and to his belief of the genuineness of the signatures of the parties, with whose handwriting he was familiar, the question whether he would act on the signatures attached to the note, if they came to him in an ordinary business transaction, is allowable, to show the strength and value of the witness' opinions.

7. On a question of the genuineness of the signatures of makers of an accommodation note, testimony of an expert that the ordinary handwriting of the nominal payee, as shown in letters, was such as to convince him that the payee could not successfully imitate signatures of others, and that the payee could have imitated the handwriting of one of the witnesses as easily as that of one of the makers of the note, though possibly irrelevant, is unimportant, and its admission is not ground for reversal.

In error to the circuit court of the United States for the district of Oregon. Affirmed.

J. H. Mitchell, for plaintiffs in error. L. R. Cox, for defendants in error.

*Mr. Justice SHIRAS delivered the opinion of the court.

This was an action brought by L. Goldsmith and Max Goldsmith, doing business as partners under the name of L. Goldsmith & Co., citizens of the state of New York, against M. B. Holmes, John Dillard, and R. Phipps, citizens of the state of Oregon, as makers of a promissory note, in the words and figures following:

"$10,000. Portland, Oregon, Aug. 9, 1886. Six months after date, without grace, we, or either of us, promise to pay to the order of W. F. Owens ten thousand dollars, for value received, with interest from date at the rate of ten per cent. per annum until paid, principal and interest payable in U. S. gold coin, at the First National Bank of Portland, Oregon; and in case suit is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit. M. B. Holmes. John Dillard. R. Phipps."

On the day of its date, W. F. Owens indorsed the note, waived, in writing, demand, notice, and protest, delivered the note, so indorsed, to the agent of the plaintiffs, and received the sum of $10,000.

*The complaint alleged that the transaction was a loan by plaintiffs to W. F. Owens; that the defendants executed the note for the accommodation of Owens, to enable him to procure the loan thereon; and that Owens was in fact a maker of said note to the plaintiffs, and never himself had any cause of action thereon against the defendants.

To this complaint the defendants demurred on the ground that it did not bring the case within the jurisdiction of the circuit court, and did not state facts sufficient to constitute a cause of action.

Upon argument this demurrer was overruled. 36 Fed. Rep. 484.

The defendants answered, denying the execution of the note and knowledge of the other facts alleged in the complaint. At the trial a verdict was given in favor of the plaintiffs for the amount of the note, with interest from date; and on June 19, 1889, judgment was entered on the verdict, in favor of the plaintiffs and against the defendants, for the amount of the note, with interest, and with costs and disbursements.

A writ of error was duly sued out and allowed, and the case brought into this court for review.

*The complaint alleges the ownership in the plaintiffs of a chose in action; as to the character, a promissory note; as to amount, ten thousand dollars; as to parties, the plaintiffs, citizens of the state of New York, and the defendants, citizens of the state of Oregon; thus bringing the case within the jurisdiction of a circuit court of the United States, as defined in the constitution.

By the demurrer to the complaint the defendants invoked the provision of the act of August 13, 1888, (25 St. p. 434,) which is as follows:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

Upon the face of the complaint, the jurisdiction of the circuit court was duly made to appear, so far as the requisitions of the constitution apply. But it has been held, in a series of cases beginning with Turner v.

Bank, 4 Dall. 8, that it is competent for congress, in creating a circuit court and prescribing the extent of its jurisdiction, to withhold jurisdiction in the case of a particular controversy.

In pursuance of this view it has been frequently held by this court that, in an action in a circuit court of the United States by an assignee of a chose in action, the record must affirmatively show, by apt allegations, that the assignor could have maintained the action. Thus, Mr. Justice Strong, in delivering the opinion of the court in the case of Morgan's Ex'r v. Gay, 19 Wall. 81, 83, said:

"In Turner v. Bank, 4 Dall. 8, it was distinctly ruled that, when an action upon a promissory note is brought in a federal court by an indorser against the maker, the citizenship of not only the parties to the suit, but also of the payee and indorser, must be averred in the record to be such as to give the court jurisdiction."

In Sheldon v. Sill, 8 How. 441, 448, it was contended, in favor of the jurisdiction of the circuit court, that the provision in the judiciary act of 1789, inhibiting a suit by an assignee of a chose in action, in cases where the assignor could not have sued, if no assignment had been made, was invalid, because it attempted to deprive the courts of the United States of the judicial power with which the constitution had invested them; but this court, speaking through Mr. Justice Grier, said:

"The eleventh section of the judiciary act, which defines the jurisdiction of the circuit courts, restrains them from taking 'cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents if no assignment had been made, except in cases of foreign bills of exchange.'

*158 * "The third article of the constitution declares that 'the judicial power of the United States shall be vested in one supreme court and such inferior courts as the congress may from time to time ordain and establish.' The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies 'controversies between citizens of different states.'

"It has been alleged that this restriction of the judiciary act, with regard to assignees of choses in action, is in conflict with this provision of the constitution, and therefore void.

"It must be admitted that if the constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by congress. But, as it has made no such distribution, one of two consequences must result,—either that each inferior court created by congress must exercise all the judicial powers not given to the supreme court, or that congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and, if not, the latter would seem to follow as a necessary consequence; and it would seem to follow, also, that, having a right to prescribe, congress may withhold, from any court of its creation, jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all. The constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court. Consequently, the statute which does prescribe the limits of their jurisdiction cannot be in conflict with the constitution, unless it confers powers not enumerated therein."

This doctrine has remained unchallenged, and has been assumed for law in numerous cases, which it is unnecessary to cite; and a similar provision has been inserted in the various acts defining the jurisdiction of the circuit courts, including, as we have seen, the act of August 13, 1888, under which the present action was brought.

Nor are we asked by the defendant in error to disregard those cases, but he contends that, consistently with their doctrine and the provision of the judiciary act, he can maintain his action by alleging and proving that the nominal indorser was not really such, but that the note was made by the makers for his accommodation and as his sureties; that he was, in legal effect, a maker of the note; that he received the proceeds of the loan effected through the note, and had no right of action against the nominal makers of the note; and hence that he cannot be regarded as an assignor of a right of action against the makers, within the true meaning of the judiciary act.

The learned judge who tried the case below adopted the view that where it is necessary, to maintain the jurisdiction of the circuit court in an action on a promissory note, to show that the plaintiff, who appears to be an indorsee or assignee, is in point of fact the payee of the note, it may be done, and therefore overruled the demurrer.

Against this view of the case, the plaintiffs in error urge two propositions: First, that it was not competent for the holders of the note to show, by allegation and evidence, that the relation of the parties to the note, as makers and payees, was otherwise than as it appeared to be in the phraseology of the note itself; and, second, that, assuming the plaintiffs' evidence to truly present the facts of the case, yet the plaintiffs were not thereby relieved from the operation of that pro-

vision of the law which forbids assignees from maintaining actions to recover the contents of promissory notes. To sustain their first objection, plaintiffs in error cite numerous cases going to show that parol evidence is not admissible to vary the contract of indorsement, or the agreement of the parties as fixed under the law by the fact of indorsement.

Certainly, as against a third party who has become, in good faith, the holder of a promissory note, a defendant, whether a maker or an indorser, will not be permitted to escape from the legal import of his formal contract by an offer of parol evidence. But, as between themselves, it has always been held that evidence showing the real relation of the parties is admissible, because it does not change or vary the contract, but shows what it really was. The defendants' engagement, as to amount and date and place of payment, and every other circumstance connected with it, is left by the evidence just what it appears to be on the face of the note.

In Brooks v. Thacher, 52 Vt. 559, where there was a question as to whether a party to a note was principal or surety, Redfield, J., said: "But the real relation of the parties to a written instrument, whether as principal or sureties, may always be shown by parol evidence."

Harris v. Brooks, 21 Pick. 195, 197, was a suit wherein one of two makers of a note was permitted to show that, though a joint maker in form, he was, in fact, surety for the other maker, and had been released by an agreement of the holder that he would look to the principal; and Shaw, C. J., said: "The fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption."

If, then, it was satisfactorily shown that Owens, the nominal indorser, was really the party for whose use the note was made, and that the plaintiffs below were the first and only holders of the note for value, the next question is whether, upon that state of facts, they were prevented, by the terms of the judiciary act, from maintaining an action in the circuit court.

It is quite plain that the plaintiffs' action did not offend the spirit and purpose of this section of the act. The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the federal court.

Bank v. Wister, 2 Pet. 318, was the case of a suit in a circuit court of the United States by a holder of a bank bill payable to individuals or bearer, concerning which individuals there was no averment of citizenship, and which, therefore, may have been payable, in the first instance, to parties not competent to sue in the courts of the United States. But the court held: "This is a question which has been considered and disposed of in our previous decisions. This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."

In Bushnell v. Kennedy, 9 Wall. 387, 391, Chief Justice Chase, in delivering the opinion of the court, said: "It may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee, though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a chose in action may maintain a suit in the circuit court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors."

We do not overlook the fact that, since the foregoing cases were determined, congress has, in the more recent judiciary acts, still further restricted the jurisdiction of the circuit courts by including in the prohibitory clause the case of promissory notes payable to bearer.

But the reasoning remains applicable, in so far as they hold that the language of the statute is to be interpreted by the purpose to be effected and the mischief to be prevented.

We think that the jurisdiction of the circuit court, in the case before us, was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers.

The jurisdiction of the court having been established, and an issue having been made as to the execution of the note, several questions arose during the progress of the trial, which are brought up for our consideration by bills of exceptions.

The 2d, 3d, 4th, and 5th assignments allege error in the action of the court in permitting one H. Abraham to testify as to what were the relations between the defendants and W. F. Owens, and as to what Owens wanted to do with the money he borrowed on the note in suit.

It was not claimed by the plaintiffs that the evidence objected to was needed to create an obligation on the part of the defendants to pay the note. That obligation arose directly from the terms of the note.

and, if the execution of the note had not been denied, the testimony of Abraham would not have been necessary.

But in view of the nature of the controversy before the jury, putting in issue the execution of the note sued on, we agree with the trial court in regarding the evidence as admissible. While each one of the facts so elicited was, when regarded singly, of small importance, yet, taken together, they were worthy of consideration; and we do not perceive that any rule of evidence was violated in submitting them to the jury.

It is argued that there was error in admitting statements by the witness Abraham as to the contents of the letters that had passed between him and Owens, without producing the letters, or accounting for their absence. But the record does not disclose that any specific objection was made to the evidence for that reason, though objection was made generally to the admission of any conversation between the witness and Owens, which was not had in the presence of the defendants, as incompetent and irrelevant. But the force of this is broken by the observation that what passed between the witness and Owens, whether in conversation or in letters, was of matters that happened prior to the making of the note, and was admitted only to show the relations of the parties, and the circumstances in which the note was made.

In view of the fact, disclosed by the record, of the death of Owens before the trial, and the consequent necessity of resorting to circumstantial evidence, we think the rules on *163 this subject were not unduly relaxed in permitting a full disclosure of the res gestae.

There are several additional assignments of error, which involve the action of the court in admitting evidence bearing on the question of the execution of the note in suit.

So far as such assignments present the vexed subject of the introduction into a cause of papers, not otherwise competent, for the purpose of enabling the jury to make a comparison of handwriting, we are relieved from discussion by the existence of an Oregon statute which provides that "evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." 1 Hill's Ann. Laws Or. § 765. We regard this statute as constituting the law of the case, and as warranting the action of the court in the particulars complained of.

The seventh assignment avers error in permitting several witnesses to testify as to whether they would act upon the signatures of the defendants attached to the note sued on if they came to them in an ordinary business transaction. Such a question, standing alone, might be objectionable, but the record discloses that each of these witnesses had testified to his acquaintance with the handwriting of one or more of the defendants, and to his belief of the genuineness of the signatures of the parties with whose handwriting he was acquainted; and, as a means of showing the strength and value of the witness' opinions, the question put was allowable.

We have more difficulty in disposing of the errors assigned in the 9th, 10th, 11th, and 12th specifications. Two letters of Owens, the nominal payee of the note, who was not a party to the suit, were admitted in evidence; and Edward Failing, an expert witness, was asked to state whether, judging from the letters produced, he believed that Owens could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers. Certain stub certificates were admitted in evidence, and George W. Jones testified that his name thereon written was his signature; and thereupon the expert was asked whether or not, in his opinion, the name of Jones, so written, would be an easier name to counterfeit than that of M. B. Holmes. That the ordinary handwriting of Owens, as shown in his letters, was such as to convince an expert that he was not able to successfully imitate the signatures of other persons, may have been entitled to some weight. That Owens could, in the opinion of the expert, have as readily counterfeited the handwriting of Jones as that of the defendant Holmes, seems to be fanciful, and entitled to little or no weight. If these offers had been rejected by the court, such rejection could not have been successfully assigned as error. Still, we cannot perceive that the case of the defendants was injured by the admission of this trifling evidence. As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required; and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." Stevenson v. Stewart, 11 Pa. St. 307.

The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.

These observations seem to sufficiently dispose of the errors assigned, and the judgment of the court below is accordingly affirmed.

(147 U. S. 190)

ILLINOIS CENT. R. CO. v. CITY OF DECATUR.

(January 9, 1893.)

No. 56.

RAILROAD COMPANIES — EXEMPTION FROM TAXATION—SPECIAL ASSESSMENTS

1. Under Act Ill. Feb. 10, 1851, § 22, which exempts the Illinois Central Railroad Company, incorporated by the act, "from all taxation of every kind, except as herein provided for," and provides that the taxes thereby imposed on the company shall be paid into the state treasury, and applied to the payment of state indebtedness, the exemption does not extend to a special tax to defray the cost of grading and paving a street, assessed on land forming a part of the company's right of way, on the ground that the property is enhanced in value by the improvement. 18 N. E. Rep. 315, affirmed. McGee v. Mathis, 4 Wall. 143, distinguished.

2. Such charge is not within the exemption from "taxation," as being a special tax, rather than a special assessment, within the distinction recognized by Const. Ill. 1870, art. 9, § 9, giving corporate authorities power "to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise," since the tax is for the cost of a local improvement charged upon the contiguous property benefited thereby. 18 N. E. Rep. 315, affirmed.

In error to the supreme court of the state of Illinois.

Proceedings by the city of Decatur, Ill., to assess a special tax for the cost of grading and paving a street in said city on contiguous property, including land forming part of the right of way of the Illinios Central Railroad Company. Judgment of the county court confirming the assessment was affirmed by the supreme court of the state. 18 N. E. Rep. 315. The railroad company brings error. Affirmed.

Statement by Mr. Justice BREWER:

On February 10, 1851, an act was passed by the general assembly of Illinois incorporating the Illinois Central Railroad Company. By it the company was made the beneficiary of the land grant from congress to the state, of September 20, 1850, (9 St. p. 466.) The twenty-second section was in these words:

"Sec. 22. The lands selected under said act of congress, and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this state until sold and conveyed by said corporation or trustees; and the other stock, property, and effects of said company shall be, in like manner, exempt from taxation for the term of six years from the passage of this act. After the expiration of said six years, the stock, property, and assets belonging to said company shall be listed by the president, secretary, or other proper officer, with the auditor of state, and an annual tax for state purposes shall be assessed by the auditor upon all the property and assets, of every name, kind, and description, belonging to said corporation. Whenever the taxes levied for state purposes shall exceed three fourths of one per centum per annum, such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the state, and the said corporation is hereby exempted from all taxation, of every kind, except as herein provided for. The revenue arising from said taxation, and the said five per cent. of gross or total proceeds, receipts, or income aforesaid, shall be paid into the state treasury, in money, and applied to the payment of interest-paying state indebtedness, until the extinction thereof: provided, in case the five per cent. provided to be paid into the state treasury, and the state taxes to be paid by the corporation, do not amount to seven per cent. of the gross or total proceeds, receipts, or income, then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation."

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By section 27 it was provided that "this act shall be deemed a public act, and shall be favorably construed, for all purposes therein expressed and declared, in all courts and places whatsoever."

In 1887, proceedings were had in the county court of Macon county to defray the cost of grading and paving a certain street in the city of Decatur. Under those proceedings two separate parcels of land belonging to the Illinois Central Railroad Company, and forming part of its right of way, were assessed to the amount of $262.70. The company objected to this assessment on the ground that by its charter it was exempted from all taxation, of every kind, except as therein provided for, and that there was no provision permitting such an assessment. This objection was overruled, and a judgment entered by the county court against the two parcels of land. Exception was taken, and an appeal allowed to the supreme court of the state. In that court the ruling of the county court was sustained, and the judgment affirmed, and the case is now brought here for review by writ of error.

B. F. Ayer, for plaintiff in error. E. S. McDonald and Hugh Crea, for defendant in error.

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*Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The single question in this case is whether this special tax for a local improvement is within the exemption from taxation granted to the railroad company by section 22 of the act of 1851.

Between taxes—or "general taxes," as they are sometimes called, by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the state as a state, the consideration of which is protection by the state—and special taxes or special assessments, which are imposed upon property within a limited area

for the payment for a local improvement, supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers, and by substantially similar methods. Taxes *198 proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. "The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder." 13 Montesq. Sp. Laws, c. 1; Association v. Topeka, 20 Wall. 655, 664; Opinions of Judges, 58 Me. 591; Hanson v. Vernon, 27 Iowa, 28, 47; Judd v. Driver, 1 Kan. 455, 462; Association v. Wood, 39 Pa. St. 73, 82; Bank v. Hines, 3 Ohio St. 1, 10.

On the other hand, special assessments or special taxes proceed upon the theory that, when a local improvement enhances the value of neighboring property, that property should pay for the improvement. In Wright v. Boston, 9 Cush. 233, 241, Chief Justice Shaw said: "When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made, providing that, under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden." In McGonigle v. Allegheny City, 44 Pa. St. 118, 121, is this declaration: "All these municipal taxes for improvement of streets rest, for their final reason, upon the enhancement of private properties." In Litchfield v. Vernon, 41 N. Y. 123, 133, it was stated that the principle is "that the territory subjected thereto would be benefited by the work and change in question." In Cooley on Taxation (page 416) the matter is thus discussed by the author: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of *199 government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be especially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made, and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax; but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice."

These distinctions have been recognized and stated by the courts of almost every state in the Union, and a collection of the cases may be found in any of the leading text-books on taxation. Founded on this distinction is a rule of very general acceptance,—that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments. Thus, in an early case, (In re Mayor, etc., of New York, 11 Johns. 77, 80,) under a statute which provided that no church or place of public worship "should be taxed by any law of this state," the court observed: "The word 'taxes' means burdens, charges, or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives of the word 'talliage,' (2 Inst. 532;) and Lord Holt, in Brewster v. Kidgell, Carth. 438, gives the same definition, in substance, of the word 'tax.' The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value fifteen hundred dollars. But to pay for the opening of a street, in a ratio to the 'benefit or advantage' derived from it, is no burden. It is no talliage or tax, within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister, as well as of other persons, pay for such an improvement, in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of law that 'qui sentit commodum debet sentire onus' is perfectly consistent with the interests and dictates of science and religion."

This rule of exemption has been applied in cases where the language granting the ex-

emption has been broad and comprehensive. Thus in Baltimore v. Cemetery, 7 Md. 517, the exemption was from "any tax or public imposition whatever," and it was held not to relieve from the obligation to pay for the paving of the street in front. In Cemetery v. Buffalo, 46 N. Y. 506, the exemption was from "all public taxes, rates, and assessments," and it was held not to discharge from liability for a paving assessment. A like rule was held in Paterson v. Society, 24 N. J. Law, 385, where the exemption was from "taxes, charges, and impositions." And in Bridgeport v. Railroad Co., 36 Conn. 255, the railroad company was held liable for a street assessment, although it paid a sum of money to the state which, by its charter, was to be "in lieu of all other taxes."

Indeed, the rule has been so frequently enforced that, as a general proposition, it may be considered as thoroughly established in this country. It is unnecessary to refer to the cases generally. It may be well, however, to notice those from Illinois. In Trustees v. City of Chicago, 12 Ill. 403, (decided in the lower court at May term, 1849, and before the passage of the act creating the contract relied upon, and by the supreme court at the June term, 1851,) the exemption was "from taxation of every description by and under the laws of this state," and it was held that that did not include an assessment made to defray the expense of opening a street. It was observed: "In our opinion, the exemption must be held to apply only to taxes levied for state, local, and municipal purposes. A tax is imposed for some general or public object. * * * The assessment in question has none of the distinctive features of a tax. It is imposed for a special purpose, and not for a general or public object." See, also, Chicago v. Colby, 20 Ill. 614; Peoria v. Kidder, 26 Ill. 351; Pleasant v. Kost, 29 Ill. 490, 494; Illinois Cent. R. Co. v. Commissioners of Drainage Dist., 129 Ill. 417, 21 N. E. Rep. 925. Nor is this a mere arbitrary distinction created by the courts, but one resting on strong and obvious reasons. A grant of exemption is never to be considered as a mere gratuity,—a simple gift from the legislature. No such intent to throw away the revenues of the state, or to create arbitrary discriminations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the state would otherwise be under obligations to do. A college or an academy furnishes education to the young, which it is a part of the state's duty to furnish. The state is bound to provide highways for its citizens, and a railroad company, in part, discharges that obligation. Or the recipient may be doing a work which adds to the material prosperity or elevates the moral character of the people. Manufactories have been exempted, but only in the belief that thereby large industries will be created, and the material prosperity increased; churches and charitable institutions, because they tend to a better order of society. Or it may be that a sum, in gross or annual installments, is received in lieu of taxes. But in every case there is the implied fact of some consideration passing for the grant of exemption. But those considerations, as a rule, pass to the public generally, and do not work the enhancement of the value of any particular area of property. So, when the consideration is received by the public as a whole, the exemption should be, and is, of that which otherwise would pass to such public, to wit, general taxes.

Another matter is this: In a general way, it may be said that the probable amount of future taxes can be estimated. While, of course, no mathematical certainty exists, yet there is a reasonable uniformity in the expenses of the government; so that there can be, in advance, an approximation of what is given when an exemption from taxation is granted, if only taxes proper are within the grant. But, when you enter the domain of special assessments, there is no basis for estimating in advance what may be the amount of such assessments. Who can tell what the growth of the population will be in the vicinity of the exempted property? Will there be only a little village, or a large city? Will the local improvements which the business interests of that vicinity demand be trifling in amount, or very large? What may be the improvements which the necessities of the case demand? Nothing can be more indefinite and uncertain than these matters; and it is not to be expected that the legislature would grant an exemption of such unknown magnitude, with no corresponding return of consideration therefor.

And, again, as special assessments proceed upon the theory that the property charged therewith is enhanced in value by the improvement, the enhancement of value being the consideration for the charge, upon what principles of justice can one tract within the area of the property enhanced in value be released from sharing the expense of such improvement? Is there any way in which it returns to the balance of the property within that area any equivalent for a release from a share in the burden? Whatever may be the supposed consideration to the public for an exemption from general taxation, does it return to the property within the area any larger equivalent with the improvement than without it? If it confers a benefit upon the public, whether the general public or that near at hand,—a benefit which justifies an exemption from taxation,—does it confer any additional benefit upon the limited area by reason of sharing in the enhanced value springing from the improvement? Obviously not. The local improvement has no relation to or effect upon that which the exempted property gives to the public as consideration for its exemption. Hence there is manifest inequity in relieving it from a share of the

cost of the improvement. So, when the rule is laid down that the exemption from taxation only applies to taxes proper, it is not a mere arbitrary rule, but one founded upon principles of natural justice.

But it is said that it is within the competency of the legislature, having full control over the matter of general taxation and special assessments, to exempt any particular property from the burden of both, and that it is not the province of the courts, when such entire exemption has been made, to attempt to limit or qualify it upon their own ideas of natural justice. Thus, in the case of College v. Boston, 104 Mass. 470, an assessment for altering a street was held within the language of the college charter exempting the property "from all civil impositions, taxes, and rates." See, also, the following authorities: Brightman v. Kirner, 22 Wis. 54; Southern R. Co. v. Mayor, etc., 38 Miss. 334; State v. City of Newark, 27 N. J. Law, 185; City of Erie v. First Universalist Church, 105 Pa. St. 278; Olive Cemetery Co. v. City of Philadelphia, 93 Pa. St. 129; City of Richmond v. Richmond & D. R. Co., 21 Grat. 604. This is undoubtedly true. So we turn to the language employed in granting this exemption to see what the legislature intended; and we notice that by the charter certain sums are to be paid into the state treasury, in money, and applied to the payment of interest-paying state indebtedness until the extinction thereof, and it is in consideration of this payment that the corporation is exempted from all taxation of every kind. Inasmuch as the payment by the corporation is to be always made into the state treasury, and for a time to be applied only to a single state purpose, a very plausible argument might be made to the effect that all that was intended to be granted was an exemption from state taxes, leaving the property, like other property, still subject to municipal taxation. That question, however, is not before us; and it has been held by the supreme court of Illinois, in Neustadt v. Railroad Co., 31 Ill. 484,—and properly so, in view of the provision in section 27 that the act "shall be favorably construed for all purposes therein expressed and declared,"—that the charter exemption extends to all general municipal taxation.

But can any intent be derived from the language of these exempting clauses to include within them special assessments? Obviously not; for out of the state treasury seldom, if ever, is money appropriated for merely local improvements. The rule is to charge them upon the property in the vicinity; and when the transaction between the parties, the state and the corporation, contemplates the payment into the state treasury of a sum in lieu of taxation, it must be held to contemplate a release only as to such charges as would ordinarily find their way into the state treasury for legislative appropriation. So that, independently of the use of the word "taxation," which has under such circumstances received almost a uniform construction, the terms of the agreement between the state and corporation excluded special assessments, and included only those matters which are the ordinary equivalent of state taxation.

But, again, it is urged that, whatever may be the rule obtaining in the courts of the states, this court has given a broader and more extended meaning to clauses exempting from taxation; and the case of McGee v. Mathis, 4 Wall. 143, is cited. But the case does not warrant the contention. The facts in that case were these: In 1850 the United States granted to the state of Arkansas all the swamp and overflowed government lands within its limits on condition that the proceeds of the lands, or the lands themselves, should be applied, as far as possible, for reclaiming them by means of levees and drains. The state accepted the grant, and by an act of the legislature, in 1851, provided for the sale of the lands. In the fourteenth section of this act it was provided that "to encourage, by all just means, the progress and the completing of the reclaiming such lands, by offering inducements to purchasers and contractors to take up said lands, all said swamp and overflowed lands shall be exempt from taxation for the term of ten years, or until they shall be reclaimed." In 1855 this section was repealed, but prior thereto McGee had become the owner of certain of these lands lying in Chicot county. In 1857 an act of the legislature, local in its nature, provided for the making of levees and drains in Chicot county, and authorized a special tax to meet the cost. This special tax was assessed upon the unreclaimed swamp lands of McGee, as well as other lands, and the question was whether this special tax impaired the contract of exemption provided by the fourteenth section of the act of 1851, and it was held that it did. The argument is thus stated by the chief justice, in delivering the opinion of the court, on page 157: "It was strenuously urged for the defendant that the exemption contemplated by the statute was exemption from general taxation, and not from special taxation for local improvements benefiting the land, such as the making of levees, and many authorities were cited in support of this view. The argument would have great force if the provision for exemption had been contained in a general tax law, or in a law in framing which the legislature might reasonably be supposed to have in view general taxation only. But the provision under consideration is found in a law providing for the construction of levees and drains, and devoting to that object funds supposed to be more than adequate, derived from the very lands exempted, and the exemption is for ten years, or until reclaimed, and is offered as an inducement to take up the lands, and thus furnish those funds. It is impossible to say that this exemption was not from taxation for the purpose of making

these levees and drains, as well as from taxation in general. Any other construction would ascribe to the legislature an intention to take the whole land for the purpose of the improvement, and then to load it with taxation for the same object in the hands of purchasers, whom it had led to expect exemption from all taxation, at least until the land should be reclaimed."

In other words, the general rule which we have been considering was recognized, but its applicability was denied by the court, and properly so. In order to create a fund to reclaim these lands from overflow, the state sold them exempted from taxation. To turn around, after such sale, and charge the cost of reclamation upon the same lands, would nullify the purpose for which they were sold. It is precisely as though the state had sold a body of lands for the specific purpose of raising funds to build a state house, and then, after the sale and receipt of the money, had turned around, and charged the cost of building such state house upon the very lands sold. By the sale the land was once appropriated to a given purpose, and could not be burdened a second time for the same purpose. It would be practically a second appropriation, which nullified that created by the sale. There is nothing in this case, therefore, which announces a doctrine in conflict with that we have been considering, and which has been recognized in all the states.

But, finally, it is urged that, if this exemption does not include special assessments, the constitution of Illinois of 1870 recognizes a distinction between special taxes and special assessments, and that in this case the charges are special taxes, rather than special assessments, and therefore to be included within the exemption of the charter. Section 2 of article 9 of the constitution of 1848, which was in force at the time of the charter of the railroad company, is as follows: "The general assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to his or her property." Section 5 of the same article contained this as to local taxation: "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same;" while in section 11 of article 13 was the ordinary provision that no property should be taken or applied to public use without just compensation. And under that constitution it was ruled, in the case of City of Chicago v. Larned, 34 Ill. 203, that "an assessment for improvements made on the basis of the frontage of lots upon the street to be improved is invalid, containing neither the element of equality nor uniformity, if assessed under the taxing powers," and equally invalid if in the exercise of the right of eminent domain, no compensation being provided." In quite an elaborate opinion the court held, substantially, that special assessments could only be imposed in proportion to the benefits actually received by the property upon which they were charged, and that, in the absence of an ascertainment of such special benefits, the expense must be borne by the entire property of the city. This decision was reaffirmed in City of Ottawa v. Spencer, 40 Ill. 211. Subsequently, and in 1870, a new constitution was adopted, section 9 of article 9 of which is as follows: "The general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." And this came before the supreme court in the case of White v. People, 94 Ill. 604, and it was held that the city council had power to charge the cost of a sidewalk upon the lots touching it, in proportion to their frontage thereon; that whether or not the special tax exceeded the actual benefit to the lots taxed was not material; that it may be supposed to be based upon a presumed equivalent; and that, where the proper authorities determine the frontage to be the proper measure of benefits, this determination could be neither disputed nor disproved,—and the cases in 34 and 40 Illinois, supra, were held to be inapplicable. This decision has been reaffirmed in Craw v. Tolono, 96 Ill. 255; Enos v. City of Springfield, 113 Ill. 65; City of Sterling v. Galt, 117 Ill. 11, 7 N. E. Rep. 471; City of Springfield v. Green, 120 Ill. 269, 11 N. E. Rep. 261.

But the difference between the two constitutions is simply in the mode of ascertaining the benefits, and does not change the essential fact that a charge like the one here in controversy is for the cost of a local improvement, and is charged upon the contiguous property, upon the theory that it is benefited thereby. This is the interpretation put upon the matter by the supreme court of Illinois. In White v. People, 94 Ill. 604, 613, it was said: "Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement." So, also, in Craw v. Tolono, 96 Ill. 255, it is said: "Special taxation, as spoken of in our constitution, is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a

determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited, or confined in their effect, to contiguous property, that no serious injustice will be done by imposing the whole expense upon such property." And in City of Sterling v. Galt, 117 Ill. 11, 7 N. E. Rep. 471, in which the difference between special assessment and special taxation was noticed, it was held that the whole of the burden in case of special taxation was imposed upon the contiguous property, upon the hypothesis that the benefits will be equal to the burden.

We do not suppose that the company had by its charter any contract with the state that the matter of special benefit resulting from a local improvement should be ascertained and determined only in the then existing way. There was nothing in the terms of that contract to prevent the state from committing the final determination of the question of benefits to the city council, rather than leaving the matter of ascertainment to a jury; and whether the charges are called "special taxes" or "special assessments," and by whatever tribunal or by whatever mode the question of benefits may be determined, the fact remains that the charges are for a local improvement, and cast upon the contiguous property, upon the assumption that it has received a benefit from such improvement, which benefit justifies the charge. The *charges here are not taxes proper, are not contributions to the state or to the city for the purpose of enabling either to carry on its general administration of affairs, but are charges only, and specially, for the cost for a local improvement supposed to have resulted in an enhancement of the value of the railroad company's property. It is not in lieu of such charges that the company pays annually the stipulated per cent. of its gross revenues into the state treasury.

We see no error in the rulings of the supreme court of Illinois, and its judgment is affirmed.

Mr. Justice BLATCHFORD took no part in the decision of this case.

(147 U. S. 238)

KOHN v. McNULTA.

(January 16, 1893.)

No. 105.

EQUITY PRACTICE — INTERVENTION — MASTER AND SERVANT — NEGLIGENCE.

1. Upon an intervention in railway foreclosure proceedings to recover damages against the receiver for personal injuries to an employe, the court has authority to send to a jury the single issue as to the amount of the damages, in case there is any liability, and a verdict, when returned, is merely advisory, and the court may thereafter set the same aside, and dismiss the intervening petition.

2. A railroad switchman, who has been employed as such in a switchyard for more than two months, being a man of mature age, assumes the risks incident to coupling cars belonging to other roads which have double deadwoods or bumpers of unusual length, although the cars belonging to his employer are not thus equipped; for a railroad company is not guilty of negligence in receiving into its yards and passing over its lines cars different from those owned by itself.

Appeal from the circuit court of the United States for the northern district of Ohio. Affirmed.

Statement by Mr. Justice BREWER:

On April 29, 1887, appellant entered into the employ of the defendant, the receiver of the Wabash, St. Louis & Pacific Railway Company, as a switchman in the yards of the company at Toledo, Ohio. He continued in such employ until the 11th of July, 1887, on which day, in attempting to couple two *freight cars, his arm was caught between the deadwoods and crushed. Thereafter he filed his petition of intervention in the circuit court of the United States for the northern district of Ohio, the court which had appointed McNulta receiver, and in which the foreclosure proceedings were still pending. At first his intervening petition was referred to a master, but afterwards, on his motion, the order of reference was set aside, and a jury called and impaneled. The testimony having all been received, the court left to the jury the single question of the amount of damages which the intervener should recover, if entitled to recover anything, and the jury in response thereto found that his damages were $10,000. The court, however, on an examination of the testimony, held that no cause of action was made out against the receiver, set aside the verdict of the jury, and dismissed the petition; from which decision the intervener brought his appeal to this court.

J. K. Hamilton, for appellant. Wells H. Blodgett, for appellee.

*Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

So far as the mere matter of procedure is concerned, there was obviously no error. The intervention was a proceeding in a court of equity, and that court may direct a verdict by a jury upon any single fact, or upon all the matters in dispute. But such verdict is not binding upon the judgment of the court; it is advisory simply, and the court may disregard it entirely, or adopt it either partially or in toto. Barton v. Barbour, 104 U. S. 126; 2 Daniell, Ch. Pl. & Pr. (5th Ed.) 1148, and cases cited in note. Improvement Co. v. Bradbury, 132 U. S. 509, 516, 10 Sup. Ct. Rep. 177, 179, and cases cited.

With respect to the merits of the case, the decision of the court was also clearly correct. The intervener was 26 years of age. He had been working as a blacksmith for about six years before entering into the employ of the defendant. He had been engaged in this work of coupling cars in the company's yard

for over two months before the accident, and was therefore familiar with the tracks and condition of the yard, and not inexperienced in the business. He claims that the Wabash freight cars, which constituted by far the larger number of cars which passed through that yard, had none of those deadwoods or bumpers; but, inasmuch as he had in fact seen and coupled cars like the ones that caused the accident, and that more than once, and as the deadwoods were obvious to any one attempting to make the coupling, and the danger from them apparent, it must he held that it was one of the risks which he assumed in entering upon the service. A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those it itself owns and uses. Baldwin v. Railroad Co., 50 Iowa, 680; Railway Co. v. Flanigan, 77 Ill. 365; Railroad Co. v. Smithson, 45 Mich. 212, 7 N. W. Rep. 791; Hathaway v. Railroad Co., 51 Mich. 253, 16 N. W. Rep. 634; Thomas v. Railway Co., (Mo. Sup.) 18 S. W. Rep. 980.

It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length, to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervener was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer. Tuttle v. Railway Co., 122 U. S. 189, 7 Sup. Ct. Rep. 1166; Ladd v. Railroad Co., 119 Mass. 412.

The decision of the circuit court was right, and it is affirmed.

(147 U. S. 248)

D. M. OSBORNE & CO. v. MISSOURI PAC. RY. CO.

(January 16, 1893.)

No. 95.

EMINENT DOMAIN—PUBLIC STREETS—RIGHTS OF ABUTTING OWNERS—INJUNCTION.

In Missouri, where the statutes provide for the assessment of compensation for a taking of property for public use, but not for any assessment when property is merely damaged, and not taken, an injunction will not issue on the complaint of an abutting owner to restrain the construction and operation of a railroad in a public street, the fee whereof is in the public, when access to the property will not be seriously obstructed, nor the value thereof materially decreased, and in such case complainant will be remitted to his remedy at law.

Appeal from the circuit court of the United States for the eastern district of Missouri.

This was a suit by D. M. Osborne & Co. against the Missouri Pacific Railway Company for an injunction to restrain the laying and operating of a railroad in a public street. Exceptions and demurrer to the answer were overruled. 35 Fed. Rep. 84. A replication was then filed, and on final hearing the bill was dismissed, without prejudice to an action at law. 37 Fed. Rep. 830. Plaintiff brings error. Affirmed.

Statement by Mr. Chief Justice FULLER:

This was a bill filed by D. M. Osborne & Co., a corporation of the state of New York, in the circuit court of the United States for the eastern district of Missouri, against the Missouri Pacific Railway Company, February 16, 1887, alleging that the defendant was about to construct a track along Gratiot street, in the city of St. Louis, from its main tracks near Twenty-Third street to the property of the St. Louis Wire Mill Company, near the corner of Twenty-First street, in front of a building on Gratiot and Twenty-Second streets, owned and occupied by complainant, and of a vacant lot adjoining this building, which was also owned by complainant, and on which it intended to erect a building similar to the one then occupied by it; and that the track would be a permanent obstruction, and was to be laid for the private use and gain of the wire mill. It was further averred that Gratiot street was but 24 feet in width from curb to curb; that when the proposed building was completed according to the original plan there would be no entrance to the same on any street but Gratiot street; that by reason of the railroad tracks, and the operation of the same, complainant and the public would be prevented from using the street as allowed by law; that travel would be diverted and turned away; that it would be impossible for a wagon and team to remain on Gratiot street in front of complainant's property, while cars were being moved or might be standing on the same, and that it would not be safe to use the street by teams and wagons; "to the great, unascertainable, and irreparable damage of your orator's business." It was also alleged that the noise, smoke, and danger from fire, and from the shaking and vibration of complainant's buildings, caused and occasioned by the passage of cars and locomotives in front of complainant's premises, would render them less desirable and valuable as a place of business to complainant; that all the damage threatened to be done complainant was irreparable in its nature, and it could not be fully compensated therefor in an action at law; and that the construction and operation of the railroad track would reduce the market value of the property, and damage the same in a sum in excess of $30,000.

The prayer for relief was that the defendant "be restrained and enjoined from commencing or carrying out the proposed construction of any railroad track or switch, or

from taking possession of said Gratiot street for said purpose, or from using said Gratiot street to the exclusion of your orator and the public, and for all such other and further relief as may be necessary and proper."

On October 8, 1887, the defendant filed its amended answer, specifically denying the allegations of complainant's bill, and averred that the track was laid, before the filing of the bill, in pursuance and by authority of an ordinance of the city of St. Louis, approved February 18, 1887, which ordinance was set out in full in the answer. Exceptions and demurrer were filed by the complainant to this answer, and overruled. The opinion of the circuit court thereon will be found in 35 Fed. Rep. 84. The court held, upon the pleadings as they stood, that the complainant should be left to its remedy at law.

*250 *A replication was then filed, and the cause came on for hearing January 31, 1889. It was stipulated that the track was laid March 20, 1887, some days after the bill was filed. Evidence was given on behalf of the complainant tending to show that the existence of the railroad track on Gratiot street lessened the value of complainant's property. The court declined to go into the question of the amount of the damages, and counsel for complainant disclaimed asking in this proceeding that the court should ascertain the amount and direct its payment.

The ordinance of the city council authorizing the construction of the track provided that the privilege of using it should be extended to other railroads by connecting their tracks with the switch, and that the track might be used to transport cars to and from the property of any other person or company owning property on Gratiot street, and desiring such connection, if municipal authority and power were granted for the laying and operation of spur tracks thereto.

There was no evidence that the track was constructed in any other than the ordinary manner upon the surface of the street, without change of grade or other disturbance, but it did not appear to have been laid for the full distance in the center of the street, but inclined to the north, and made a curved line at the west boundary of complainant's premises. There was no evidence of improper or unskillful construction or operation of the railroad, and there was evidence that, before and after the construction, complainant used continuously, for receiving goods, the Twenty-Second street entrance to its building. It was also shown that the track was used by the defendant in a reasonable and proper manner, and at reasonable hours; and there was a conflict of testimony as to whether the value of complainant's property had been enhanced or lessened by reason of the construction of the track. The court directed the bill to be dismissed without prejudice to complainant's right to sue at law for the damages which it claimed to have suffered, and a decree to that effect was accordingly entered, from which an appeal was prosecuted to this court. The opinion is reported in 37 Fed. Rep. 830.

*251 *Section 21 of article 2 of the Missouri Constitution of 1875 provides "that private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Section 765 of the Revised Statutes of Missouri of 1879, being one of the sections of article 2 of chapter 21, relating to railroad companies, reads: "Every corporation formed under this article shall, in addition to the powers hereinbefore conferred, have power * * * to construct its road across, along, or upon any stream of water, water course, street, highway, plank road, turnpike, or canal which the route of its road shall intersect or touch; but the company shall restore the stream, water course, street, highway, plank road, and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness. Nothing herein contained shall be construed to authorize the * * * construction of any railroad not already located in, upon, or across any street in a city or road of any county, without the assent of the corporate authorities of said city, or the county court of such county."

By subdivision 11 of section 4417 of the Revised Statutes of 1879, in article 2 of chapter 89, in relation to cities, towns, and villages, it is provided that cities shall have "sole power and authority to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part."

P. R. Fletcraft and J. E. McKeighan, for appellant. John F. Dillon and Winslow S. Pierce, for appellee.

*252 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

We assume upon this record that the complainant was an abutting owner merely, and that the fee of the street was in the municipality for the public, or in the public; that the construction of the tracks was duly authorized; that they were laid with due care and skill, and in strict accordance with the authority granted; and that the road was properly operated. And the terms of the ordinance were such in relation to other persons and companies than the mill company,

and to other railroads than this, that it is not open to the objection that it empowered a construction exclusively for private use.

The contention of complainant is that it was entitled, under section 21, article 2, of the state constitution, to compensation for the damage it alleged it had sustained, and that the company should have been enjoined from the operation of its road, because such compensation had not been paid.

In Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820, which was an action in trespass on the case, the provision of the constitution of the state of Illinois, adopted in 1870, that "private property shall not be taken or damaged for public use without just compensation," came under consideration in this court, and it was ruled, in concurrence with the interpretation placed upon that language by the supreme court of the state, that a recovery might be had wherever private property had sustained a substantial injury from the making and use of an improvement that was public in its character, whether the damage was the direct result of a physical invasion of the thing owned, or of the injurious disturbance of its user and enjoyment, as in a diminution of its market value. The same conclusion was reached in Rigney v. City of Chicago, 102 Ill. 64, where, among other things, it was said: "In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." Many decisions under similar constitutional provisions are to the same effect. Reading v. Althouse, 93 Pa. St. 400; Railroad Co. v. Vance, 115 Pa. St. 325, 8 Atl. Rep. 764; Auman v. Railroad Co., 133 Pa. St. 93, 20 Atl. Rep. 1059; Railroad Co. v. Williamson, 45 Ark. 429; Railroad v. Witherow, 82 Ala. 195, 3 South. Rep. 23; Gottschalk v. Railroad Co., 14 Neb. 550, 16 N. W. Rep. 475, and 17 N. W. Rep. 120; Spencer v. Railroad Co., 23 W. Va. 406.

It is insisted, however, that the settled rule of decision of the highest tribunal of Missouri is that the construction and operation of a steam railroad track in the ordinary way upon the streets of a municipality is a legitimate use of the street, and does not impose a new burden or servitude, and that the injury which owners of abutting property may suffer by reason of such construction and operation is not of a nature for which compensation is demandable under the constitutional provision in question.

In Julia Bldg. Ass'n v. Bell Telephone Co., 88 Mo. 258, a bill for an injunction was filed by an abutting landowner to restrain the erection and maintenance of telephone poles and wires on the sidewalk. The bill was dismissed, and the judgment affirmed, at October term, 1885, of the supreme court, the court holding that when the public acquires a street in a city, either by condemnation, grant, or dedication, it may be applied to all purposes consistent with the proper use of a street; that it is only when the street is subjected to a new servitude, inconsistent with and subversive of its proper use, that the abutting landowner can complain; that the erection and maintenance of defendant's poles were a proper use of the street; that it seemed that the owner of adjoining premises could not claim compensation for damages resulting from such use; and in no event would compensation be allowed for speculative or contingent damages, although recovery could be had for injuries resulting from the unskillful and negligent conduct of the work. And it was observed in the prevailing opinion that "railroads operated by steam are permissible, because such methods of transportation and travel are among those to which the street may be properly applied, as not being inconsistent with its free and unrestricted use."

The court was not unanimous, and it is said by counsel that the dissenting opinion is the better law, and that the allusion to railroads in streets was an obiter dictum; but in the recent case of Henry Gauss & Sons Manuf'g Co. v. St. Louis, K. & N. W. Ry. Co., 20 S. W. Rep. 658, (decided December 13, 1892,) the precise question was passed upon. This was a suit to enjoin the defendant from laying a track and operating a railroad laterally along Main street, in the city of St. Louis, in front of plaintiff's property, until compensation for damage thereto should be ascertained and paid. A preliminary injunction, which was granted at the commencement of the suit, was dissolved, and the road had been built and was in use when the cause was tried. The petition charged that the plaintiff owned an entire block fronting on Main street, and had thereon a two-story and basement factory, erected for the special purpose, and adapted by its construction for use as a planing mill, sash, door, and box factory, and was used as such; that the building fronted on Main street, and was so constructed that the only front that was adapted for receiving and shipping lumber from the street was the Main street front; that the defendant threatened and was about to occupy the street by laying and operating by steam a railway with double tracks, thereby permanently obstructing the street, and not leaving space between the tracks and the building sufficient to permit of the standing of wagons and other vehicles without constant danger of collision with engines and cars passing to and fro over the tracks, and wholly destroying the use of the street as a thoroughfare. The damage to the property as charged consisted of the prevention of the free ingress and egress to and from the street, noise and smoke, damage from fires, shaking and vibration of the building; all caused by

the passage of engines and cars over the street in proximity to the premises.

The court was satisfied that the plaintiff's property had been depreciated somewhat in value by reason of the construction and operation of the railroad, and the inquiry was whether the damages thus inflicted were such as were contemplated by section 21 of article 2 of the state constitution. It was not claimed by plaintiff that there was any physical injury done to its property, or that its possession was disturbed; and it was shown that the street was dedicated without restriction to general use as a highway; that the defendant was authorized by the charter and ordinance of the city to lay its tracks along the street, and to operate thereon; and that the track was laid on the established grade of the street, and constructed in a careful and skillful manner, and in strict compliance with the requirements of the ordinance. It was conceded by the court that every owner of a lot abutting on a public street, besides the ownership of the property itself, had rights appurtenant thereto, which formed a part of the estate, among which might be named an easement for the free admission of light and pure air, and the right of ingress and egress to and from the property; that the interest of the lot owner in the adjacent street was a peculiar interest, which neither the local nor the general public could pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to the contiguous ground; an incidental title to certain facilities and franchises which was in the nature of property, and which could no more be appropriated against the owner's will than any tangible property of which he might be the owner. And it was held that depriving the owner of these incorporeal hereditaments by interfering with their full enjoyment in the appropriation of the street to a new and different public use than that originally contemplated would undoubtedly be a damage within the constitutional provision; but the court was of opinion that the laying of a railroad track in the street, on grade, and operating the road in the usual manner, was not applying the street to a new public use which required the payment of compensation for damage to the property; that when land is dedicated generally, and without restrictions, or condemned for a public street in a town or city, the owner of the abutting lots who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street could be lawfully subjected by the public; and, after quoting with approval from the majority opinion in Julia Bldg. Ass'n v. Bell Telephone Co., the court said: "There has been great diversity of opinion among the courts of this country as to whether, though under proper legislative authority, laying a track on the established grade, and operating a steam railroad thereon, in the transaction of commercial business, along a street, is subjecting the street to a public use not contemplated in a general grant or dedication. Whatever the rule may be elsewhere, this court has been uniform in holding that such a use is not a perversion of the highway from its original purposes. Lackland v. Railroad Co., 31 Mo. 180; Porter v. Railway Co., 33 Mo. 128; Cross v. Railway Co., 77 Mo. 321; Julia bldg. Ass'n Case, supra; Smith v. Railway, 98 Mo. 24, 11 S. W. Rep. 259; Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co., 97 Mo. 469, 10 S. W. Rep. 826; Rude v. City of St. Louis, 93 Mo. 414, 6 S. W. Rep. 257. * * * It appears from the evidence that the only substantial damage which was special to plaintiff and not common to the public, shown by it, consisted in the interference with its free access from the street to its factory; the obstruction of the light and air across the open street; smoke, cinders, and dust from engine and cars; noise and jarring of the ground,—all caused by the movement of trains. These may cause damage to, and depreciation of, the value of the property, but the damage results from a legitimate use of the street, and which might have been anticipated by plaintiff as a probable use when it bought its property and erected its improvements." And it was concluded that, while for any damages that might be caused by the unlawful or negligent maintenance of the tracks in the street, or by negligent use of engines or movement of trains, defendant would be liable in an action to recover them, plaintiff had shown no ground for injunction. This decision, although rendered some years after the entry of the decree under review, must be regarded as an authoritative exposition of the previous judgments of that court upon the same subject.

As a general rule, this court follows the decisions of the highest tribunals of a state, upon the construction of its constitution and laws, if they do not conflict with or impair the efficacy of some provision of the federal constitution, or of a federal statute; but we are not required to express an opinion as to the applicability of that rule in this case, as the decree must be affirmed on other grounds.

Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition.

Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded ex debito justitiae.

But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere.

In McElroy v. Kansas City, 21 Fed. Rep. 257, which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. Justice Brewer, then circuit judge, considered under what circumstances a chancellor could grant such relief. It was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer large inconvenience, if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages. If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition, while not restraining defendant from the exercise of its ultimate rights. Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of property for public use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted, with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which complainant would sustain, upon payment of which the injunction would be vacated.

Assuming, as the circuit court did, and as we prefer to do in disposing of the case upon this record, that, if the complainant had sustained damages, it had a cause of action, we nevertheless entirely agree that the bill was properly dismissed.

Evidence was adduced of the extent and character of the alleged damage, although the circuit court did not undertake to go into the question of amount, and the result was that the court concluded that the use of the track had not seriously obstructed, and would not in future seriously obstruct, access to complainant's premises, and that the lessening of the market or rental value of the property was, in any event, small; that a jury might find that no damage had been sustained, or that it was inconsiderable; and that there was no proceeding which defendant could take to obtain an assessment of damages, if any, while the complainant had an adequate and simple remedy by an action at law.

The prayer was for an unconditional injunction, and, although this was coupled with a prayer for general relief, a decree different from that specifically prayed could hardly have been awarded under the general prayer, as the averments of the bill were not introduced for that purpose, and besides, the complainant explicitly disclaimed upon the hearing any desire for the ascertainment of damages in this proceeding.

The statutes of Missouri provided for the assessment of compensation for the taking of property for public use, but not for such assessment where property was merely damaged, and complainant occupied the position of seeking by an absolute injunction to compel the defendant to pay such amount as accorded with its own judgment upon that matter. It may be that, if this had been a case where compensation as such was demandable, the defendant, by filing a cross bill, could have obtained an order such as was entered in McElroy v. Kansas City, but it is useless to indulge in speculation in this regard.

We are satisfied that complainant was not entitled to the relief prayed, and the decree of the circuit court is accordingly affirmed.

(147 U. S. 261)

CITY OF NEW ORLEANS v. PAINE, Deputy United States Surveyor.

(January 16, 1893.)

No. 1,154.

PUBLIC LANDS—SURVEYS—AUTHORITY OF LAND OFFICE.

A surveyor acting under special instructions, based upon an opinion of the secretary of the interior, surveyed an old French grant, and reported the same to the surveyor general. Protests were filed against the survey; but the surveyor general approved the same, and forwarded it, together with the protests and evidence, to the commissioner of the general land office. The latter accepted the survey in part, but reserved the remainder for further consideration, meantime directing the surveyor general to withhold the filing of the triplicate plats from the local land office. The matter was then referred to the secretary of the interior, who held that the survey did not comply with the decision of his predecessor, and directed a new survey. *Held*, that the action of the surveyor general and the commissioner did not exhaust the authority of the land department, but that the matter was still lawfully pending therein, and the courts, therefore, had no authority to enjoin the obliteration of the old survey, or the making of the new one. 2 C. C. A. 516, 51 Fed. Rep. 833, 2 U. S. App. 330, affirmed.

Appeal from the circuit court of appeals for the fifth circuit.

Suit in equity by the city of New Orleans against Ruffin B. Paine, deputy surveyor gen-

eral of the United States for the state of Louisiana, to enjoin the obliteration of an old survey, and the making of a new one, directed by the secretary of the interior. In the circuit court an injunction was denied, and a temporary restraining order dissolved. 49 Fed. Rep. 12. Complainant appealed to the circuit court of appeals, where the decree was affirmed. 51 Fed. Rep. 833, 2 C. C. A. 516. Complainant thereupon appealed to this court. Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity filed in the circuit court for the eastern district of Louisiana by the city of New Orleans, suing as residuary legatee under the will of John McDonough, deceased, against the deputy surveyor general of the United States for the state of Louisiana, to enjoin him from surveying and locating a new back line or rear boundary of a French grant, and from dividing into sections lands alleged to belong to the plaintiff north of, and contiguous to, such new back line.

The grant in question was made April 3, 1769, by the proper authorities of the province of Louisiana, then an appanage of the French crown, to Pierre Delille Dupard, and was described as "30 arpents of front to the river, upon the whole depth which shall be found unto Lake Maurepas, of the land where heretofore were two villages of the Collapissas savages," etc. Upon the acquisition of the territory of Louisiana by the United States, under the treaty of 1803, the greater part of this grant was confirmed to John McDonough, Jr., & Co., and was described by the board of land commissioners as having "thirty-two arpents front on the Mississippi river, with a depth as far as the Lake Maurepas, with side lines diverging as they extended into the interior," etc. McDonough, having purchased the interest of his partner, devised his portion of the grant, upon certain charitable uses, to the city of *262 New Orleans and Baltimore, and, upon partition made* between the said devisees, the lands described in the bill fell to the plaintiff. In due course the government surveyed and fixed the front and side lines of the grant, but it seems that neither of these lines touched Lake Maurepas, nor was it included between them. When, in 1885, the state of Louisiana, claiming adversely to the city of New Orleans under the swamp-land grant of March 2, 1849, (9 St. p. 352,) raised the question before the general land office as to what depth the claims were entitled, the surveyor general of Louisiana, to whom the matter had been referred, decided that the grant should extend to Lake Maurepas and the Amite river, by extending its lower side line back to said water boundary. On appeal to the commissioner of the general land office, the decision of the surveyor general was affirmed; but, on further appeal to the secretary of the interior, Mr. Lamar, he decided, on January 6, 1888, that the depth of the grant should be determined by a straight line drawn through the center of the grant from the front to the rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of Lake Maurepas.

The matter was referred to the surveyor general of Louisiana, who directed the defendant, Paine, as deputy surveyor, to examine carefully the southern shore line of Lake Maurepas, and if entirely satisfied, from reliable evidence, that there had been a change in said shore line since the grant was made, in 1769, he was to run the line according to such location, and not according to its then location. These instructions were approved by the commissioner of the general land office under date of March 4, 1890. The defendant, the deputy surveyor, proceeded under these instructions, and satisfied himself that the southern shore line of Lake Maurepas had, for an indefinite time, been a moving line, slowly extending itself south and southwest; but as to where the shore line was in 1769, he could form no definite conclusion. "The only thing which seemed certain is that it was a long way from where it now is, and in fixing upon the distance *263 * * * I have tried to adopt a location which would probably give the* claims all the depth they are entitled to, without extending them so far as some of the evidence would require." The bill averred that this survey was approved by the surveyor general, and was forwarded to the commissioner of the general land office, "and thereupon, and in due official course, the said surveys of the said R. B. Paine were duly paid for by the United States, including his said survey and location of said back line of said Dupard grant."

This survey seems, however, never to have been formally approved, and on May 14, 1891, Mr. Chandler, then acting secretary of the interior, wrote to the commissioner of the general land office, saying that he found nothing in the decision of the department of January 6, 1888, to indicate that it was the intention of the secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769, but, on the contrary, it seemed to be clearly indicated that the southern shore of the lake, as it now exists, should be fixed absolutely as the starting point, and determine the back line of the said grant. "You will instruct the surveyor general accordingly." In pursuance of this, the commissioner of the general land office instructed the surveyor general to enter into a new contract with some competent deputy for the establishment of the back line from the southern shore of the lake as it now exists, and thereupon a new contract was entered into with the defendant, Paine, for a resurvey upon the basis of such instructions. Thereupon plaintiff filed this bill to enjoin such resurvey.

A restraining order was issued upon the filing of the bill, and a day fixed for the hearing of the motion for an injunction. A demurrer being filed to the bill, the case was brought to a hearing upon bill and demurrer, and a decree entered denying the injunction and dismissing the bill. 49 Fed. Rep. 12. From this decree an appeal was taken and allowed to the circuit court of appeals, by which court the decree of the circuit court was affirmed, and an appeal allowed to this court. 2 U. S. App. 330, 2 C. C. A. 516, 51 Fed. Rep. 833.

J. L. Bradford, for appellant. Asst. Atty. Gen. Maury, for appellee.

*264 *Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case turns upon the power of the court to enjoin the action of an officer of the land department in relocating the boundaries of a land grant; and an injunction is demanded upon the theory that a former survey of the same line had been examined, approved, and paid for, and that the rights of the plaintiff to the lands included in such survey had thereby become vested.

In Noble v. Railroad Co., 13 Sup. Ct. Rep. 271, (decided at the present term,) we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the head of a department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power. In that case it appeared that the only remedy of the plaintiff was to enjoin the secretary of the interior from revoking his approval of a certain map, which operated as a grant of land. His contemplated action amounted, in effect, to the cancellation of a land patent.

So, in this case, if it were made to appear that the former survey had been completed and approved in such manner that all the lands included within the lines of the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling a title thereby acquired. But the difficulty here is that the facts do not exhibit such a case. It appears that the first survey was made under the direction of the surveyor general, who was himself acting under instructions from Mr. Lamar, then secretary of the interior, which instructions, in his opinion, authorized him to direct the defendant, Paine, to ascertain the shore line of Lake Maurepas as it existed in 1769, the date of the grant; and his *instructions to defendant, which were most careful and explicit as to the method of locating this line, were found to be satisfactory by the commissioner of the general land office, who also approved his contract with the defendant for the survey upon the basis of these instructions. Defendant proceeded to act upon these instructions, and to locate the line as near as he could ascertain the southern shore of the lake to have been in 1769. His report of this survey seems to have been forwarded to the commissioner of the general land office, but never to have been formally approved.

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The only record evidence upon this subject consists of three letters: One from the commissioner of the land office to the surveyor general, of January 23, 1891, in which he acknowledges the receipt of the duplicate plat and transcript of field notes of defendant's survey, and also of certain protests, affidavits, and letters, and in closing his correspondence says: "In view of the foregoing, and of the condition expressed in the contract, allowing partial payments as the survey progresses, I hereby accept the survey, as far as herein considered; and as the several points of objection to the acceptance of some of the lines established in this survey, as set forth in the protests above mentioned, will necessarily demand a further consideration by this office, you are directed to withhold the filing of the triplicate plats in the local land office until you are further advised in regard thereto." The second letter is from the acting secretary of the interior to the commissioner of the general land office, under date of May 14, 1891, in which, speaking of the decision of Mr. Lamar, the former secretary of the interior, he says: "I find nothing in this decision to indicate that it was the intention of the secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769, but, on the contrary, it seems to be clearly indicated that the southern shore of the lake, as it now exists, should be fixed absolutely as the starting point to determine the back line of said grant. You will instruct the surveyor general accordingly." This letter does not indicate, as contended, a reversal of the action of Mr. Lamar, his predecessor in office, but merely that he put a different *interpretation upon his decision from that of the surveyor general, under whose instructions the defendant had acted. The last letter was written by the acting commissioner of the land office to the surveyor general, May 21, 1891, and states that "this line was run by Deputy Surveyor Ruffin B. Paine, under his contract No. 1, dated November 11, 1889, under instructions of your predecessor, and was accepted by this office to the extent of payment for the work, it having been done in accordance with his instructions; but the plats were withheld from filing, awaiting the decision of the department as to the correctness of the instructions, in view of the original decision of the department in this case, dated January 6,

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1888. It is unnecessary to enter into the details of the instructions issued by your predecessor, or of the work performed by his deputy in pursuance thereof, as they form a part of the files of your office, and you are no doubt familiar with them. It is sufficient to state that the inclosed decision directs that the southern shore of the lake, as it now exists, shall be fixed absolutely as the starting point to determine the back line of the aforesaid claims. This necessitates the rejection of the survey executed by Paine as to the establishing of this line, and you will enter into a new contract with some competent deputy for its establishment as now directed by the department."

It is quite evident from this correspondence that the first survey was never formally approved by the secretary of the interior or the commissioner of the land office, and that no title ever vested in the plaintiff to the lands included in this survey, though defendant, having obeyed his instructions, was, of course, entitled to his pay. If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing. Fourinquet v. Perkins, 16 How. 82. Thus, in Gaines v. Thompson, 7 Wall. 347, 352, it was held that the action of the secretary of the interior directing the commissioner of the land office to cancel an entry of land was within the exclusive control of the department, and that the court had no jurisdiction or authority to interfere with the exercise of this power by injunction. In delivering the opinion of the court, Mr. Justice Miller stated the general doctrine to be "that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone; and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer, so as to interfere with the exercise of that judgment, while the matter is properly before him for action."

The case under consideration is not unlike that of Stotesbury v. U. S., 146 U. S. 196, 13 Sup. Ct. Rep. 1, (decided at the present term,) in which a decision by the commissioner of internal revenue, authorizing the refunding of certain taxes, which was reported to the secretary of the treasury for his consideration and advisement, was held by the court not to have been a final decision, but to have been subject to a revision by the secretary. Obviously, the decision of the surveyor general, approving the act of his deputy, was not a finality, since the papers were forwarded by him to the commissioner of the land office, and by him to the secretary of the interior for final approval. So long as there was a superior officer, whose approval was contemplated by law or the regulations of the department, no approval by a subordinate officer would operate as a finality. In this particular the case is readily distinguishable from that of U. S. v. Stone, 2 Wall 525, in which the secretary of the interior attempted to annul the action of his predecessor in issuing certain land patents, by revoking them. It is not at all improbable that the proper location of the back line of this grant may hereafter become the subject of judicial inquiry; but at present, while the matter is still pending before the land department, and the officers are bringing to bear upon it their own judgment and discretion, we have no right to interfere with their action by injunction. This case is within that large number cited in Noble v. Railroad Co., in which it was held that the judicial power will not interpose by mandamus or injunction to limit or direct the action of departmental officers in respect to pending matters within their jurisdiction and control.

The decree of the court of appeals, affirming the decree of the circuit court, dismissing the plaintiff's bill, is therefore affirmed.

(147 U. S. 396)

HARMON v. CITY OF CHICAGO.

(January 23, 1893.)

No. 1,022.

SHIPPING—PUBLIC REGULATIONS—UNITED STATES LICENSE—POWER OF CITY TO REQUIRE LICENSE.

1. Steam tugs engaged in the business of towing vessels from the Chicago river into the harbor and lake, and in bringing vessels from the lake into the river, are engaged in interstate and foreign commerce, and if they possess a license to engage in the coasting and foreign trade, under Rev. St. § 4321, they cannot be compelled to pay any further license fee to the city of Chicago, and a city ordinance requiring the same is void. Gibbons v. Ogden, 9 Wheat. 210; Foster v. Davenport, 22 How. 244; and Moran v. New Orleans, 5 Sup. Ct. Rep. 38, 112 U. S. 69,—followed.

2. The exaction of such a license fee cannot be supported upon the ground that the city of Chicago had from time to time expended money in deepening the Chicago river for navigation purposes, when the ordinance does not profess to require the license fee on any such ground, and no suggestion is made that any special benefit has arisen, or can arise, to such tugs, by such deepening of the river. 29 N. E. Rep. 732, reversed. Huse v. Glover, 7 Sup. Ct. Rep. 313, 119 U. S. 543, and Sands v. Improvement Co., 8 Sup. Ct. Rep. 113, 123 U. S. 288, distinguished.

In error to the supreme court of the state of Illinois.

Action in the circuit court of Cook county, Ill., by William Harmon against the city of

Chicago, to recover moneys paid to it, under protest, as license fees for the use of tugs in navigating the Chicago river. In the trial court judgment was rendered for defendant, which was affirmed by the appellate court of the state for the proper district. 37 Ill. App. 496. An appeal being then taken to the supreme court of the state, the judgment was at first reversed, (see 26 N. E. Rep. 697,) but a rehearing was subsequently granted, and after reargument the judgment of the appellate court was affirmed, (see 29 N. E. Rep. 732.) From this judgment a writ of error was taken to this court. Reversed.

Statement by Mr. Justice FIELD:

This was an action against the city of Chicago, Ill., to recover the sum of $300 paid by the plaintiff on compulsion, and under protest, for licenses for 12 steam tugs, of which he was the manager and owner. The action was commenced in the circuit court of Cook county, Ill., and was tried by the court without the intervention of a jury, by stipulation of parties. At the trial the plaintiffs put in evidence the following agreed statement of facts:

"It is hereby stipulated and agreed that for the purposes of determining the right of the defendant to require of the plaintiff a license, and to impose and collect a fine or license fee therefor, under an ordinance of the said defendant hereinafter set forth, the following are the ultimate facts under which the said license was required, and the fine or license fee imposed and collected, viz.: That on the 26th day of September, 1888, the said plaintiff was the owner and manager of the following steam tugs, viz.: Tom Brown, F. S. Butler, J. H. Hackley, C. W. Parker, Bob Teed, A. B. Ward, W. H. Wolf, Crawford, G. B. McClellan, Mary McLane, Success, and Wahbun. That said tugs, and each of them, were of twenty tons burden, and upwards, and were on the said date, and for long time prior thereto had been, enrolled and licensed for the coasting trade, in pursuance of, and under the provisions of, title 50 of the Revised Statutes of the United States, to which reference is hereby made, and which are made a part hereof. That prior to the date aforesaid, and on the 5th day of March, 1883, the common council of said city of Chicago, acting under the power supposed to be vested in it by chapter 24 of the Revised Statutes of the state of Illinois, and under which the said city was at said time incorporated, passed and enacted an ordinance regulating the navigation of steam tugs and other vessels on Chicago river and Lake Michigan, and the waters tributary thereto, requiring that the owner thereof take out a license therefor, and imposing upon him a fine or penalty for failing so to do, which said ordinance is in the words and figures following:

"'Be it ordained by the city council of the city of Chicago:

"'Section 1. No person or persons shall keep, use, or let for hire any tug or steam barge or towboat, for towing vessels or craft in the Chicago river, its branches or slips connecting therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned.

"'Sec. 2. All applications for such license shall be made to the mayor, and upon payment of twenty-five ($25) dollars to the city collector a license shall be issued for the period of one year by the city clerk for such tug or steam barge or towboat, and it shall be the duty of the city clerk to keep a register of the name of the person to whom such license is granted or transferred, the day when issued or transferred, the number of the license, and the name and description of the tug so licensed.

"'Sec. 3. Every tug or steam barge or towboat shall have the number of the license and the name of the owner marked on both sides of such tug or steam barge or towboat, in plain, legible figures and letters.

"'Sec. 4. Any individual or person violating any provisions of this ordinance shall be subject to a fine of not less than five dollars ($5) nor more than fifty dollars ($50) for each offense.

"'Sec. 5. This ordinance shall be in force from and after its passage.'

"That said steam tugs were enrolled and licensed in the manner and for the purpose aforesaid by the United States authorities in and at the northern district of Illinois, in which the said defendant, the said city of Chicago, is situated, and were on the 26th day of September, 1888, and for a long time prior thereto had been engaged, in the coasting and foreign trade, and in commerce and navigation, namely, in towing vessels engaged in interstate commerce into and out of the Chicago river and harbor from and to said Lake Michigan, and, in pursuance of the conduct of the said trade, were navigating the said Chicago river and the waters of Lake Michigan, and the tributaries thereto, which said river is from time to time deepened for navigation purposes by dredging, under the direction and at the expense of said city of Chicago.

"That on the said day the said city collector of the said city of Chicago, the defendant herein, notified the said plaintiff to apply for and take out a license in pursuance of the requirements of the said ordinance for each of said steam tugs, and to pay therefor the sum of twenty-five dollars for each of said tugs, or the sum of three hundred dollars in the aggregate. That the said plaintiff thereupon notified the said collector that the said steam tugs, and each of them, were licensed for the coasting trade, in pursuance of, and in accordance with, the requirements of the laws of the said United States, and were engaged in said trade on the said Chicago river and said Lake Michigan, and the waters tributary thereto, in the manner as aforesaid, and thereupon claimed to the said collector that

the said ordinance was invalid, and that the said city of Chicago had no power or authority to require the said plaintiff to take out a license in pursuance of the requirements of the said ordinance, or to pay the said fee, whereupon the said collector of the said defendant caused the said plaintiff to be arrested upon a warrant issued for that purpose, and that while the said plaintiff was under arrest he paid the said license fee, under protest, and took out the license, as required by the said ordinance, and as demanded of him by the said collector, which said license was thereupon issued to him.

"That the amount of the fees so as aforesaid paid to the said collector for the said defendant was the sum of three hundred dollars. That the said sum was paid by the said collector into the treasury of the said defendant, the said city of Chicago; and that the questions which arise on the foregoing state of facts are as follows, viz.:

"(1) Whether or not the said defendant can require the plaintiff to take out the license, and collect therefor the fees provided for in the ordinance aforesaid.

"(2) Whether there was vested in the defendant the power to require of the plaintiff the license and fee provided for in the ordinance aforesaid, and in the manner shown by the foregoing state of facts.

"(3) Whether the said ordinance under which said license was required, and the said fee was imposed and collected, is legal and binding upon the plaintiff.

"(4) Whether the plaintiff is not entitled to judgment for the amount of fees so paid by him as aforesaid.

"It is hereby further stipulated that the said facts may be presented to the court and tried under the pleadings as they now stand, and that an order may be entered in said suit submitting the same to the Honorable Richard S. Tuthill for trial without the intervention of a jury, and that either party shall have the right to appeal from the decision *400 and final judgment of the court herein in the same manner and to the same extent as they would have if the same case had been tried in the usual and ordinary way."

And there was also introduced in evidence on behalf of the defendant in error an ordinance of the city council of the city of Chicago, in the words and figures as follows:

"Section 1. The inhabitants of all that district of country in the county of Cook and state of Illinois contained within the limits and boundaries hereinafter prescribed shall be a body politic, under the name and style of the city of Chicago; and by that name sue and be sued, complain and defend, in any court; make and use a common seal, and alter at pleasure; and take and hold, purchase, lease, and convey such real and personal or mixed estate as the purposes of the corporation may require, within or without the limits aforesaid.

"Sec. 2. The corporate limits and jurisdiction of the city of Chicago shall embrace and include within the same all of township thirty-nine north, range fourteen east of the third principal meridian, and all of sections thirty-one, thirty-two, thirty-three, and fractional section thirty-four, in township forty north, range fourteen east of the third principal meridian, together with so much of the waters and bed of Lake Michigan as lies within one mile of the shore thereof, and east of the territory aforesaid.

"Sec. 3. All that portion of the aforesaid territory lying north of the center of the main Chicago river, and east of the center of the north branch of said river, shall constitute the north division of said city; all that portion of the aforesaid territory lying south of the center of the main Chicago river, and south and east of the center of the south branch of said river and of the Illinois & Michigan canal, shall constitute the south division of said city; and all that portion of the aforesaid territory lying west of the center of the north and south branches of said river and of the Illinois & Michigan Canal shall constitute the west division of said city."

On the trial of the case the issues were found for the defendant. Thereupon an appeal was taken to the appellate court for the first district of the state of Illinois; and there, without argument, the judgment was affirmed, (37 Ill. App. 496,) and then an appeal was *taken by the plaintiff to the su- *401 preme court of the state. Upon a hearing before that court the judgment of the court below was reversed, (26 N. E. Rep. 697,) and the ordinance of the city declared to be invalid; but upon a petition a rehearing was granted, and the case was reargued. After such reargument the judgment previously rendered by the court was set aside, and the judgment of the appellate court was affirmed. 29 N. E. Rep. 732. The plaintiff thereupon brought the case to this court upon a writ of error.

D. J. Schuyler and C. E. Kremer, for plaintiff in error. John S. Miller, for defendant in error.

*Mr. Justice FIELD, after stating the facts, *404 delivered the opinion of the court.

The question presented for determination is the validity of the ordinance of the city of Chicago exacting a license from the plaintiff for the privilege of navigating the Chicago river and its branches by tugboats owned and controlled by him. The Chicago river is a navigable stream, and its waters connect with the harbor of Chicago, and the vessels navigating the river and harbor have access by them to Lake Michigan, and the states bordering on the lake and connecting lakes and rivers. The tugs in question, from the owner of which the license fees were exacted, were enrolled and licensed in the coasting trade of the United States, under the provisions of the Revised Statutes pro-

scribing the conditions of such license and enrollment. The license is in the form contained in section 4321 of the Revised Statutes, in title 50, under the head of "The Regulations of Vessels in Domestic Commerce." It declares that William Harmon, managing owner, of Chicago, having given bond that the steam tug (naming it and her tonnage) shall not be employed in any trade while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn that this license shall not be used for any other vessel nor for any other employment than therein specified, the license is thereby granted for such steam tug (naming it) to be employed in carrying on the coasting and foreign trade for one year from the date thereof. The license is given by the collector of customs of the district, under his hand and seal. The licenses for the several tugs were in this form, differing from each other only in the name of the tug licensed, and its tonnage. The licenses confer a right upon the owner of the steam tugs to navigate with them the rivers and the waters of the United States for one year, which includes the river and harbor of Chicago, Lake Michigan, and connecting rivers and lakes. It appears from the record that at the time the license fees in controversy were exacted these tugs were actually engaged in the coasting and foreign trade, and in towing vessels engaged in interstate commerce from Lake Michigan to the Chicago river and its branches, and in towing vessels similarly engaged from the river into the lake.

In Gibbons v. Ogden, 9 Wheat. 210, this court held that vessels enrolled and licensed pursuant to the laws of the United States, as these tugs were, had conferred upon them as full and complete authority to carry on this trade as it was in the power of congress to confer.

The language of the court in that case, respecting the first section of the act then under consideration, is equally applicable to the provisions of section 4311 of title 50 of the Revised Statutes. This latter section declares that "vessels of twenty tons and upward, enrolled in pursuance of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force, as required by this title, and no others, shall be deemed vessels of the United States, entitled to the privileges of vessels employed in the coasting trade or fisheries." The first section of the act mentioned in Gibbons v. Ogden is substantially the same as the above section 4311; and, referring to the privileges conferred by it, the court said: "These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act."

The business in which the tugs of the plaintiff were engaged is similar to that of the vessels mentioned in Foster v. Davenport, 22 How. 244. In that case a steamboat was employed as a lighter and towboat in waters in the state of Alabama. It was therefore insisted that she was engaged exclusively in domestic trade and commerce, and consequently the case could be distinguished from the preceding one of Sinnot v. Davenport, Id. 227, argued with it, in which a law of Alabama, passed in 1854, requiring the owners of steamboats navigating the waters of the state, before leaving the port of Mobile, to file a statement, in writing, in the office of the probate judge of Mobile county, setting forth the name of the vessel, the name of the owner or owners, his or their place or places of residence, and the interest each had in the vessel, was held to be in conflict with the act of congress passed in February, 1793, so far as the state law was brought to bear upon a vessel which had taken out a license, and was duly enrolled under the act of congress for carrying on the coasting trade. But Mr. Justice Nelson, speaking for the court, replied as follows: "It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels, assisted to their port of destination. The case, therefore, is not distinguishable in principle from the one above referred to."

In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they were expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which congress has control. No state can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of congress. The requirement that every steam tug, barge, or towboat towing vessels or craft, for hire, in the Chicago river or its branches, shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges

*407 conferred by the United States except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of congress to regulate commerce, interstate and foreign. The steam tugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any port on Lake Michigan, or other lakes and rivers connected therewith. As justly observed by counsel, the citizen of any of the states bordering on the lakes, who, with his tugboat, also enrolled and licensed for the coasting trade, may wish to tow his or his neighbor's vessel, must, according to the ordinance, before he can tow it into Chicago river or any of its branches, obtain a license from the city of Chicago to do so. The license of the United States would be insufficient to give him free access to those waters.

In Moran v. New Orleans, 112 U. S. 69, 74, 5 Sup. Ct. Rep. 38, a law of Louisiana authorized the city of New Orleans to levy and collect a license upon all persons pursuing any trade, profession, or calling, and to provide for its collection, and the council of that city passed an ordinance to establish the rate of licenses for professions, callings, and other business for the year 1880, and, among others, provided that every member of a firm or company, other agency, person, or corporation, owning and running towboats to and from the Gulf of Mexico, should pay a license fee of $500. The owner of two steam propellers, measuring over 100 tons, duly enrolled and licensed at the port of New Orleans, under the law of the United States, for the coasting trade, employed them as tugboats in taking vessels from the sea up the river to New Orleans, and from that port to the sea. The city of New Orleans brought an action against him to recover the license under the ordinance, and obtained a judgment in its favor, which on appeal was affirmed by the supreme court of the state. Being brought to this court, the judgment was reversed, with directions to the court below to dismiss the action of the city. In deciding the case this court, speaking by Mr. *408 Justice Matthews, said of the license exacted: "It is a charge explicitly made as the price of the privilege of navigating the Mississippi river, between New Orleans and the Gulf, in the coastwise trade, as the condition on which the state of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the state thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the constitution and laws of the United States. The Louisiana statute declares expressly that, if he refuses or neglects to pay the license tax imposed upon him for using his boats in this way, he shall not be permitted to act under, and avail himself of, the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition the only question is, which is the superior authority? And, reduced to that, it furnishes its own answer."

In the light of these decisions,—and many others to the same effect might be cited,—there can be no question as to the invalidity of the ordinance under consideration, unless its validity can be found in the alleged expenditures of the city of Chicago in deepening and improving the river. It is upon such alleged ground that the court below sustained the judgment, and upheld the validity of the ordinance, and it is upon that ground that it is sought to support the judgment in this court.

The decisions of this court in Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313, and in Sands v. Improvement Co., 123 U. S. 288, 8 Sup. Ct. Rep. 113, are particularly referred to and relied upon. The attempt is made to assimilate the present case to those cases from the fact that it is conceded that the Chicago river is from time to time deepened for navigation purposes by dredging, under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expenses of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen, or can arise, to the tugs in question, by the alleged deepening of the river. The license is not exacted as a toll or compensation for any specific improvement of the river of which the steam barges or tugs have the benefit, but is exacted for the keeping, use, or letting to hire of any steam tug or barge or tow boat for towing vessels or craft in the Chicago river, its branches, or slips connected therewith. The business of the steam barge or tow boat is to aid the movement of vessels in the river and its branches and adjacent waters; that is, to aid the commerce in which such vessels are engaged.

As said by this court in Foster v. Davenport, 22 How. 244, from which we have quoted above, the character of the navigation and business in which the steam barges or tugboats are employed cannot be distinguished from that in which the vessels towed are engaged. In Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313, the legislature of Illinois had, by various acts, adopted measures

for improving the navigation of the Illinois river, including the construction of a lock and dam at two places on the river, and for that purpose created a board of canal commissioners, and invested them with authority to superintend the construction of the locks and canals, to control and manage them after their construction, and to prescribe reasonable rates of toll for the passage of vessels through the locks. The works were constructed at an expense of several hundred thousand dollars, which was borne principally by the state, although the United States bore a part of it, sufficient to testify to their consent and approval of the work; and the commissioners prescribed rates of toll for the passage of vessels through the locks, the rates being fixed per ton according to the tonnage measurement of the vessels and the amount of freight carried. Certain parties engaged in the ice trade, and employing several vessels in transporting ice on the river, and thence by the Mississippi and other navigable streams to St. Louis and other southern markets, all of which vessels were licensed and registered under the act of congress, filed a bill alleging that prior to the construction of the dams the complainants were able to navigate the river without interruption, except such as was incident to the ordinary use of the channel in its natural state; that said dams were an impediment to the free navigation of the river; that for the construction of the locks they were charged and paid duties upon the tonnage measurement of their steamboats, and other vessels, amounting to about $5,000; and that similar charges would be made upon subsequent shipments. And the bill alleged that the imposition of the tolls and tonnage duties was in violation of article 4 of the ordinance for the government of the territory of the United States northwest of the Ohio river, passed July 13, 1787, which provides "that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be a common highway, and forever free, as well to the inhabitants of the territory as to citizens of the United States, and those of any other state that may be admitted into the confederacy, without any tax, impost, or duty therefor," and of the article of the constitution prohibiting the imposition of a tonnage duty by any state without the consent of congress. The bill therefore prayed that the canal commissioners, and persons acting under them, might be restrained from exacting any tonnage duties or other charges for the passage of their steamboats or barges, and other vessels used by them in navigating the Illinois river, and from interfering in any manner with the free navigation of the river in the course of their business. The circuit court of the United States sustained the validity of the statute, and this court affirmed its judgment. In its opinion this court said:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways, without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The state is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere, and control or supersede it. If, in the opinion of the state, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state,—and on that point the state must necessarily determine for itself,—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good."

We adhere to the doctrine thus declared. It was not new when stated in the case mentioned. It had been often announced, though, perhaps, not with as much fullness. That case differs essentially from the one before us. It pointed out distinctly the nature of the improvement. The benefit which it extended to vessels was readily perceptible, and no principle was violated, and no control of congress over commerce, interstate or foreign, was impaired thereby. Congress, by its contribution to the work, had assented to it. The navigation of the river was improved and facilitated, and those thus benefited were required to pay a reasonable toll for the increased facilities afforded. Nothing of this kind is mentioned for consideration in the ordinance of Chicago. The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city under which the ordinance was passed is a general one to all municipalities of the state. Waters navigable in themselves in a state, and connecting with other navigable waters so as to form a waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by congress. Such right the defendants had, from the fact that their steam barges and towboats were enrolled and

licensed, as stated, under the laws of the United States.

The case of Sands v. Improvement Co., 123 U. S. 288, 8 Sup. Ct. Rep. 113, does not have any bearing upon the case under consideration. The Manistee river is wholly within the state of Michigan, and its improvement consisted in the removal of obstacles to the floating of logs and lumber down the stream, principally by the cutting of new channels at different points, and confining the waters at other points by embankments. The statute under which the improvement company was organized contained various provisions to secure a careful consideration of the improvements proposed, and of their alleged benefit to the public, and, if adopted, their proper construction, and also for the establishment of tolls to be charged for their use. When the case came before this court it was held that the internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government, and to encourage the growth of that commerce, and render it safe, states might provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, and levy a general tax or toll upon those who use the improvements, to meet their cost, provided the free navigation of the waters, as permitted by the laws of the United States, was not impaired, and provided any system for the improvement of their navigation, instituted by the general government, was not defeated. No legislation of congress was, by the statute of Michigan, in that case interfered with, nor any right conferred, under the legislation of congress, in the navigation of the river by licensed or enrolled vessels, impaired, defeated, or burdened in any respect. It was *413 the improvement of a river wholly within the state, and therefore, *until congress took action on the subject, wholly under the control of the authorities of the state. County of Mobile v. Kimball, 102 U. S. 691, 699; Escanaba, etc., Co. v. City of Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185.

It follows from the views expressed that the judgment of the supreme court of Illinois should have been for the plaintiff below, the plaintiff in error here. Its judgment will therefore be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

(147 U. S. 322)

WEATHERHEAD et al. v. COUPE et

(January 16, 1893.)

No. 104.

PATENTS FOR INVENTIONS — INFRINGEMENT—CONSTRUCTION OF CLAIMS — HIDE-STRETCHING MACHINES.

1. Letters patent No. 213,323, issued March 18, 1879, upon the application of William Coupe, for an improvement in hide-stretching machines, consisting of a friction beam over which the hide is drawn, a stretcher bar with doubly-inclined faces, which stretches the hide laterally at the same time that it is being stretched longitudinally, and a revolving roller upon which the hide is wound, is not infringed by a machine which has no stretcher bar interposed between the friction beam and the roller, and in which the hide is stretched longitudinally and laterally by separate and independent operations. 16 Fed. Rep. 673, reversed.

2. The use on defendants' table or friction beam of outward spreading grooves, which served merely to prevent the hide from wrinkling laterally while being drawn over the same, is not the equivalent of the doubly-inclined stretcher bar of the patent.

3. The third claim of the patent is for the "improvement in the method of stretching hides, which consists in dragging the hide over a stretcher, and also over a friction table or beam, by means of a revolving roller, to which the hide is secured, as described, whereby, as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag by pressure applied to such thicker portions, to increase at such points the friction between the hide and the table, substantially as specified." *Held*, that this claim is merely for the exclusive right of using the machine of the first claim, and cannot be infringed except by infringing that claim.

Appeal from the circuit court of the United States for the district of Rhode Island. Reversed.

Causten Browne and Walter B. Vincent, for appellants. W. H. Thurston, for appellees.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought January 11, 1881, in the circuit court of the United States for the district of Rhode Island, by William Coupe and Edwin A. Burgess against George *Weatherhead, John E. Thompson, and William G. Evans, copartners as Weatherhead, Thompson & Co., for the alleged infringement of letters patent of the United States No. 213,323, granted March 18, 1879, on an application filed January 24, 1879, to the said William Coupe, for an improvement in hide-stretching machines. The bill of complaint alleges that the defendants, from July 17, 1879, have made, used, and sold hide-stretching machines containing the invention described in the patent. The answer sets up in defense want of novelty and noninfringement. A replication was filed, proofs were taken, and the case was brought to a hearing before the court, held by Judge Lowell, then circuit judge, and Judge Colt, then district judge; and on the 20th of April, 1883, the opinion of the court (16 Fed. Rep. 673) was delivered by Judge Lowell, sustaining the patent, and holding that the first and third claims of it had been infringed.

On the 1st of May, 1883, an interlocutory decree for an injunction and account was entered. The master filed his report on January 7, 1888, exceptions were filed to it by the defendants, and they made a motion to dismiss the bill. The master found that the amount of gains and profits to be accounted for by the defendants was $15,412.82. The court, held by Judge Colt, filed its opinion on the motion and the exceptions November 15,

1888. 37 Fed. Rep. 16. It overruled the motion and the exceptions, and on May 6, 1889, entered a decree in favor of the plaintiffs for $15,412.82, with interest from February 1, 1888, and the costs of the suit. The defendants have appealed to this court. The only question contested here is that of infringement.

The specification of the patent is as follows:

"The invention hereinafter described relates generally to an improved method of stretching and reducing to a uniform thickness the hides of animals previous to said hides being manufactured into dressed leather, or what is known as 'rawhide;' and it particularly relates to a combination of mechanism which, accompanied by certain hand manipulation, will accomplish the desired result of stretching and reducing the hides, as above mentioned.

*324 "As is well known, all hides vary considerably in thickness at different points, and when taken from the liquor vats in which they have been immersed to remove the hair, etc., they are found to be soft, flabby, wrinkled, and fulled. Owing, therefore, to this condition of the hides, it is necessary, before they are dressed and finished for the market, that they be stretched throughout to remove the wrinkles and fullness, and also to reduce those parts which are thicker that other portions, so that, as far as possible, the hides shall be uniform in thickness.

"My invention consists in a combination of mechanical devices which are capable of producing, in connection with hand manipulation, the desirable results of thoroughly stretching the hides, and rendering them of even thickness in all parts, the said devices comprising, in the main, a friction table or beam, over which the hides are dragged, a stretcher bar of suitable form for stretching the hides transversely, and a slowly-revolving roller, to which the edge of each hide is secured, and around which it is wound after being drawn over the table or beam and the stretcher bar.

"Referring to the drawings, Fig. 1 represents a front elevation of my improved machine. Fig. 2 shows the same in central vertical transverse section, and Fig. 3 represents the stretcher bar in perspective.

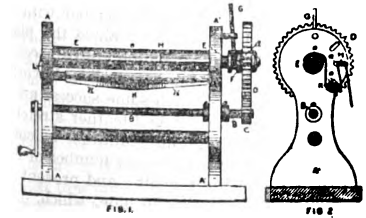

FIG. 1.

FIG. 2.

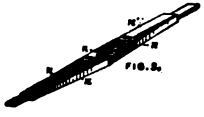

FIG. 3.

"As particularly shown in Fig. 1 of the drawing, my improved machine consists of the following devices: A pair of standards, as at A, A', in which is mounted a shaft, as at B, to which power is applied. Upon one end of this shaft is a pinion, as at C, arranged to mesh with a gear, as at D, loosely mounted on one end of a roller, as at E. The inner side of this gear, D, is provided with a clutch face or pin, as at d, for engagement with a clutch, as at F, splined [spliced?] to the roller, E, and furnished with a shipping handle, as at G, so arranged as to be convenient of access to the operating attendant. The remaining parts of the machine consist of a narrow table or breastbeam, as at H, which is mounted in mortises, as at a, in the standards, A, A', and a stretcher bar, as at K, likewise mounted in mortises, as at a', and having its two working faces doubly inclined, as at k, k', Fig. 3. Both the breastbeam, H, and stretcher bar, K, are so arranged as to be easily inserted in their respective mortises, where they are confined in proper longitudinal position by the standard, A', at one end, and a button, as at L, at the other end. The said beam and bar are capable also of lateral movement, to enable them to be moved backward to give room for a larger hide being wound upon the rollers, and also to facilitate their entire removal from the machine after the hide has been stretched, and is to be removed to give place for another.

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"The methods of treating the hides and the operation of the mechanism above described are substantially as follows: A hide as it comes from the vat, wrinkled and fulled, and with its various parts of unequal thickness, is placed over the table or breastbeam, H, and one of its ends carried under the stretcher bar, K, and secured to the roller, E, by the clamp, e, the other end hanging free in front of the machine, as shown in Fig. 2. The operator now connects the roller, E, to the continuously revolving gear, D, by means of the handle, G, and clutch, F, and the roller, E, slowly revolves, winding the hide around its surface, and drawing the said hide over the friction table or beam, H, and around the stretcher bar, K. When any part of the hide whose thickness should be reduced, or whose wrinkled or fulled-up portion is to be smoothed out, passes over the table or beam, H, the operator, who stands in front of said beam, applies pressure by hand to the proper portions, thereby increasing the friction between the under surface of the hide and the surface of the bar, H, and causing the onward movement of such portions of the hide to be retarded. The portions thus pressed upon, therefore, are more severely stretched than other parts of the hide, and by proper manipulation by the attendant its thickness is rendered uniform, and it passes to the stretching bar, K, in a smooth condition, having been longitudinally stretched upon the beam, H.

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"In passing over the bar, K, the hide is transversely stretched by the doubly-inclined sides, k, k', from which it passes onward to the roller, E, winding about the said roller uniformly and smoothly. The machine is now stopped, the hide removed, another secured to the roller, E, and the operations above described are repeated.

"From the foregoing description my improved machine will be readily understood; and it will be seen that my improvement in the method of stretching hides results from the combination of the mechanical agencies mentioned, coupled with the manipulation of the hide as it passes over the friction table or beam, at which time it is smoothed from wrinkles, and reduced to a uniform thickness."

The patent has three claims, in these words: "(1) The combination of a friction table or beam, over which the hide is drawn, a stretcher, substantially as described, and a revolving roller, to which the hide is secured and around which it is wound as the hide is drawn over the friction beam and stretcher, substantially as set forth. (2) The combination of a revolving roller, to which the hide is secured and around which it is wound, a laterally yielding stretcher and a laterally yielding friction table or beam, substantially as described. (3) The improvement in the method of stretching hides, which consists in dragging the hide over a stretcher, and also over a friction table or beam, by means of a revolving roller, to which the hide is secured, as described, whereby, as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag by pressure applied to such thicker portions, to increase at such points the friction between the hide and the table, substantially as specified."

The master states correctly in his report that Coupe, being engaged in the manufacture of rawhide leather, was experimenting on methods of stretching it, and finally perfected the method and invented the machine for which he obtained the patent; that the defendant Weatherhead, contemplating for the first time the manufacture of rawhide leather in the fall of 1879, desiring to have a stretching machine, and hearing that Coupe had invented one, and having seen Coupe's patent, applied to him, on January 5, 1880, for a license to use it, or for the sale of one of the machines; that Weatherhead, not being able to effect that object, got up a machine of his own, which Coupe notified him was an infringement on the patent; and that, the defendants persisting in using their machine, notwithstanding such notice, the present suit was begun.

Judge Lowell, in his opinion, says that rawhide leather is a hide which has been stripped of its hair, and softened, and brought to a state in which it is very soft, flabby, and much wrinkled, but has not been tanned. He then proceeds:

"The specification describes a table or beam, over which the hide is to pass, and which is breast high, in order that the workmen may conveniently use it. Then the hide passes over a bar or stretcher, which is somewhat arched or crowned, in order to stretch the hide transversely. It then goes to a roller, to which it is clamped, and over which it is slowly wound.

"The workman accelerates or retards the passage of the hide by lifting it up or pressing it down, and in this way the thicker parts secure a greater longitudinal pull from the roller than do the thinner parts, and the bar, by its shape, tends to stretch the hide laterally as it passes from the table to the roller. The table and the bar have a lateral yield or adjustment to accommodate hides of different sizes.

"The first claim is for the combination of the table, the stretcher, and the roller; the second for the lateral yield in the table and stretcher; the third for 'the improvement in the method of stretching hides, which consists in dragging the hide over a stretcher, and also over a friction table or beam, by means of a revolving roller, to which the hide is secured, as described, whereby, as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag by pressure applied to such thicker portions, to increase at such points the friction between the hide and the table, substantially as specified.'

"There was a machine for stretching leather for belts well known to the patentee and to some others in the trade, which was made by modifying a splitting machine. Mr. Coupe did not, in fact, make his improvement upon this stretcher, but it is much more like his machine than anything else which preceded it.

"This old machine was used upon hard-tanned leather to adapt it to be made into belts for machinery, for which purpose it must be stretched with great power, eighteen or twenty thousand pounds to the square inch, in order to take out of it all possibility of further stretching. This was done by passing the leather through a trough which was brought up against the stretcher bar with the force we have mentioned. Since the plaintiffs' method and machine have become known, Mr. Davis, an accomplished worker in leather, has tried with some success an enlarged copy of the old belt-leather stretcher, to do the work of the plaintiffs' machine. He is obliged to use a greater number of men or boys to tend the machine and prevent the pressure from ruining the hide, which, of itself, tends to prove that the machines are not alike; and we have no doubt that, if the plaintiffs' devices are considered an improvement upon this old machine, they embody a patentable improvement. They omit the means for producing the pressure, and add a table not useful in the old machine, but which, in

the new machine, enables the workmen to exert sufficient pressure.

"The defendants at one time used a machine which closely resembles that of the plaintiffs. At present they have one which works with a trough and bar, like the old belt stretcher, with the addition of a table over which the leather passes, and which enables the workmen to spread out and manipulate the hide. Upon the edge of this table is a piece of metal with grooves spreading outward, and these grooves have a tendency to stretch the hide laterally, or at least to prevent it from wrinkling; that is, to keep it to its lateral stretch, which seems to be much the same thing. The slot and bar are so placed in relation to each other that a hide is not squeezed between them, as in the old belt stretcher; but, in the legitimate attempt to avoid infringement of the plaintiffs' invention, which the defendants intended to copy as far as they lawfully might, because they had failed to come to terms with the plaintiffs for a license, they now put into the trough a piece of board, supported at either end upon blocks, about one third the width of the trough. The operation of the machine, as thus modified, is known only to the defendants themselves, and Mr. Weatherhead testifies that it exerts a pressure upon the hide, how great in pounds we do not know. We understand him to say that, by passing the hide through the machine several times, all parts come sooner or later under the board, and thus substantially all the stretching is done by its aid.

"Infringement of the plaintiffs' first claim is not escaped by the use of this piece of board, for, although it causes the defendants' machine to approach more nearly the old belt stretcher, still the operation must remain to some extent at least like that of the patent. The manipulation with the table and grooves must enable the operator to use all the elements of the first claim upon two thirds of the width of the hide each time it passes through the machine, and it depends altogether on the thickness and stability of the board whether the whole operation is or is not copied. The very presence of this removable board is evidence that the old machine is not satisfactory for the new use.

"The argument that a machine must be automatic in order to be patentable is not sound. A piano is not automatic, nor is any tool or implement intended for use by hand; but improvements in any such tool used in an art or industry are patentable.

"In the second claim the combination is limited to a laterally yielding stretcher and a laterally yielding friction table or beam. As one bar, however, in the defendants' machine is fixed and the other has a motion up and down, we find no infringement of this claim.

"The third claim appears to be for the exclusive right of using the machine referred to in the first claim, and, as the defendants have used such a machine, they have infringed the third claim, and we do not at present see how it could be infringed otherwise than by infringing the first claim."

In the testimony and the proceedings before the master, the consideration of the case seems to have gone solely upon the machine which Judge Lowell in his opinion states was used by the defendants "at present," and that machine is the only one considered by the defendants in their brief and their oral argument. The report of the master is based upon the use by the defendants of "their machine" for stretching hides, from January, 1880, to April, 1883, and he speaks in his report of but a single machine, and calls it "their infringing machine." The $15,412.82, reported by the master as gains and profits, is made up of three items, viz.: $3,669.72, as the saving in the cost of stretching and manipulating the hides; $4,403.66, for the increased area of hide secured; and $7,339.44, as the increased value of the hides by reason of their improved condition. But the master makes no distinction as to how much of each of those items was due to the machine used at one time by the defendants, which, Judge Lowell states in his opinion, closely resembled that of the plaintiffs, and how much to the machine which the defendants used subsequently.

The plaintiffs contend that the defendants at first built and used a machine as near like a Coupe machine as possible, constructing it with two bars, one of which was bent, or curved; that that machine was commenced in December, 1879, and completed in January, 1880; that in the latter month, on application by the defendants, Coupe declined to sell them one of his machines, and they then proceeded to complete their machine; that after August, 1880, the defendants informed Coupe that they had reconstructed their machine so as to take it outside of his patent; that Coupe, on examining it, notified the defendants that it was still an infringement; that they again reconstructed it; and that, as so reconstructed, it is the machine which they continue to use. It is claimed that that machine is an infringement of claim 1; that the use of it is an infringement of claim 3; and that it is the machine of which Judge Lowell speaks in his opinion as the machine used "at present" by the defendants.

On the whole case, we think the inquiry must be confined to that machine; and we are of opinion that claims 1 and 3, rightly construed, do not appear to have been infringed, and that the decree of the circuit court must be reversed.

The machine spoken of by Judge Lowell in his opinion as one well known to Coupe, and to some others in the trade, prior to the making of the invention by Coupe, was

known in the art as the "dog machine." In that machine there were two dogs or clamps, corrugated on their inner side so as to hold the leather against slipping. The hide being grasped at two opposite parts of its edge by the two dogs, the latter were then pulled apart, and the hide was stretched in the line between the two parts to which the dogs were clamped. The machine was then thrown out of gear, the dogs were taken off from the hide and applied to it in another place, and the process was so continued until the hide was considered to be sufficiently stretched.

The difficulty with that apparatus was that by it the stretch which it gave to one place it took out of another, and consequently the hide was not thoroughly stretched, being stretched always lengthwise, but not crosswise, and contracting towards the center line of pull between the dogs. Thus, when the hide was grasped at two other extreme points and pulled, the stretch first given was taken out again.

*333 In the operation of the machine of the Coupe patent the hide is stretched longitudinally and transversely at the same time, instead of, as in the dog machine, stretching it first in one direction, across the hide, and then, by a subsequent operation, stretching it in another direction, transversely to the first direction. This transverse stretching in the Coupe machine is produced by the doubly-inclined working faces, k, k^1 of the stretcher bar, K. The stretcher bar, K, being highest in the center, because its sides or working faces are doubly inclined, causes that part of the hide which passes over its highest point to make a longer circuit in passing from the table or breastbeam, H, to the roller, E, than do the other parts, and thereby that part is stretched somewhat more than the other parts, and the hide has a tendency to spread laterally towards the ends of the stretcher bar where there is a shorter line of passage, and thereby it is stretched transversely to the longitudinal line of movement of the hide towards the roller, E. This tendency is assisted by the use of the hands of the operator in pressing downward upon the hide. Thus, the hide has a lateral stretch given to it simultaneously with its longitudinal stretch, while it is drawn through the machine by the roller, E. The pull of that roller against the resisting pressure of the hands of the operator gives the longitudinal stretching, and the same pull gives the transverse stretching, owing to the joint action of the pressure of the operator's hands and the form of the stretcher bar, K, with its doubly-inclined working faces.

According to the specification of the patent, a single passage of a hide through the machine is supposed to give it sufficient stretching transversely as well as longitudinally; for the specification, after describing both stretches, says: "The machine is now stopped, the hide removed, another secured to the roller, E, and the operations above described are repeated."

In the old "dog" machine, the hide was stretched first in one direction, and then taken out and grasped at another place, and stretched in a direction transverse to the first. The transverse stretching in the Coupe machine has the effect to preserve the result of the longitudinal stretching, and to stretch the hide completely in a single passage of it through the machine.

*333 The first claim of the patent is for the combination of a friction table or beam, over which the hide is drawn, a stretcher, substantially as described, and a revolving roller, to which the hide is secured, and around which it is wound as it is drawn over the friction beam and stretcher. This is a claim to mechanism.

The third claim is a claim to an improvement in the method of stretching hides, which consists in dragging the hide over a stretcher and also over a friction table or beam, by means of a revolving roller to which the hide is secured, as described, whereby, as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag, by pressure applied to such thicker portions to increase at such points the friction between the hide and the table. The "pressure" mentioned in the third claim is the pressure applied by the hands of the operator to the hide as it passes over the friction table or beam.

It was correctly held by the circuit court that the third claim is for the exclusive right of using the machine referred to in the first claim, and that it cannot be infringed otherwise than by infringing the first claim. If the defendants have used the combination of the mechanism covered by the first claim they have infringed it, and have also thereby used the method covered by the third claim.

Although the third claim is not confined to a passage of the hide through the machine only once, where such single passage does not produce a perfect result, it is manifest from the specification that the use of the combination covered by the first claim is intended and expected to produce complete longitudinal and transverse stretching simultaneously, by a single passage through the machine. Such stretching action, transverse as well as longitudinal, may not be, in a given instance, sufficiently severe, and a second application of the machine to the same hide may be required; but in both cases the transverse stretching will take place simultaneously with the longitudinal stretching. The defendants do not so use their machine.

*334 In the first claim of the patent the stretcher bar, K, is interposed between the

friction table or beam, H, and the revolving roller E. Therefore, to infringe the first or the third claim, there must be used a stretcher bar substantially such as described in the specification, of such form as will give a transverse stretch to the hide simultaneously with the giving of the longitudinal stretch.

In the defendants' machine there is no stretcher bar, K, or its equivalent, for transverse stretching, and the transverse stretching is not done simultaneously with the longitudinal stretching. On the contrary, in the defendants' method the hide is grasped at two opposite portions of its edge, and stretched on that line. It is then taken out, grasped between two other opposite portions of its edge, and stretched on that line transversely to the first line. It is thus stretched by the consecutive method operated by the old dog machine. That method is excluded by the Coupe specification.

In the defendants' machine the line of tension runs in different directions at different times. Strains in it are imparted successively and not simultaneously. The theory of the Coupe specification is that, unless the hide is stretched transversely while it is stretched longitudinally, the stretch put into it when it is stretched in one direction will be wholly or partially taken out when it is stretched in another direction.

It is contended, however, that in the use of the defendants' machine a transverse stretching is produced simultaneously, and by a device substantially like the doubly-inclined stretcher bar, K, of the patent. It is for the plaintiffs to establish that the defendants use substantially the doubly-inclined stretcher bar, K. The mere smoothing out of wrinkles, and the stretching of the body of the leather so as to reduce it permanently to an equal thickness throughout, are two separate and distinct things. The operation of the doubly-inclined stretcher bar, K, is not that of merely smoothing out wrinkles in the hide. The circuit court seemed to be of the opinion that the outward spreading grooves on the edge of the table in the defendants' machine had a tendency "to stretch the hide laterally, or at least to prevent it from wrinkling, that is, to keep it to its lateral stretch, which seems to be much the same thing." The machine of the defendants has divergent grooves or serrations formed on the surface of the friction table. We are of opinion that it is not a sound conclusion that the corrugations on the friction beam in the defendants' machine perform the office of Coupe's stretcher bar, K, interposed between the friction beam and the roller, H. While it is true that the corrugations prevent the hide from wrinkling, yet, as there is not in the defendants' machine any lateral stretch, it is not true that such corrugations keep the hide to its lateral stretch. There is no lateral stretch which is kept from going back by such corrugations. Any office of the corrugations to keep a lateral stretch from going back would be unnecessary in the defendants' machine, because the hide is to be taken out and reattached at new points, and stretched longitudinally in the very direction in which the previous transverse stretching, if it existed, would have been performed.

It is shown by the evidence that the hide does not, in the defendants' machine, enter the grooves or serrations to any appreciable extent; that they are not deep enough to have any such effect; that there is no indication on the upper surface of the hide that its lower surface enters into the serrations; that there is no indication that the under surface of the hide is not supported by a smooth bar or table; and that this is shown by the fact that the upper surface of the hide appears smooth where it lies over the grooves or serrations. It is not shown by the evidence for the plaintiffs that the grooves are not too shallow to have any effect in giving lateral movement to the hide, or that the hide would not show on the upper surface whether the under surface was engaged in the grooves, or that there was any appearance on the upper surface indicating any such engagement.

Irrespectively of this, the combination of the first claim of the patent is one in which the stretcher bar is interposed between the friction table or beam and the roller. In the defendants' machine, the organization is different.

We are of opinion that the first claim is not infringed, because the defendants do not have the stretcher bar, K, or any substitute for it, performing the same operation. They get their transverse stretch by taking out the hide and grasping it at new points, and stretching it between those points. The corrugations only keep the hide from wrinkling,—an operation which the patent says is performed before the stretcher bar acts upon the hide. It does not appear that, as the defendants' machine is used, there is any lateral stretching of the hide simultaneously with its longitudinal stretching. The corrugations are not combined with the friction beam and the roller, as the convex stretcher bar of the patent is; for that is interposed between the friction beam and the roller, and the description in the specification is that the hide, after being longitudinally stretched on the friction beam passes to and is stretched transversely by the stretcher bar; whereas, in the defendants' machine, the corrugations are integral with the friction beam. It would not be practicable to make the convex stretcher bar of the patent integral with the friction beam. The specification describes the stretcher bar as having a lateral movement relatively to the friction beam; and this excludes the idea of the stretcher bar being integral with the friction beam.

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The defendants do not stretch the hide longitudinally and transversely at the same time, but only stretch it longitudinally in different successive directions across the hide.

The third claim is not infringed, because the described method of operation of the combination of the first claim is not performed by the defendants.

The decree of the circuit court is reversed, and the case is remanded to that court with a direction to dismiss the bill, with costs.

(147 U. S. 230)

SUTLIFF v. BOARD OF COUNTY COM'RS OF LAKE COUNTY.

(January 9, 1893.)

No. 1,085.

CONSTITUTIONAL LAW—COUNTY BONDS—VALIDITY.

1. Const. Colo. art. 11, § 6, forbids a county, under any circumstances, to issue bonds beyond a certain amount, and limits the right to issue bonds, without a previous vote of the qualified electors of the county, to half such amount. Gen. Laws 1877, p. 218, § 30, provides that the board of county commissioners of each county shall make out semiannual statements showing the debt owed by the county, payments thereon, and rate of interest, and shall cause such statements to be entered on their records, open to the inspection of the public at all times. Lake county, being already indebted beyond the constitutional limit, issued bonds containing a recital that the issue was by virtue of a vote of the qualified voters of the county, in compliance with the general statute. *Held*, that a purchaser of the bonds for value, and before maturity, was charged with the duty of examining the county record of indebtedness in order to ascertain whether the bonds were lawfully issued.

2. The recital in the bonds did not estop the county to prove by the county records that the bonds were issued in violation of the constitution, and were therefore void. Dixon Co. v. Field, 4 Sup. Ct. Rep. 315, 111 U. S. 83, and Lake Co. v. Graham, 9 Sup. Ct. Rep. 654, 130 U. S. 674, followed. Chaffee Co. v. Potter, 12 Sup. Ct. Rep. 216, 142 U. S. 355, distinguished.

On a certificate from the United States circuit court of appeals for the eighth circuit.

Statement by Mr. Justice GRAY:

This was an action brought in the circuit court of the United States for the district of Colorado, by a citizen of Connecticut, against the county of Lake, a municipal corporation of Colorado, upon coupons for interest of 6 bonds for $500 each, part of a series of 10 bonds issued by the county on July 1, 1881, payable to bearer in 20 years, and redeemable at the pleasure of the county after 10 years, and containing this recital:

"This bond is one of a series of five thousand dollars, which the board of county commissioners of said county have issued for the purpose of constructing roads and bridges, by virtue of, and in compliance with, a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of, and in compliance with, an act of the general assembly of the state of Colorado entitled 'An act concerning counties, county officers, and county government, and repealing laws on these subjects,' approved March 24, A. D. 1877; and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

One defense was that the bonds were illegal and void because they increased the indebtedness of the county to an amount in excess of the limit prescribed by article 11, § 6, Const. Colo., which is copied in the margin.[1]

On March 24, 1877, the legislature of Colorado passed an act entitled "An act concerning counties, county officers, and county government, and repealing laws on these subjects,"[2] (Gen. Laws 1877, p. 218,) the material provisions of which are also copied in the margin.[3]

The circuit court gave judgment for the defendant, (47 Fed. Rep. 106;) and the plaintiff took the case by writ of error to the circuit court of appeals for the eighth circuit, before which the following facts were made to appear: At and before the issue and sale of said bonds, the county was in fact indebted to an amount greater than that permitted by the limitation contained in the con-

[1] No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof: counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: provided, that this section shall not apply to counties having a valuation of less than one million dollars.

[2] Sec. 21. When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record, specifying the amount required, and the object for which such debt is created, submit the question to a vote of the people at a general election; and they shall cause to be posted a notice of such order, in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election; and all persons voting on that question shall vote by separate ballot, whereon is placed the words, "For county indebtedness," or "Against county indebtedness,"—such ballots to be deposited in a box provided by the county commissioners for that purpose; and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an

stitution and statute of Colorado, above cited; and therefore, as a matter of fact, the issue of said series of bonds, and the issue of each one thereof, created an indebtedness on the part of the county in excess of the constitution and statutory limitation applicable to said county at the date of the issue of said bonds. The plaintiff bought six of said series of bonds, paying full value therefor, relying upon the recitals in the bonds contained, and without making any examination into the facts that might appear upon the records of the county, and without any actual knowledge of the facts, other than such knowledge with which he might be held chargeable from the statements in the bonds and the constitution and statutes of Colorado.

Upon the case, as above stated, the circuit court of appeals certified to this court the following questions and propositions of law:

"(1) In view of the provisions of the act of the legislature of Colorado, approved March 24, 1877, providing for the making of a public record of the indebtedness and financial condition of the several counties in said state, was the said John Sutliff, plaintiff herein, when about to purchase the bonds sued on, and issued under the provisions of said act of March 24, 1877, charged with the duty of examining the record of indebtedness provided for in said act, in order to ascertain whether the bonds he proposed to purchase were lawfully issued, or whether the issuance thereof did not increase the indebtedness of the county beyond the constitutional limit?

"(2) Do the recitals found in said bonds estop the county of Lake, as against a purchaser thereof, for value, before maturity, from proving as a defense thereto that, when said series of bonds were issued, the indebtedness of the county already equaled or exceeded the amount of indebtedness which the county could legally incur, under the provisions of the constitutional limitation already cited?"

J. R. McClure, for plaintiff in error. H. B. Johnson, for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The constitution as well as the statute of Colorado absolutely forbade a county to issue bonds, under any circumstances, to such an amount as would make the aggregate amount of the indebtedness of the county more than six dollars on each thousand if the assessed valuation of the taxable property in the county was more than five millions of dollars, or twelve dollars if such valuation was less than five and more than one million, and limited the right to issue bonds, without a previous vote of the qualified electors of the county, to half of such rates.

The statute, moreover, required the county commissioners, in submitting the question to a vote of the electors, to enter of record an order specifying the amount required, and the object of the debt, and also made it their duty to publish, and to cause to be entered on their records, open to the inspection of the public at all times, semiannual statements exhibiting, in detail, the debts, expenditures, and receipts of the county for the preceding six months, and striking the balance so as to show the amount of any deficit, and the balance in the treasury.

It is stated in the certificate upon which this case comes before us that, at the time of the issue of the bonds in question, the defendant county was in fact indebted beyond the constitutional and statutory limit, and the issue of each bond, therefore, created a debt in excess of that limit, and that the plaintiff bought the bonds upon the faith of the recitals therein, and without making any examination into the facts appearing on the records of the county.

Upon these facts, in the light of the previous decisions of this court, it is clear that the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the duty of examining the record of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the

elector, as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding; and if, upon canvassing the vote, (which shall be canvassed in the same manner as the vote for county officers,) it shall appear that a majority of all the votes cast are for county indebtedness, then the county commissioners shall be authorized to contract the debt in the name of the county: provided, that the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of property shall exceed one million of dollars for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions and exceed one million of dollars, twelve dollars on each thousand dollars thereof.

Sec. 30. It shall be the duty of the board of county commissioners of each county to make out semiannual statements at the regular sessions in January and July, at which times they shall have such statements published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such commissioners shall cause such statement to be posted in three conspicuous places in said county, one of which shall be the courthouse door; and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts, and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any; and the statement thus made, in addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times.

county beyond the constitutional limit, and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the constitution.

In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the state, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. Marcy v. Oswego Tp., 92 U. S. 637; Humboldt Tp. v. Long, Id. 642; Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315; Lake Co. v. Graham, 130 U. S. 674, 682, 9 Sup. Ct. Rep. 654; Chaffee Co. v. Potter, 142 U. S. 355, 363, 12 Sup. Ct. Rep. 216.

But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

Accordingly, in Dixon Co. v. Field, above cited, which arose under an article of the constitution of Nebraska limiting the power of a county to issue bonds to 10 per cent. of the assessed valuation of the county, it was *236 adjudged that a county issuing *bonds, each reciting that it was one of a series of $87,000 issued under and by virtue of this article of the constitution and the statutes of Nebraska upon the subject, was not estopped to show by the assessed valuation on the books of public record of the county that the bonds were in excess of the constitutional limit; and Mr. Justice Matthews, delivering the unanimous judgment of the court, fully stated the grounds of the decision, which sufficiently appear by the following extracts:

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officer charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to the proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument." 111 U. S. 93, 4 Sup. Ct. Rep. 320.

"In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent. upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors,—the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, ex vi termini, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of *the bonds can take the place of the assessment itself; for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." 111 U. S. 95, 4 Sup. Ct. Rep. 320.

That decision and the grounds upon which it rests were approved and affirmed in Lake Co. v. Graham and Chaffee Co. v. Potter, above cited, each of which arose under the article of the constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. In Lake Co. v. Graham, each bond showed on its face the whole amount of bonds issued, and the recorded valuation of property showed that amount to be in excess of the constitutional limit; and for this reason, as well as because the bonds contained no recital upon that point, the county was held not to be estopped to plead that limit. 130 U. S. 682, 683, 9 Sup. Ct. Rep. 654. In Chaffee Co. v. Potter, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit, and did not show on their face the amount of the issue, and the county records showed only the valuation of property, so that, as observed by Mr. Justice Lamar, in delivering judgment: "The purchaser might even know—indeed, it may be admitted that he would be required to know—the assessed valuation of the taxable property of the county; and yet he could not as-

certain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises." 142 U. S. 363, 12 Sup. Ct. Rep. 216.

*The case at bar does not fall within Chaffee Co. v. Potter, and cannot be distinguished in principle from Dixon Co. v. Field or from Lake Co. v. Graham. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown,—the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds.

It follows that the first question certified must be answered in the affirmative, and the second in the negative. Ordered accordingly.

(147 U. S. 342)

SMITHMEYER et al. v. UNITED STATES.

(January 23, 1893.)

No. 645.

COURT OF CLAIMS—JURISDICTION—CONGRESSIONAL LIBRARY BUILDING—CLAIMS BY ARCHITECT.

1. By an appropriation act passed October 2, 1888, (25 St. at Large, p. 523,) the control of the congressional library building was given to the chief of engineers of the army, and all prior contracts relating thereto were rescinded, but it was provided that all loss or damages under such contracts, together with the value of the architect's plan, "may be adjusted and determined by the secretary of the interior, to be paid out of the sums heretofore or hereby appropriated." *Held*, that this did not exclude the court of claims from the jurisdiction over the architect's claim which it had before the passage of the act, but merely gave the architect an additional method of adjusting the claim without suit, if he so desired.

2. An architect devoted several years to the preparation of plans for the construction of the congressional library building, but there was no contract entered into with him by any commission or officer empowered to adopt plans, employ architects, or enter upon the construction of the building, until Act April 15, 1886, c. 50, (24 St. at Large, p. 12,) which adopted the architect's plan. *Held*, that the act did not constitute a contract, but only declared the legislature's intention, and might have been rescinded by either party without liability at any time before the architect entered upon the performance of the work.

3. The act of 1886 created a commission, which appointed S. and P. architect and draughtsman at fixed salaries. The appointees did not notify congress or the commission before the work began that they intended to charge according to the schedule of the American Institute of Architects, though they had previously notified the chairman of a committee on the library building that they intended to charge for the plans. *Held*, that the value of the services of the appointees in preparing plans prior to their appointment should be measured by their subsequent salaries, and not by the schedule of the American Institute of Architects.

Appeal from the court of claims.

Petition by John L. Smithmeyer and Paul J. Pelz against the United States to recover for services as architects. The court of claims gave judgment for the petitioners to the amount of $48,000. 25 Ct. Cl. 481. Petitioners appeal. Affirmed.

John Paul Jones, Reese H. Voorhees, and James Coleman, for appellants. Sol. Gen. Aldrich, for the United States.

*Mr. Justice BLATCHFORD delivered the opinion of the court. *343

This is a suit brought against the United States in the court of claims by John L. Smithmeyer and Paul J. Pelz, architects, to recover the sum of $210,000, as 3 per cent. on $7,000,000, the alleged cost of the building for the library of congress, when completed.

*The petition alleges that the claimants made and prepared the general plans and drawings for the library building now in process of construction at Washington city; that from the year 1873 to the year 1886 they, at the request of the United States, were employed in making plans and drawings for a building for the library; that in 1886 such plans and drawings were delivered to the United States, and accepted by the latter, which thereafter used, and is using, the same in the construction of said library building; that it will cost, when completed, $7,000,000; that the customary charge by architects for the making of general drawings and plans for the construction of said building, and the reasonable value of such service so rendered by them, is 2½ per cent. upon the cost of the building; and that there is now due to the claimants 3 per cent. on the cost of said building, namely, $210,000. *344

The usual general traverse was put in by the United States. The court of claims heard evidence, and filed findings of fact, and afterwards additional findings of fact, all of which are set forth in the margin,[1] with a conclu-

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[1] Original Findings of Fact.

1. The claimants, John L. Smithmeyer and Paul J. Pelz, were at the times hereinafter mentioned copartners doing business as architects in the city of Washington.

2. From the year 1873 until the 15th April, 1886, the claimants devoted their time as architects in the making of plans and drawings for a building for the library of congress. They acted under the direction and at the request of the commissions and committees of congress mentioned in the following acts of congress, viz.: The commission created by the sundry civil appropriation act, March 3, 1873, (17 St. pp. 510, 513;) the joint committee on the library of congress, sundry civil act, June 23, 1874, (18 St. pp. 204, 226,) and the legislative appropriation act, August 15, 1876, (19 St. pp. 143, 169;) the commission on the enlarged accommodation for the library of congress, (Act April 3, 1878, 20 St. p. 35;) the joint select committee on additional accommodation for the library of congress, organized under the Act June 8, 1880, (21 St. p. 165;) deficiency act, March 3, 1881, (21 St. pp. 414, 424;) and the Act April 15, 1886, (24 St. p. 12.)

3. Under the Act 3d March, 1873, providing for "a plan for a new library building for the library of congress," the commission appointed thereunder published and issued the following prospectus or

sion of law that, upon the findings, the claimants were entitled to recover $48,000; and it entered a judgment in their favor for that amount, from which the claimants have appealed to this court. The opinion of the court of claims was delivered by Judge Nott, and is reported in 25 Ct. Cl. 481, but the additional findings of fact are not there set forth.

The claimants complain that, instead of being allowed $210,000, they were allowed only $48,000. The United States has not appealed, but says that, if the question of jurisdiction raised in the court of claims, and appearing on the face of the record, and hereinafter considered, is decided adversely to the United States, it is content that the judgment should be affirmed.

The question of the jurisdiction of the court of claims in this case arises on certain provisions of Act Oct. 2, 1888, c. 1069, (25 St. pp. 505, 523,) entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," referred to in finding 7, which read as follows:

"For the building for the library of congress, as herein provided for, and for each

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invitation to architects: "Washington, August, 1873. To Architects: In accordance with the provisions of an act of congress approved March 3, 1873, the undersigned hereby invite architectural plans or sketches (not including details or working plans) for a new building for the library of congress, to be drawn in accordance with limits and conditions which will be furnished to applicants. The sum of fifteen hundred dollars will be paid for such design as may be adjudged the best by the commission, one thousand dollars for the second best, and five hundred dollars to the third best; to be paid on the 31st of December, 1873. The plans must be submitted on or before the 1st day of November next, and addressed (prepaid) to the Librarian of Congress, Washington, D. C. Commission: Chairman of the Joint Committee on the Library; Chairman of the Senate Committee on Public Buildings and Grounds; Librarian of Congress."

4. During the ensuing 13 years—that is to say, between March 13, 1873, and April 15, 1886—the claimants prepared for and submitted to different committees and commissions of congress the following sets of plans and designs for a library building, to wit:

(1) In reply to the foregoing prospectus, the claimants submitted a plan for a library building in the Italian renaissance style of architecture, to said commission. Said building, by the terms of the prospectus, was to be 270 by 340 feet. These plans consisted of one perspective, one front elevation, one side elevation, one first-story plan, one second-story plan, and one section. They were accepted by said commission in December, 1873, and claimants were awarded the first prize for excellence of design, and were paid therefor a premium of $1,500. In that competition there were 28 competitors, and prizes for first, second, and third best plans, respectively, of $1,500, $1,000, and $500.

(2) Shortly afterwards claimants, at the request of the chairman and members of the committee on the library, submitted a new design as a modification of the above-mentioned design, making a change of elevation, and some changes of ground plan. This design consisted of a colored perspective, a front elevation, a portion of first-story plan, and a part of the second-story plan; five drawings in all.

(3) About 1875, at the request of Senator Howe, chairman of the joint committee on the library, claimants prepared a plan for a new library building in the gothic style of architecture, upon an entirely new basis. This plan was for a building 463 feet 11½ inches by 583 feet 9 inches, and the series of drawings consisted of seven different sketches, but four of which were submitted to the committee.

(4) Said gothic plans were acceptable to the said committee, but at the session of congress following, at the request of Senator Howe, chairman of said committee, claimants made modifications of the exterior designs for said gothic building, five in number, and these were submitted to his committee.

(5) About 1877, at the request of Senator Howe, chairman of said committee, claimants prepared plans for a new library building in the French renaissance style of architecture. These consisted of an elevation, framed and colored, and a pencil study of the front elevation. In general arrangement it corresponded with the gothic design, which largely increased the capacity of the building over the premium plan, with the exception that the first and second stories were interchanged. In all designs previous to this one the building consisted of a basement, a very tall first story, and a subordinate second story. At the time these plans were prepared, instead of the Capitol Hill site, originally contemplated for the erection of the library, the committee considered Judiciary Square as a possible site, and, at the request of the committee, claimants prepared two cross sections of Judiciary Square with the proposed building located, showing grades, sewers, etc. These plans were delivered to the said committee.

(6) Claimants next prepared, at the request of the joint committee on the library, a design for said building in the Romanesque style of architecture, with perspective elevations; that being a cheaper style of architecture, and permitting the use of coarser material than the gothic. There were three drawings in all in this set of plans, and they were submitted to the said committee.

(7) About 1879, claimants, at the request of said committee, prepared a design in the German renaissance style of architecture, with finished perspective and eight other drawings, consisting of front, rear, and side elevations, and a full set of plans of the different stories, together with a section showing the halls and reading room, all of which were fully developed. The study of the reading room was an entirely new and original design, and is the idea carried out in the plans finally adopted by the act of congress of April 15, 1886, and as set forth in the report of the chief of engineers of the army, mentioned in the sundry civil act of March 2, 1889, (25 St. pp. 939, 966,) as "Exhibit D." There were also many changes in this set of plans, to wit, in the ground plans, and showing higher development and greater elaboration of original ideas, and progress both in construction and light effect.

(8) In 1880 claimants prepared full general drawings for a building in the Italian renaissance style of architecture, embodying all the improvements which had been made by the claimants since 1873. In this set of plans there were finished drawings, numbering 40. These drawings consisted of a colored perspective, with a full set of ground plans, elevations, and sections, drawn on a large, working scale one eighth of an inch to the foot and one fourth of an inch to the foot, showing the complete arrangements of the building. These plans with exterior modified as set forth in paragraph (10) below, are the plans adopted by act of congress of April 15, 1886, aforesaid, and they were readopted by the act of March 2, 1889, above cited. These plans, drawings, and designs, though prepared by the claimants' firm, were prepared in consequence of a request made to J. L. Smithmeyer, individually, by the joint select committee on additional accommodations for the library of congress under the act 8th June, 1880, as more fully set forth in finding 12.

(9) In 1882, at the request of the said committee, claimants redesigned and revised the gothic plans above referred to in paragraphs (3) and (4) of this

urpose connected therewith, in-
ost of all professional and other
ices that the chief of engineers
may deem necessary for the
all specially order, five hundred
lars.

opriation, and all approp lations
de, and all sums available from
is heretofore made for this pur-
e expended under the direction
ion of the chief of engineers of
ho shall have the control and
of all said work, and the em-
all persons connected therewith.

And all contracts for the construction of said building, or any part thereof, shall be made by the chief of egineers of the army, and so much of the act entitled 'An act authorizing the construction of a building for the accommodation of the congressional library,' approved April fifteenth, eighteen hundred and eighty-six, as requires the construction of said building substantially according to the plan submitted to the joint select committee on additional accommodations for the library of congress, by John L. Smithmeyer, and so much of the first section as provides for a commission, together with the eighth section

g perspectives and front elevations. plans were also turned over to the d were adopted by the senate in a that body authorizing the construc- essional library, but which failed in

of Italian renaissance plans, pre- y the claimants, under instructions ee as aforesaid, was very severe and the request of the said committee, two new designs were prepared by in the same style of architecture, and them. These exterior plans were ian those submitted in 1880. They ges in the interior of the building, ided to affect only the exterior, and perspectives. These perspectives the color effect of using different erial in the elevation. They are on and carefully considered with refer- chitectural effect of the building.

s, in the year 1874, gave up their ess as architects, and from that time evoted themselves almost exclusive- ration of the plans above described, time of the commencement of this ot regained their private business. of the firm, Mr. Smithmeyer, trav- his country and in Europe, visiting y buildings in New York, Phila- n, Baltimore, Liverpool, London, , Vienna, Berlin, Dresden, Leipsic, t the request of the said joint select the purpose of obtaining informa- to the architecture of the great s of the world.

gress, by the Act 15th April, 1886, as prepared by the claimants in issance style of architecture, as set eceding findings, the commission was organized, and the work of e library building under and in h the said plans so furnished by so adopted by congress was com- nonth of October, 1886.

ection of the commission the foun- or the rotunda and center building, tains and corner pavilions of the the plan so adopted by congress, excavation and drainage system ilding has been completed. Some of cut granite for the cellar walls so small quantities of terra cotta gs, and broken stone for concrete, ed on the premises. Only about of the granite, however, had been d for. A partial outfit of derricks, ts, and other mechanical appli- ollected, mainly by transfer from uilding for the state, war, and s, and a number of contracts were

lance with the provisions of the , October 2, 1888, (25 St. pp. 505, chief of engineers, on October 3, e superintendence of the new

t the requirements of said act of said building to $4,000,000,

Gen. Casey so far changed the plans adopted by the act of April 15, 1886, as to reduce the cost within this prescribed limit, by cutting out the curtains connecting the wings with the central pavilion, and abutting the wings immediately thereupon, thus eliminating the courts formed by said curtains, and the storage magazines contained therein, in this way decreasing the size of the proposed building and the amount of material required in its construction.

The plans so submitted are the plans marked "A" in the report of the chief of engineers, and are the identical plans submitted by John L. Smithmeyer and adopted by congress by the act of April 15, 1886, with certain parts omitted as aforesaid.

(2) Plans D, mentioned in said act of March 2, 1889, are the identical plans which congress had formerly adopted by the above-mentioned act of April 15, 1886, with certain interior parts of the building for book magazines omitted, which omitted parts are shown in the drawings appended to the said report of the chief of engineers.

8. At the time when the Act 15th April, 1886, (24 St. p. 12,) authorized the construction of a library building "substantially according to the plans submitted to the joint select committee on additional accommodations for the library of congress by John L. Smithmeyer, in the Italian renaissance style of architecture, with such modifications as may be found necessary or advantageous without materially increasing the cost of the building," no specifications fixing or designating the material of the building had been adopted, and until such specifications were adopted, or the kind of material was in some way determined, it was impossible to fix, except approximately, the amount of the estimated or anticipated cost of the building to be constructed.

The first estimate of the cost of the building authorized by the Act April 15, 1886, made by any officer or agent of the government, was made by the chief of engineers of the army in his report to the speaker of the house of representatives, bearing date December 1, 1888; that is to say, after the duty of constructing the building had been devolved upon him by the Act 2d October, 1888, (25 St. pp. 505, 523.) In his report he submitted to congress an "estimate of cost of the original plan modified," which "estimate" amounted to $6,003,140.

This original plan "modified" was the plan of the claimants adopted by the Act April 15, 1886, and the modification consisted in omitting about one sixth of the finished interior, though retaining the external walls of the building as originally designed by the claimants. The portion so omitted would cost, if built according to the original plan, about $1,000,000 in addition to the estimate of $6,003,140 made by the chief of engineers for the modified plan. This modified plan, to cost $6,003,140, was designated in the report to congress as "Plan D," and is the same plan adopted and authorized by the Act 2d March, 1889, (25 St. pp. 939, 966.)

But in 1884, while the claimants' plans were still under consideration in congress, the claimant Smithmeyer had prepared a paper entitled "Description of the plans for a new building for the

of said act, be, and the same are hereby, repealed, and the duties of said commission under said act are hereby devolved upon the chief of engineers of the army, who shall annually report to congress at the commencement of each session a detailed statement of all the proceedings under the provisions of this act; and hereafter, until otherwise ordered by congress, no work shall be done in the construction of said library except such as is herein provided for, and all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded. And all loss or damage occasioned thereby or arising under said contracts, together with the value of the plan for a library building submitted to the joint select committee on additional accommodations for the library of congress by John L. Smithmeyer in the Italian renaissance style of architecture, may be adjusted and determined by the secretary of the interior, to be paid out of the sums heretofore or hereby appropriated: provided that, before any further contracts are let for the construction of said building, general plans for the entire construction thereof shall be prepared by or under the direction of the chief of engineers of the army, which plans shall be subject to the inspection and approval of the secretary of war and the secretary of the interior: and provided, further,

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congressional library," which was "ordered to be printed for the information of the members of the house, April 3, 1884." The plans referred to in this document were the same plans then before congress, subsequently designated as the "Plan of John L. Smithmeyer" in the act of 1886, after which the building is now being constructed; and it was an accurate description of the said plan as then existing. It concluded with the following paragraph:

"The approximate estimate of the cost of completing this structure, made from the drawings on hand this date—i. e. the plan adopted by the committee—in the Italian renaissance style of architecture, in stone and iron, will be $3,262,600, and the cost of completing such portions of the inside for occupation as will accomodate one million of books will be $2,323,600."

9. The usual and customary schedule of charges and the professional practice of architects, as prescribed by the American Institute of Architects, (chartered under the laws of the state of New York, and of which both claimants are members,) the Western Association of Architects, and other architectural societies, including the District of Columbia, and by the profession generally, fixes the rates of compensation and rules governing the same as follows:

"For full professional services, (including supervision,) 5 per centum upon the cost of the work.

The charge for partial service is as follows:

	Per cent.
Preliminary studies	1
Preliminary studies, general drawings, and specifications	2½
Preliminary studies, general drawings, specifications, and details	3½

"For works that cost less than $10,000, or for monumental and decorative work and designs for furniture, a special rate in excess of the above. An additional charge to be made for alterations or additions in contracts or plans, which will be valued in proportion to the additional time and services employed. Necessary traveling expenses to be paid by the client. The architect's payments are successively due as his work is completed in the order of the above classifications. Until an actual estimate is received, the charges are based upon the proposed cost of the works, and the payments are received as installments of the entire fee, which is based upon the actual cost."

These are the rates and rules established by the custom and usage of the profession, and are never deviated from by architects in good standing, except under exceptional circumstances, and then only by a special and express contract.

The plans under which the building for the library of congress is being constructed are designed and intended for a monumental building, within the meaning of the paragraph of the foregoing schedule which prescribes additional rates for such plans.

In a number of cases the executive branch of the government has employed architects at the rates prescribed by the foregoing schedule of the American Institute.

10. The plans prepared and submitted by the claimants, and accepted and so used by the government in the construction of the building, consisted of "preliminary sketches and general drawings," within the meaning of the classification in the schedule of the American Institute of Architects, and were so complete and perfect that any competent architect could take them and construct the contemplated building from them, without the assistance or advice of the claimants.

For such preliminary studies and general drawings the rate of remuneration prescribed in the schedule set forth in the preceding finding is, with specifications added, 2½ per cent. upon the cost or proposed cost of the work, but, inasmuch as the kind of material and the style of finish for the library building had never been fixed upon by congress or by any officer or agent of the government, no specifications were ever prepared by the claimants.

They consequently were unable to furnish the specifications, and were relieved from the duty and labor of preparing them. The court finds $3,300 to be the reasonable value of the service of preparing specifications for this building from which the claimants were so relieved; that is to say, if the claimants are entitled to recover a commission of 2½ per cent. on the cost or proposed cost of the building, the sum of $3,300 represents the amount which may be deducted for specifications, which they were ready and willing to furnish, but which they did not, in fact, furnish, to the defendants.

11. On the 1st of October, 1886, the commission created by the act of 15th April, 1886, appointed the claimant John L. Smithmeyer architect of the library building, and fixed his compensation at $5,000 per annum. On the 13th November, 1886, the commission also appointed the claimant Paul J. Pelz principal draughtsman, and fixed his compensation at $3,000 per annum. The appointments were in writing. Mr. Smithmeyer continued in the service of the defendants as architect of the library building until October 3, 1888, when he was removed by the chief of engineers. Mr. Pelz is still employed. The claimants, at the time of accepting such appointments, did not notify either congress or the commission that they intended to charge according to the schedule of the institute for the plans furnished, nor did they so notify congress or the commission before the work began on the building under the act of 1886, but had previously notified the chairman of the joint select committee that they intended to charge for the plans.

During the preceding 12 years—that is, say, from October, 1874, to April 15, 1886—the claimants had given substantially their whole time to the service of the committees and commissions having charge of the subject of a library building, as is more particularly set forth in finding 4; and had also furnished the necessary draughtsmen and clerks and office room. It has been shown that the cost of draughtsmen, clerks, and office

otal cost of said building shall not
ır million dollars, exclusive of ap-
is heretofore made."
icular provision referred to is that
or damage occasioned thereby, or
der said contracts, together with
of the plan for a library building
to the joint select committee on
accommodations for the library of
John L. Smithmeyer, in the Ital-
ance style of architecture, may
and determined by the secretary
rior, to be paid out of the sums
or hereby appropriated."
ended for the United States that
'may," in such provision, means
"shall;" that the secretary of the interior was thus constituted a special tribunal to adjust and determine the equitable right of Mr. Smithmeyer for the value of his plan; that the secretary of the interior never had an opportunity to make payment for the plan, as, according to finding 14, the claimants did not submit any demand to him for an adjustment and determination under the act of October 2, 1888; and that neither the court of claims nor this court has any jurisdiction in the premises. It is contended that the act referred the claim to the secretary of the interior as a special tribunal, with exclusive power, not only to make an award, but also to pay its amount.

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y about 50 per cent. of the gross re-
architect's business, and that the
and specifications in the office of the
architect of the treasury is about 2½
the cost of the building; but it has
vn what were the expenditures of
during the 13 years above mentioned,
:hat their office rent was $600 per an-
it they ordinarily employed a num-
s and draughtsmen, whose compen-
ively ranged from $2 a day to $10 a

itely after the enactment of the act of
80, the joint select committee therein
d Edward Clark, Alexander R. Esty,
nt John L. Smithmeyer as the three
ns contemplated by that act to de-
ier it was practicable and beneficial
itional library space in the capitol,
to erect a separate building. The
pointment was in the following

ie Joint Select Committee on Addi-
iodations for the Library of Con-
gton, D. C., June 17, 1880. John L.
Esq., Washington, D. C.—Sir: The
mittee contemplated by the act of
ved June 8, 1880, (a copy of which
inclosed,) being duly organized,
me to notify you that you have
s one of the 'three persons of suit-
attainments' provided for in said
the questions therein named. In
munication to you, the committee
our attention to the provisions of
relating to the examination of the
. This examination will be made
with your associates, Mr. Edward
of the capitol, and Mr. Alexander
ton. It is not deemed necessary
out your duty in connection with
of said act, except to call your at-
st sentence of the same. You will
vision is there made for a compar-
n and estimate of the advantages
accommodations connected with
ie erection of a separate building
The object of the act is to em-
sons of suitable skill and attain-
bject of architecture to determine
acticable and beneficial' to pro-
commodations for the library in
he capitol building, or whether it
o elsewhere and erect a separate
and your associates find adverse-
building on the present capitol,
ee desire you, and each of you, to
ecifications, and estimates for a
eligible point in the city, discon-
capitol. In doing this the com-
se that what is known as 'Judi-
also the ground east of the pres-
d, be taken into consideration;
these points the committee do
understood as excluding from your consideration other eligible sites that may occur to you. If a new building should be decided on, it is the judgment of the committee that it should be not less than four hundred and fifty (450) feet in length and three hundred (300) feet in width; that it should be constructed of material as durable as the two wings of the capitol; and that the interior should be brick, iron, or other material as nearly fire-proof as possible. As to the interior arrangement, and the practicability of its future extension and improvement, it is the desire of the committee that you consult with the librarian of congress. It is proper in this connection to call your attention especially to that part of section 1 which looks to the improvement of the 'legislative halls,' 'the convenience of communication between them,' 'their better ventilation, light, and exposure to the open air.' That subject you will consider in connection, however, with the primary purpose of this legislation, which is to provide a structure for the better accommodation of the library of congress, and for its future wants. The committee earnestly hope that you and your associates will be able to meet at an early day, and proceed with the duties pointed out in this act. They hope to receive a preliminary report from you, if possible, as early as the 1st of October next, and it is their expectation that they will have such reports from you as will enable them to report to congress upon its meeting in December next. The committee have designated Mr. Edward Clark, architect of the capitol, to act as chairman of the board when in consultation. Very respectfully yours, &c., D. W. Voorhees, Chairman."

After receiving such appointment, the claimant Smithmeyer entered upon and performed the duties therein indicated, both with regard to the adaptation of the capitol to the purposes of a library and with regard to a separate building. In the discharge of these duties he produced, at the request of the joint select committee, in 1880, a plan or plans for the alteration and enlargement of the capitol, and a plan for a building to be erected on Judiciary Square, and likewise the plan or plans described in finding 4, subd. 8, for a separate building. The latter plan or plans had inscribed upon them the name of Smithmeyer & Pelz, the claimants' firm name, and were prepared by the firm, and at its cost, but were delivered to the committee by the claimant Smithmeyer, and the plan so delivered was the same adopted by and referred to in the Act 15th April, 1886, as "the plan submitted to the joint select committee on additional accommodations for the library of congress by John L. Smithmeyer." It was reported to congress by the committee on the 14th January, 1881, restudied, and greatly improved by the claimants, and was afterwards modified at the request of the committee, as set forth in paragraph (10) of finding 4.

No express contract or agreement was entered into by the committee and the claimant Smithmeyer, determining his compensation for his services generally, or for preparing these specific plans; neither was any contract whatever entered

*356 But this right of action accrued in 1886, and the court of claims from that time had full jurisdiction over it, under its general jurisdiction. The act of October 2, 1888, did not repeal, either expressly or by implication, the general jurisdictional act of the court of claims, to the extent of this case. The purport of the act of 1888 seems to have been to provide a method of adjusting the claim, if the claimants so desired, without a suit. The claimants had a right to the additional method, but they could also waive its benefit. The general jurisdiction of the court of claims, and the additional method of adjustment, can both of them well stand together. De Groot v. U. S., 5 Wall. 419, 432; Gordon v. U. S., 7 Wall. 188; Henderson's Tobacco, 11 Wall. 652; Shutte v. Thompson, 15 Wall. 151; Bechtel v. U. S., 101 U. S. 597; Campbell v. U S., 107 U. S. 407, 2 Sup. Ct. Rep. 759; Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. Rep. 255; U. S. v. Great Falls

into between the committee and the firm of Smithmeyer & Pelz.

13. The following statement sets forth all the payments made by the defendants to the claimants in and about the matter of preparing plans for a building for a congressional library, including a plan for the extension of the capitol. With the exception of the first item of $1,500, all the payments were made to Smithmeyer alone, for his individual services, under the provisions of the act of June 8, 1880.

Statement of Payments.

From the $5,000 appropriation of March 3, 1873, "for a plan for a new building for a library of congress," (17 St. p. 513:)

On December 29, 1873, "for one set of designs for a new building for the library of congress, the amount of the first premium"	$1,500 00
From the appropriation of $8,000, made by the act of June 8, 1880, (21 St. p. 165,) and the act of March 3, 1881, (Id. 424,) to be expended by the joint select committee created by said act of June 8, 1880, for the purpose therein mentioned:	
On August 10, 1880, "for services rendered the joint select committee to provide additional accommodations for the library of congress"	600 00
On October 23, 1880, "for services rendered and drawings submitted" for said committee	500 00
On ——, ——, "for draughts of plans, etc., for library building"	802 00
On February 26, 1881, "for ground plans, elevations, and perspective drawings of the capitol building, as illustrating the preliminary report on the subject of extending it"	650 00
On March 30, 1881, for "professional services rendered"	650 00
On November 2, 1881, for "labor on plans, sections, etc."	500 00
On February 28, 1882, for "services rendered"	400 00
On June 29, 1882, for "professional services rendered, i. e. estimates, drawings, etc., etc."	500 00
On August 23, 1882, for "professional services up to date"	800 00
On January 20, 1883, for "services rendered as professional expert"	955 00
On January 4, 1883, for "drawings, photographs, copies of plans, and books purchased from C. Pulman, Esq., custodian of British Museum"	40 88
Total as above	$7,897 88

14. The claimants have not submitted any demand to the secretary of the interior, under the provisions of the act of October 2, 1888, above cited, for adjustment and determination; nor have they, or either of them, made any claim to the executive department in regard to any matter alleged in their petition looking to the payment of the fees or compensation demanded in this suit.

15. Since October, 1886, the library building has been, and still is, in process of construction according to the plan designated by the Act 15th April, 1886, modified by the Act 2d March, 1889, as is more fully set forth in the preceding findings.

16. The court finds the fair and reasonable value of the claimants' services in preparing the plans delivered to the joint select committee and reported to congress on the 14th of January, 1881, and which are now being used by the government in the construction of a library building, to be ($48,000) forty-eight thousand dollars.

Additional Findings of Fact.

1. From the passage of the act of 15th April, 1886, until October 1, 1886, neither of the claimants were in any way in the employ of the defendants.

At this time the claimant Smithmeyer was employed. The following letter shows the extent of his employment:

Washington, D. C., April 19, 1887. John L. Smithmeyer, Esq.—Dear Sir: At a meeting of the commission held on Friday, October 1, 1886, you were appointed architect of the building for the accommodation of [the library of] congress, at a compensation of $5,000 per annum. Respectfully, L. Q. C. Lamar, Sect. of the Interior and Chairman Cong. Library Commission."

Subsequently, and on the 13th day of November, 1886, the commission employed the claimant Pelz as principal draughtsman of the building, and agreed to pay him $3,000 per annum.

The claimants were not employed as a firm, and neither had any interest in the employment of the other, or in the services to be rendered by the other, or in the compensation to be paid for such services. Their employment related solely to service to be rendered by them in the future construction of the building, and no other.

2. Subsequently to the act of April 15, 1886, the defendants paid for the services of draughtsmen, computers, modelers, and experts of every kind, and also all expense for stationery, instruments, clerk hire, office rent, fuel, gas, and all other necessary expense which might be connected with an architect's office, and none of such service or expense was paid by claimants or either of them. From April, 1886, to the 30th of April, 1888, the commissioners paid for such expense the sum of $33,803.29.

3. The acceptance of the salaries by Smithmeyer and by Pelz were the only acts, as far as appears, done by them, or either of them, or agreements, express or implied, between them and the defendants or the commissioners, relative to their compensation as architects, either for preparing the plans or superintending the work.

4. In determining the value of claimants' services in preparing the plans accepted by the defendants, and adopted by them, and used by them in the construction of the library building, no allowance has been made for service rendered after the 14th day of January, 1881, in restudying and improving such plans, or in preparing the new designs for the exterior of said building, as set forth in paragraph (10) of finding 4, and in the last paragraph of finding 12.

5. In fixing $48,000 as the fair and reasonable value of claimants' services in preparing said plans, accepted and adopted by the defendant, no allowance has been made for the expenses of the architect's office.

Co., 112 U. S. 645, 5 Sup. Ct. Rep.
i. v. Harmon, 147 U. S. —, infra.
ıtention on the part of the claim-
at the value of their plans or serv-
ıt not to be estimated according
e of quantum meruit, but that they
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› be $48,000. This was a finding
lence. The evidence is not before
thout it, we are asked, on findings
to work done in connection with
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ent of the court of claims as to
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ed, and for which alone the right
ation exists.

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v. County of Cook, 103 U. S.
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claimants were of an advisory
compensation, and were such
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in finding 13 as "professional

finding 11, the commission cre-
ıct of April 15, 1886, (24 St. p.
d Smithmeyer, on October 1,
rchitect of the library building,
ıtion of $5,000 per annum; and
13, 1886, it also appointed the
to be principal draughtsman,
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ing under the act of April 15, 1886, although they had previously notified the chairman of the joint select committee that they intended to charge for plans.

The acceptance by the claimants of employment at an agreed compensation per annum, before either party had acted on the faith of a different understanding, leaves no room for implying any other contract or usage. There was an express contract by which the claimants, as architects, were under the duty of furnishing plans at the agreed compensation.

In the opinion given by the court of claims it is stated that the court was of opinion that the acts of the parties indicated that the services of the claimants should be estimated according to the rule of quantum meruit, and not according to the schedule of charges of the American Institute of Architects; that, instead of a percentage, the United *States* elected to give, and the claimants consented to take, two annual salaries amounting to $8,000 a year, as an equivalent for such percentage; that, as the claimants thus departed from the general rule of architects, of measuring their compensation by the customary fees of their profession, and did so without any express agreement or reservation as to the preceding part of their service, the court was of the opinion that such part should be estimated according to the same rule, which the parties had themselves adopted; and that, taking those facts of mutual acquiescence as elements for computing damages, bearing in mind that a period of about six years existed between October, 1874, when the claimants began to give their entire time to what may be termed the evolution of their plans, and January 14, 1881, when the plans were submitted to congress, and remembering also that one of the claimants had received from the government, for other professional services connected with the library, the sum of $4,600, the court found as the value of perfecting the design and preparing the plans a like equivalent of six years' service at $8,000 a year, and fixed the damages at $48,000. This we consider a proper and reasonable decision.

Judgment affirmed.

(147 U. S. 268)

UNITED STATES v. HARMON.

(January 16, 1893.)

No. 649.

CLAIMS AGAINST THE UNITED STATES—MARSHALS' FEES—MILEAGE—SERVING WRITS—TRANSPORTATION OF PRISONERS.

1. The disallowance by the first comptroller of the treasury of a marshal's account for fees is not such a rejection or adverse report "by a court, department, or commission," under the proviso of 24 St. at Large, p. 505, § 1, cl. 1, as to prevent a circuit court from taking jurisdiction of a suit for the claim. 43 Fed. Rep. 560, affirmed.

2. In the first circuit the marshal is entitled, under Rev. St. § 829, cl. 3, to a fee of two

dollars for distributing venires to the constables, according to the long-established practice in that circuit. 43 Fed. Rep. 560, affirmed.

3. A marshal is entitled to be reimbursed for money paid with the approval of the attorney general, to whom Rev. St. § 368, gives general supervisory power over the accounts of the court officers; the payment having been made on a requisition of the district attorney for blanks necessary for his use. 43 Fed. Rep. 560, affirmed.

4. Under Rev. St. § 829, cl. 24, when the court adjourns over one or more days, the marshal may return home, and charge travel for going to attend the term at the day to which it is adjourned, and he may also charge travel for going to each special term. 43 Fed. Rep. 560, affirmed.

5. Under Rev. St. § 829, cl. 18, a marshal may charge two dollars a day for expenses in endeavoring to make an arrest when the services charged for were actually rendered, and the disbursements actually made.

6. Under Rev. St. § 829, cl. 25, where a marshal serves several precepts (not in behalf of the same person) against different persons, for different causes, he is entitled to full travel on each, though they are all served on the same trip. 43 Fed. Rep. 560, affirmed.

7. Act Cong. Feb. 22, 1875, c. 95, § 7, does not preclude a marshal from charging full mileage on each of two or more writs served at the same time and place on different persons, but applies only to cases in which there is no actual travel, as where a writ was sent through the mail to be served by a deputy near the place of service. 43 Fed. Rep. 560, affirmed.

8. The hire of hacks to transport prisoners to and from court being agreed to have been in accordance with the usual practice, and to have always before been allowed, it will be presumed to have been required by the court, for the prompt dispatch of business, and a marshal should be reimbursed for money so spent. 43 Fed. Rep. 560, affirmed.

9. A circuit court, under the discretion given by 24 St. at Large, p. 508, § 15, on a petition by the marshal to recover fees and expenses against the United States, awarded $59.15 costs, "considering the frivolous and vexatious nature of the objections taken." On appeal the items of costs were not objected to, and did not appear in the record. *Held*, that the costs must be assumed to have been taxed in accordance with the statute, which says that costs shall include only what was actually incurred for witnesses and fees paid to the clerk.

Appeal from the circuit court of the United States for the district of Maine.

At Law. Action by Charles B. Harmon against the United States to recover certain fees and disbursements due the plaintiff as United States marshal. Judgment was given for plaintiff. 43 Fed. Rep. 560. Defendant appeals. Affirmed.

Sol. Gen. Aldrich and Felix Brannigan, for the United States. E. M. Rand, for appellee.

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*Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit brought in the circuit court of the United States for the district of Maine, February 7, 1890, by Charles B. Harmon against the United States, under the act of March 3, 1887, c. 359, (24 St. p. 505,) to recover $1,770.60 as fees and disbursements of Harmon while marshal of the United States for that district, from March 9, 1886, to October 1, 1888, which were included in his account presented to the district court, proved to its satisfaction by his oath, approved by it, forwarded to the first auditor of the treasury and by him to the first comptroller, and disallowed by the latter; the items of the same being set forth in detail in schedules annexed to the petition.

The United States, by a plea in the nature of nonassumpsit, put in issue the plaintiff's right to recover. The suit, under the requirement of section 2 of the act of 1887, was tried by the court without a jury.

There was filed the following admission in writing, signed by the district attorney of the United States: "In the above-entitled cause, it is admitted, on behalf of respondent, that the services charged in the petition and schedules were actually rendered; that the disbursements charged were actually made in lawful money; and that the sums charged as paid to witnesses were actually, and in every instance, paid upon orders issued in due form, either by court or a commissioner of the circuit court, in the respective cases."

The case, as now presented before us, involves only items numbered 2, 3, 4, 5, 6, and 9, discussed in the opinion of the circuit court.

There was filed, before the hearing, an "agreed statements of facts," signed by the attorneys for both parties, the only parts of which that it is important to recite being as follows:

"First. As to jurisdiction:

"That, of the total amount claimed by petitioner, items amounting to $140.32 were disallowed by the first comptroller prior to March 3, 1887.

"Second. As to the items claimed:

"That they are correctly classified and set forth in the abstract of schedules annexed to brief of petitioner.

"Third. As to the several classes of claims:"

"2. Distributing venires, marshal's fees, $186.

"That, if the marshal is entitled to a fee of $2 for each venire distributed to the several constables, he is entitled to the amount claimed; but it is claimed by respondent that said amount was erroneously charged in the marshal's account as mileage, and was for that reason disallowed by the comptroller.

"3. Paid for blanks for United States attorney, $14.

"That upon requisition of the United States attorney, approved by the attorney general, this amount was paid by the marshal for blank indictments and informations for the necessary use of the United States attorney. That a similar charge has since been allowed by the comptroller.

"4. Marshal's travel to attend court, $156.60.

"That, of the amount claimed, $118.80 is for travel to attend regular terms of the circuit and district courts, and that one travel, $1.80, has been allowed and paid to the marshal for travel at each of said terms.

"That said $118.80 is charged for travel on days when said courts were held by adjourn-

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ction 7 of the act of 1887, spe-
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t had jurisdiction to pass upon

those items of the claim, amounting to $140.-32, which were disallowed by the first comptroller before March 3, 1887. By section 2 of the act of that date, the circuit and district courts of the United States are vested with concurrent jurisdiction (within certain limits as to amount) of all matters which, by section 1 of the act, "the court of claims shall have jurisdiction to hear and determine," including "all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable: provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which have heretofore been rejected, or reported on adversely, by any court, department, or commission authorized to hear and determine the same."

The question is whether claims disallowed by the first comptroller prior to March 3, 1887, were claims which, under section 1 of the act of that date, had been, prior to its passage, "rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

It is contended for the United States that except where congress, by special law, empowers some court or executive officer to hear and determine a claim against the United States, the accounting officers of the treasury department alone have the power to hear and determine it; that, under section 236 of the Revised Statutes, "all claims and demands, whether by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the department of the treasury;" that, as to marshals' accounts, their settlement and adjustment belong to the first auditor and the first comptroller alone, under sections 269 and 277 of the Revised Statutes; that, prior to the act of 1887, the only remedies existing in favor of marshals, as against the action of the accounting officers, were, in proper cases, by set-off in the circuit or district courts, or by suits in the court of claims; that prior to the establishment of the court of claims the settlement and adjustment of accounts by the accounting officers of the treasury department, and their final action on claims and accounts, were regarded by all the departments of the government as a final determination, adjustment, and adjudication of the claims and accounts so passed upon; that

in respect to hearing such claims the accounting officers constituted the "department" which heard and determined them; that their powers came within the very terms of the act of 1887; that the act of 1887 cannot be construed so as to apply only to claims determined by courts and special tribunals; that, when the accounting officers of the United States settle accounts and claims, they are authorized to hear and determine them, and to reject or report adversely such claims or items as, in their judgment, should be disallowed; and, therefore, that the claims so reported are rejected by a department authorized to hear and determine them, within the meaning of the act of 1887.

But we concur with the views of the circuit court on this point, which, in its opinion delivered by Mr. Justice Gray, are expressed as follows:

"Upon the question whether a disallowance of an account by the first comptroller of the treasury is within the latter part of this proviso, there has been a diversity of judicial opinion. The circuit court for the eastern district of Missouri held that it was, and its decision was followed by the district court in this district, as well as in the eastern district of Missouri. Bliss v. U. S., 34 Fed. Rep. 781; Rand v. U. S., 36 Fed. Rep. 671; Preston v. U. S., 37 Fed. Rep. 417. But the opposite view has since been maintained, on fuller consideration, by the district court in Connecticut, in Georgia, and in Illinois. Stanton v. U. S., Id. 252; Erwin v. U. S., Id. 470; Hoyne v. U. S., 38 Fed. Rep. 542.

"The earlier decisions are based upon section 269 of the Revised Statutes, by which it is made the duty of the first comptroller 'to superintend the adjustment and preservation of the public accounts subject to his revision,' and upon section 191, which is as follows: 'The balances which may from time to time be stated by the auditor, and certified to the heads of departments by the commissioner of customs or the comptrollers of the treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a comptroller, may, however, submit to such comptroller any facts, in his judgment, affecting the correctness of such balance; but the decision of the comptroller thereon shall be final and conclusive, as hereinbefore provided.'

"The clause of section 269, as to the general duty of the comptroller to superintend the adjustment and preservation of public accounts subject to his revision, is a re-enactment of a provision of earlier acts, reaching back to the foundation of the government. Acts Sept. 2, 1789, c. 12, § 3, (1 St. p. 66;) March 3, 1817, c. 45, § 8, (3 St. p. 367;) March 3, 1849, c. 108, § 12, (9 St. p. 396.)

"Section 191 is a re-enactment of the act of March 30, 1868, c. 36, (15 St. p. 54.) Before that act it was settled by a series of opinions of successive attorney generals that the action of the comptroller or of the commissioner of customs was subject to the revision of heads of departments. See opinion of Attorney General Stanbery, of September 15, 1866, and earlier opinions therein referred to. 12 Op. Atty. Gen. 43. The action of accounting officers of an executive department was never considered as a conclusive determination, when the question was brought before a court, of justice. Acts March 3, 1797, c. 20, (1 St. p. 512;) May 15, 1820, c. 107, § 4, (3 St. p. 595;) Rev. St. § 3636; U. S. v. Jones, 8 Pet. 375, 384; U. S. v. Bank of Metropolis, 15 Pet. 377, 401; 1 Op. Atty. Gen. 624; 5 Op. Attys. Gen. 650.

"The sole purpose and effect of the act of 1868 were to regulate the business of the executive departments; to define the comparative powers of the comptrollers or the commissioner of customs on the one hand, and of the heads of departments on the other, in the performance of their executive and ministerial duties; and to make the decision of a comptroller or of the commissioner of customs final and conclusive, so far as the executive department was concerned, but not to affect the powers of the legislature or of the judiciary. 13 Op. Attys. Gen. 5; 14 Op. Attys. Gen. 65; 15 Op. Attys. Gen. 192, 596, 626; Delaware R. Steamboat Co. v. U. S., 5 Ct. Cl. 55.

"The act itself, after providing that the balances certified to the heads of departments by the comptroller or by the commissioner of customs, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be 'conclusive upon the executive branch of the government,' adds, in equally unequivocal terms, 'and be subject to revision only by congress or the proper courts;' and the further provision, which makes the decision of the comptroller upon facts submitted to him by the head of a department 'final and conclusive,' reserves the legislative and the judicial authority with equal clearness by the qualifying words, 'as hereinbefore provided.' Act March 30, 1868, c. 36, (15 St. p. 54;) Rev. St. § 191.

"The judgments of the court of claims, and of the supreme court on appeal from its decisions, accord with this view, and uniformly treat the action of the accounting officers as not conclusive in a suit between the United States and the individual. McElrath v. U. S., 12 Ct. Cl. 201, and 102 U. S. 426, 441; Chorpenning v. U. S., 11 Ct. Cl. 625, and 94 U. S. 397, 399; Pittsburgh Sav. Bank v. U. S., 16 Ct. Cl. 335, 351, 352, and 104 U. S. 728, 734; Wallace v. U. S., 20 Ct. Cl. 273, and 116 U. S. 398, 6 Sup. Ct. Rep. 408; Saunders

1 Ct. Cl. 408, and 120 U. S. 126, 7 ep. 467.

on 1 of the act of March 3, 1887, c. ords 'hear and determine' are used ,—once as applied to the court of ice as applied to that court and to and district courts, and again as 'any court, department, or commis- se words must be taken to be used stance in the same sense, and as in adjudication, conclusive as be- parties, in the nature of a judg- vard. The proviso that nothing in n shall be construed as giving to ne courts named in the act jurisdic- r and determine any claims 'which ofore been rejected, or reported on by any court, department, or com- thorized to hear and determine the it be limited to a rejection of a an adverse report thereon, by a irtment, or commission, which de- he rights of the parties, such as al by the secretary of the treasury int of expenses under the captured oned property acts, as in U. S. v. 124 U. S. 236, 8 Sup. Ct. Rep. 446, ision of an international commis- Meade v. U. S., 9 Wall. 691.

er, the court of claims, even before e of the act of 1887, had jurisdic- ims under an act of congress or ntract, and could, therefore, hear nine claims for legal salaries or hell v. U. S., 18 Ct. Cl. 281, and 46, 3 Sup. Ct. Rep. 151; Adams v. t. Cl. 115; U. S. v. McDonald, 128 Sup. Ct. Rep. 117; U. S. v. Jones, , 16, 9 Sup. Ct. Rep. 669.

not believe that the act of 1887, act to provide for the bringing of st the government of the United l the manifest scope and purpose re to extend the liability of the to be sued, was intended to take isdiction already existing, and to decisions of accounting officers and effect which they never had

is follows: "Distributing venires, ees, $186." As to this item the ment of facts says "that, if the entitled to a fee of $2 for each buted to the several constables, d to the amount claimed, but it by respondent that said amount isly charged in the marshal's ac- leage, and was for that reason y the comptroller." As to this ircuit court, in its opinion, says: rict, the jurors being drawn by accordance with the laws of fees paid by the marshal to the r their services, as well as those im for his own services, in dis- ires, are in accordance with the s of the Revised Statutes, (sec- tion 829, cl. 3,) and with the settled course of decision in this circuit. U. S. v. Cogswell, 3 Sum. 204; U. S. v. Smith, 1 Woodb. & M. 184; U. S. v. Richardson, 28 Fed. Rep. 61, 73." In the case last cited the mode of summoning jurors in the first circuit is fully explained. As to this item 2, all that the counsel for the United States says is that the finding as to it is not of fact, but is a mere conclusion of law, and therefore is error. We do not perceive that there is any error.

Item 3 is as follows: "Paid for blanks for United States attorney, $14." As to this item 3 the agreed statement of facts says: "That upon requisition of the United States attorney, approved by the attorney general, this amount was paid by the marshal for blank indictments and informations for the necessary use of the United States attorney. That a similar charge has since been allowed by the comptroller." As to this item 3 the circuit court says: "The sums paid by the marshal, upon the requisition of the district attorney, approved by the attorney general, for blank indictments and informations for the necessary use of the district attorney, having been paid by the marshal, with the approval of the attorney general, exercising the general supervisory power conferred by Rev. St. § 368, the marshal is entitled to be repaid those sums." All that the counsel for the United States says in regard to item 3 is that the item is payable only out of the earnings of the district attorney, and is a part of his office expenses, and that the marshal cannot be allowed credit for that item, because there is no law authorizing or making appropriation for such blanks. We think that item 3 is allowable.

Item 4 is as follows: "Marshal's travel to attend court, $156.60." As to this item 4 the agreed statement of facts says: "Of the amount claimed, $118.80 is for travel to attend regular terms of the circuit and district courts; and one travel, $1.80, has been allowed and paid to the marshal for travel at each of said terms. That said $118.80 is charged for travel on days when said courts were held by adjournment over an intervening day, and were not held on consecutive days. That the remaining sum of $37.80 is charged for travel to attend twenty-one special courts or special terms of the district court. That the docket of the district court shows that said twenty-one special courts or special terms were duly held." As to this item 4 the circuit court says: "By Rev. St. § 829, cl. 24, the marshal is to be allowed 'for traveling from his residence to the place of holding court, to attend a term thereof, ten cents a mile, for going only.' This allowance is not expressly, or by any reasonable implication, restricted to a single travel at each term, but extends to every time when he may be expected to travel from his home to attend a term of court. If the court sits for any number of days in succession, he should

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continue in attendance, and is entitled to only one travel. But, if the court is adjourned over one or more intervening days, he is not obliged to remain, at his own expense, at the place of holding court, but may return to his home, and charge travel for going anew to attend the term at the day to which it is adjourned. His right to charge travel for going to each special court or special term is, if possible, still clearer, and is scarcely contested." The counsel for the United States says that this item is for mileage of the marshal for traveling more than once from his residence to attend a term of court, and is for travel caused by temporary adjournments of the court for a day or two during a term thereof, the marshal preferring to go home, rather than to remain, at his own expense, at the place of holding the court; that a fair reading of section 829 of the Revised Statutes forbids more than one mileage for going to attend a term of court; that it allows the marshal, "for traveling from his residence to the place of holding court, to attend a term thereof, ten cents a mile, for going, only," and does not say that he shall have such mileage for each time he travels from his place of residence to the place of holding court, during a term thereof. No suggestion is made on behalf of the United States that if item 4 is legal the amount allowed is unreasonable. We think that the item was properly allowed.

Item 5 reads as follows: "Expenses endeavoring to arrest, $4." As to this item 5 the agreed statement of facts says "that this charge for two days at $2 was disallowed by the first comptroller solely because he claimed it was not charged in the proper account." As to item 5 the circuit court says: "The charge for expenses in endeavoring to make an arrest was no more than the statute permits to be allowed. Rev. St. § 829, cl. 18." As to this item 5 the counsel for the United States says that the finding is defective; that it is not shown that the expenses amounted to $2 a day; and that the fee bill allows necessary expenses only, and not exceeding two dollars a day. We think the item is covered by the admission that the services charged in the petition were actually rendered, and that the disbursements charged were actually made in lawful money. This four dollars is for "expenses."

Item 6 is as follows: "Travel to serve precepts, $237.60." In regard to item 6 the agreed statement of facts says: "That in some instances the officer had in his hands for service several precepts against different persons, for different causes, and made service of two or more of such precepts in the course of one trip; making but one travel to the most remote point of service, but charging full travel on each precept. The following item, viz.: '1886, April 24. In U. S. v. Jeffrey Gerroir, travel to serve subpoena from circuit court, Massachusetts district, at Cranberry Isle, 314 miles, $18.84,'—is suspended by comptroller because the only actual travel was from Portland to Cranberry Isle, say 206 miles. If travel, as charged, is not to be allowed, then this charge should be for 206 miles, $12.36. That in serving a warrant of removal, (in every instance within this district,) or warrant to commit, the marshal has charged travel, while the comptroller claims that, transportation of officer and prisoner being allowed, no travel can be charged." In regard to item 6 the circuit court says: "The general rule prescribed by Rev. St. § 829, cl. 25, allows the marshal 'for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service.' The explanatory or restrictive provisions as to the cases of two persons served with the same precept, and of more than two writs in behalf of the same party, against the same person, emphasize the general rule, and confirm its application to several precepts against different persons for different causes, although served at the same time. This clause of the fee bill, which allows for travel in going only, as a compensation for actual travel in both going and returning, is wholly independent of, and unaffected by, the distinct clause allowing fees for transportation of officer and prisoner only while the officer has the prisoner in custody, and without any regard to any additional distance which he may be obliged to travel out and back in serving the warrant of arrest or removal. The United States rely on the act of February 22, 1875, c. 95, § 7, which, after providing that all accounts of attorneys, marshals, and clerks for mileage and expenses shall be audited, allowed, and paid as if the act of June 16, 1874, c. 285, had not been passed, further provides that 'no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.' 18 St. p. 334. We concur in the opinion of Attorney General Devens that this last provision, which manifestly includes marshals, does not deny a marshal full travel on two or more writs in his hands at the same time, and served at the same place on different persons, inasmuch as his travel is actual and necessary to serve each and every of those writs, but that 'that provision was intended to apply to cases in which no actual travel is performed in serving process, as, for instance, where the writ is sent through the mail to be served by a deputy at or near the place of service.' 16 Op. Attys. Gen. 165, 169. It follows that by the statute of 1875 the travel to be allowed to the marshal for serving at Cranberry Isle a subpoena from the circuit court for the district of Massachusetts must be limited to his actual travel within his district from Portland to Cranberry

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the same question is involved in No.
S. v. Fletcher,) 13 Sup. Ct. Rep.
ie counsel for the United States in
in No. 783, relies on the same pro-
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St. p. 334,) which, recited above, re-
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officer or person shall become en-
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The comptroller claims that the
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Sup. Ct. Rep. 615.
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treasury department.

The circuit court, under the discretion given to it by section 15 of the act of 1887, (24 St. p. 508,) awarded to the plaintiff $59.15 costs, "considering the frivolous and vexatious nature of the objections taken to the greater part" of his claim. The items of costs allowed are not objected to, and do not appear in the record sent up. It must be assumed that the costs were taxed in accordance with the statute, which says that the costs "shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court."

Judgment affirmed.

(147 U. S. 413)

DOYLE v. UNION PAC. RY. CO., (two cases.)

(January 23, 1893.)

Nos. 100, 101.

LANDLORD AND TENANT—WHEN RELATION EXISTS—DANGEROUS PREMISES—TRIAL—INSTRUCTIONS.

1. Where a railroad company leases to an individual a house situated near its railroad track, under an agreement that the lessee shall board its section hands therein at a specified price to be paid by the hands, the company agreeing to aid her in collecting the same by retaining the amount from their wages, the relation thus created, in so far as concerns the company's duty in respect to the leased premises, is merely that of landlord and tenant.

2. Under the rule that there is no implied warranty on the part of a landlord that the demised house is safe or reasonably fit for occupation, a railroad company which lets a house situated upon a mountain side where snowslides sometimes occur is not bound to notify the lessee of the danger therefrom, although the company has knowledge thereof, and the lessee has not, and has never before lived in a region where snowslides occur; and in the absence of any deceit or misrepresentation the company is not liable for personal injuries to the lessee, or for the death of members of her family, occasioned by the destruction of the house by a snowslide.

3. It is not reversible error for a federal judge to express to the jury his opinion on the facts, if the rules of law are correctly laid down, and the jury are given to understand that they are not bound by such opinion.

In error to the circuit court of the United States for the district of Colorado.

These were two actions brought by Marcella Doyle against the Union Pacific Railway Company, one of them being for personal injuries to herself, and the other to recover for the death of her children; such injuries and death being caused by a snowslide which destroyed the house in which she was living, and which she had leased from the defendant company. There were verdict and judgment for defendant, and plaintiff appeals. Affirmed.

T. M. Patterson, for plaintiff in error.
John F. Dillon and Harry Hubbard, for defendant in error.

*414 *Mr. Justice SHIRAS delivered the opinion of the court.

In the early part of November, A. D. 1883, Marcella Doyle, a widow with a family of six children, agreed with the Union Pacific

Railway Company to occupy the company's section house situated on the line of the railroad at or near Woodstock, in the county of Chaffee and state of Colorado, and to board at said section house such section hands and other employes of the company as it should desire at the rate of $4.50 per week, to be paid by the persons so to be boarded, and the company agreed to aid her in collecting her pay for such board by retaining the same for her out of the wages of the employes so to be boarded.

Mrs. Doyle moved with her children into the section house, and continued in the discharge of her duties as boarding housekeeper until the 10th day of March, A. D. 1884, when a snowslide overwhelmed the section house, injured Mrs. Doyle, and crushed to death the six children residing with her.

Subsequently, Marcella Doyle brought, in the circuit court of the United States for the district of Colorado, two actions against the Union Pacific Railway Company,—one for her personal injuries; the other for damages suffered by her in the loss of her children,—and which latter action was based on a statute of the state of Colorado.

The actions resulted in verdicts and judgments in favor of the defendant company, and the cases have been brought to this court by writs of error. As the cases turn upon the same facts and principles of law, they can be disposed of together.

The record discloses that the facts of the case, as claimed by the respective parties, and certain admissions by the defendant company, were stated in a bill of exceptions, and upon which instructions by the court were given which are made the subject of the assignments of error.

The bill of exceptions was as follows:

*415 "Be it remembered that on the trial of this cause, at the November term, A. D. 1886, of the said circuit court, the defendant admitted, and such admissions were received in evidence before the jury:

"That the plaintiff was at the several times named in the complaint a widow and the mother of the said Martin Doyle, Andrew Doyle, Christopher Doyle, Catharine Doyle, Marcella Doyle, and Maggie Doyle, mentioned and named in the complaint as the children of the plaintiff, and as having each and all been killed by a snowslide at Woodstock in the month of March, A. D. 1884.

"That her husband and the father of said children had died previously to their death. That each of said children was of the age and sex stated in the complaint; was each unmarried and had no child nor children, and had each lived with their said mother, making their home with her, up to the time of their death; and were each then living with the plaintiff, aiding and assisting her in and about making a living, and in and about her duties and labors in the keeping of the section house of the defendant at Woodstock, in the county of Chaffee and state of Colorado, where said children were killed. That said children were all killed while in said section house, on the 10th day of March, A. D. 1884, by a snowslide, which then and there occurred from the mountain side above said section house. That said section house was built and used by the defendant as and for a section house and a place at which the section hands of the defendant who should work on said section could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant, and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with the defendant to keep for it, during its will and pleasure, its section house situated at or near Woodstock, on the line of its railroad, in the county of Chaffee and state of Colorado. That by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section house for such section hands and other employes of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so furnished with such board; but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board. That plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section house with her family, and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snowslide, on the 10th of March, A. D. 1884. That the defendant did not at any time notify or apprise the plaintiff or either of her said children, or cause her or either of them to be notified or apprised, of the danger of a snowslide or snowslides or of the liability of a snowslide or snowslides at such place where said section house then was, or in that locality. And the plaintiff, further to maintain the issues on her part, introduced evidence tending to show that said section house was a one-story frame building, and was constructed in 1882, about the time that said railroad was first operated in that section of the country; was situated in the mountains, near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account. That the sides of the mountain at the base of which was the house in question were marked by the tracks of former snowslides, but only those familiar with snowslides and their effects would know what they meant. That the defendant was aware of said danger at and before the time it engaged the plaintiff to keep its said section house. That the plaintiff and her said children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the dangers incident thereto, and was not aware of the particular danger in question. That there

rominence or hip on this mountain
ut ten or twelve hundred feet above
n house, which cut off a view of the
side above said hip from the sec-
se or its immediate vicinity. That
id hip there was a large depression
n the mountain side extending from
to the summit, into which great
s of snow fell and drifted during the
ason of each year, thus tending to
owslides of danger to persons in
on house or its vicinity. That this
as not apparent even to a person
nowledge of snowslides and their
thout a view or examination of this
side above said hip. That the alti-
id section house was about 10,200
of the summit of said mount in
,000 feet. That the snowfall there
in the winter season of each year,
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of March 10, 1884, which killed
ildren, proceeded from this depres-
said hip. That a snowslide of less
s, and of less scope and extent, oc-
re in February, 1883, in the same
from the same source, which
within about two hundred feet of
n house, and of which the defend-
owledge at the time thereof.

e attention of the superintendent
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r, at or about the time said section
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fendant who assisted in locating
said railroad.

r said son Andrew Doyle was an
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mountain is a part of the range
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m those of the Pacific. At this
Woodstock station the course of
n is nearly east and west. This
ses this mountain by means of
led 'Alpine Tunnel,' which is to
d of a line north of Woodstock,
is this mountain at a heavy
the side thereof, about midway
between the section house and the said hip on the mountain, (which hip is termed a 'projection of rocks' by some of the witnesses,) and passes on to the eastward of Woodstock a considerable distance, where it turns, and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section house and said hip,—the section house being below and distant from this lower track about two hundred and thirty feet; and the two tracks forming this horseshoe are both between the section house and said hip, and on a direct line from the section house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy feet higher in point of altitude where they cross this line from the section house to the hip on the mountain side above. That there was a water tank on the upper side of the lower track fifty or sixty feet to the westward of the section house, which water tank was injured by the snowslide of February, 1883.

"That the snowslide of March 10, 1884, spread out as it descended the mountain, so that where it passed over the lower railroad track its space in width was six or seven hundred feet, and the section house was not far from the center of said snowslide track.

"That the contour of this mountain, beginning at the section house and ascending the mountain, is about as follows, to wit: Above the section house it slopes slowly to the first railroad track; then there is a rockslide; then there is a bench above that, and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a space from three to four hundred feet in width of nothing but rock, with a very steep slope, and above this slope some very steep rocks, (the hip on the mountain side,) and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet along to the summit of the mountain, which has an elevation or altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope of more than thirty-three degrees, and from the hip down there is quite a precipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber, and in and about the section house there is a space of eight or nine hundred feet square on which there is no timber except three or four trees.

"That the timber on the mountain side was sparse and scattered. That only a few trees were carried down by the snowslide. That snowslides do not always follow beaten tracks made by former snowslides on the same mountain side, but frequently depart therefrom. That the snowslide of March 10 1884, separated into broken fragments or divisions before reaching the base of the moun-

tain, one of which struck the section house, resulting in the injuries complained of.

"That the winter of 1883–84 was severer, and the snow fell some deeper, than the winter previous thereto, and that it snowed heavily and continuously from about the 1st of March to the 10th of March, 1884, and the trains had ceased to run on account of the snow. That ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift, and after it had settled compactly. That it drifted greatly, filling up basins and depressions on the mountain sides. That there were rockslides and existing evidences of former snowslides on this mountain side above said section house.

"That the snowslide of February, 1883, deposited snow and debris on the upper track of the railroad above said section house from twenty to twenty-five feet deep; and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

"And the defendant, to maintain the issues on its part, introduced evidence tending to prove that said section house was built below the said tracks and behind, and protected *420 by a thick growth of timber above and between said section house and the mountain; that there were no marks or tracks of former snowslides directly above or in the vicinity of said section house; that the defendant was not aware of any danger from snowslides at the place where the section house was built, but, on the contrary, that the officers of the company had carefully examined the locality where the same was built, and the contour of the mountains above the same to the summit of the range, and that said section house was built at that place because the officers of the company thought that it was — safe place, and could not be endangered by snowslides, which were apt to occur in that part of the country; that the prominence or hip spoken of was a protection against snowslides which might occur on the mountain sides above said section house; that an examination of the ground, timber, and rocks in the vicinity of where the house was built, and above, on the mountain side, showed that there had not been a snowslide there for at least two hundred years; that the snowslide of March 10, 1884, was caused by a storm of unprecedented severity and duration, and that the same came down through the timber above said house, breaking down and carrying with it standing trees, from bushes up to trees two feet in diameter; that the snowslide mentioned as occurring in February, 1883, came down a considerable distance to the north of where the one came down in 1884, and that the snowslide in 1883 did no damage except to cover up a short distance of the railroad track, and break in some boards of the house under the water tank; that the attention of the superintendent of construction of said railroad was not called by any one to the fact of there being any danger from snowslides at the place where said section house was built, but that the conversation or notice referred to was in regard to a place a mile or more further up Quartz creek; that the said Andrew Doyle had been an employe of the defendant as a section hand, but had quit work some days before on account of the road being blockaded by snow, and all attempts to open it having been abandoned, and for ten days or more before the snowslide no work whatever was being done by defendant on said road for *421 a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section house and its immediate locality from snowslides; that there was no chasm or draw immediately above said section house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section house; that said section house was broken down by said snowslide of March 10, 1884, by a spreading out of the snow as it came down the mountain, and that said section house was on the southerly side of said snowslide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the 'hip' or 'prominence;' that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable amount of timber between said section house and the first railroad track, and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rockslides or existing evidences of former snowslides on the mountain sides immediately above said section house.

"And the foregoing was all the evidence in the case."

To the answers of the court to the prayers for instructions, and to the charge, the plaintiff has filed 13 assignments of error.

The twelfth assignment alleges that "the circuit court erred in charging the jury substantially to the effect that they must find for the defendant;" and in the brief of the plaintiff in error it is asserted that the answers of the court to the several requests for instructions were in effect directions to the jury to find for the defendant.

Although, in point of fact, the court did not give the jury peremptory instructions to find for the defendant, but left the cases to them on instructions under which they might have found verdicts for the plaintiff, yet the validity of the plaintiff's exceptions to the court's treatment of the cases may be conveniently tested by assuming, for the present, that the *422 charge and instructions legally amounted to a direction to find for the defendant. If an

examination of the facts and of the principles of law involved warrants us in concluding that the court would have been justified in so doing, it will not be necessary to consider each and every assignment of error, nor to minutely scan isolated expressions used by the court.

The first question to be determined is, what was the relation between the plaintiff and the railway company? Was Mrs. Doyle a servant or employe of the company, aiding in the transaction of its business and subject to its directions, or was she a tenant at will holding the premises by an occupation during the will of the company? The facts averred by the plaintiff show that the company was not interested, in a legal sense, in the management of the boarding house; did not receive the board money, pay the expenses, take the profits, or suffer the losses. The company could not call upon her for any account, nor could she demand payment from the company for any services rendered by her in carrying on the boarding house. The fact that the company agreed to aid her in collecting what might be due to her from time to time by the boarders, by withholding moneys out of the wages payable to them by the railroad company, did not convert Mrs. Doyle into a servant of the company, or change her relation to the company as a tenant at will of the company's house. Such an arrangement might equally have been made if Mrs. Doyle had been the owner of the house. The court below was not in error in holding that the relation of the parties was that of landlord and tenant.

If, then, such was the relation of the parties, upon what principle can a liability for the damages occasioned by the snowslide be put upon the company? There was neither allegation nor proof of fraud, misrepresentation, or deceit on the part of the defendant company as to the condition of the premises. Indeed, it was not even pretended that the catastrophe was in any way occasioned by the condition of the house.

It was, indeed, alleged that the section house was built near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account; that the company was aware of said danger; that the plaintiff and her children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the dangers incident thereto; and that the company did not at any time notify or apprise the plaintiff or her children of the danger of snowslides or of the liability of snowslides at such place where said section then was, or in that locality; and upon this alleged state of facts it was contended that the jury had a right to find that the railway company was guilty of carelessness or disregard of duty towards the plaintiff such as to make it liable in these actions.

It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes, or snowslides. The law is thus stated in a well-known work on Landlord and Tenant:

"There is no implied warranty, on the letting of a house, that it is safe, well built, or reasonably fit for habitation; or of land, that it is suitable for cultivation, or for any other purpose for which it was let; and where a person hired a house and garden for a term of years, to be used for a dwelling house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defense to an action for rent; and in all cases where a tenant has been allowed, upon suggestions of this kind, to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting, or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may, in this respect, amount to a deceit practiced upon the lessee." Tayl. Landl. & Ten. § 382.

The principles applicable to the present case have been well stated in the recent case of Bowe v. Hunking, 135 Mass. 380. The syllabus states the case and decision as follows:

"A tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which has been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord; the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it, and it bore his weight, and he thought it would bear anybody's weight."

The judge directed a verdict for defendants, and the supreme court sustained this ruling. Field, J., giving the opinion of the court, said, (page 383:)

"There is no implied warranty in the let-

ting of an unfurnished house or tenement that it is reasonably fit for use, [citing cases.] The tenant takes an estate in the premises hired, and persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter his premises, [citing cases.]

"In the case at bar there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase. This duty if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction as a ground of liability between an intentional and an unintentional neglect to perform it; but in such a case as this is there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon the defendants.

"A tenant is a purchaser of an estate in the land or building hired; and Keates v. Earl of Cadogan, 10 C. B. 591, states the general rule that no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit. See, also, Robbins v. Jones, 15 C. B. (N. S.) 240. This is a general rule of caveat emptor. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. Hight v. Bacon, 126 Mass. 10; Ward v. Hobbs, 3 Q. B. Div. 150; Howard v. Emerson, 110 Mass. 320. This rule does not apply to cases of fraud."

This rule of caveat emptor has been applied also in many other cases, some of which we now refer to.

Keates v. Earl of Cadogan, above cited, was an action on the case. The declaration stated in substance that the defendant knew that the house was in such a ruinous and dangerous state as to be dangerous to enter, occupy, or dwell in, and was likely to fall, and thereby do damage to persons and property therein; that the plaintiff was without any knowledge, notice, or information whatever that the said house was in said state or condition; that the defendant let the house to plaintiff without giving plaintiff any notice of the condition of the house; and that plaintiff entered, and his wife and goods and business were injured. Defendant demurred to the declaration, and the court unanimously sustained the demurrer. Jervis, C. J., giving the opinion, said, (page 600:)

"It is not contended that there was any warranty that the house was fit for immediate occupation; but it is said that, because the defendant knows it is in a ruinous state, and does nothing to inform the plaintiff of that fact, therefore the action is maintainable. It is consistent with the state of things disclosed in the declaration that, the defendant knowing the state of things, the plaintiff may have come to him and said, 'Will you lease that house to me?' and the defendant may have answered, 'Yes, I will.' It is not contended by the plaintiff that any misrepresentation was made, nor is it alleged that the plaintiff was acting on the impression produced by the conduct of the defendant as to the state of the house, or that he was not to make investigations before he began to reside in it. I think, therefore, that the defendant is entitled to our judgment, there being no obligation on the defendant to say anything about the state of the house, and no allegation of deceit. It is an ordinary case of letting."

The rule of caveat emptor was also applied in the recent case of Woods v. Cotton Co., 134 Mass. 357. Defendant was owner of a tenement house fitted for four families, and plaintiff was tenant at will, or wife of tenant at will. There were three stone steps leading down from the yard to the street, on which ice and snow had accumulated, and on which plaintiff slipped and received the injury complained of. There was evidence tending to prove that at the time plaintiff was injured she was in the exercise of due care. The jury viewed the premises. Plaintiff contended that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of snow and ice thereon improperly, and that the defendant's omission to place a rail on either side, or to take other reasonable measures to prevent one from falling, was such negligence as would render the defendant liable; but the trial court held there was no evidence to go to the jury, and directed a verdict for defendant, and the supreme court sustained this ruling. Field, J., giving the opinion, says, (page 359:)

"There may be cases in which the landlord is liable to the tenant for injuries received from secret defects which are known to the landlord and are concealed from the tenant, but this case discloses no such defects in the steps. * * * [Page 361.] The ice and snow were the proximate cause of the injury.

"The exceptions state that no railing had ever been placed on either side of the steps, that the jury viewed the premises, and that it was contended 'that the steps were of such material, and constructed in such manner,

that they occasioned the accumulation of ice and snow thereon improperly.' The steps were of rough-split, unhewn granite, and the 'structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received her injury.' The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant."

Hazlett v. Powell, 30 Pa. St. 293, was an action of replevin, in which an apportionment of rent was claimed by the tenant of an hotel, on the ground that he had been partially evicted by the act of an adjoining owner in building so that the tenant's light and air from one side of his hotel were shut off or obstructed, and, as a result, that the hotel was rendered pro tanto unfit for the purpose for which it was intended to be used. There was an offer to prove certain facts, (page 294,) which the court states as follows, (page 297:)

"But the rejected proposition also contained an offer to prove that the lessor knew at the time of executing the lease that the adjoining owner intended building on his lot, —at what time is not offered to be shown,— and did not communicate this information to the lessees. We think he was not bound to do so, and that, if the evidence had been received, it would have furnished no evidence of fraud on the part of the lessor, or become the foundation in equity for relief of the lessees. The substance of the complaint regarded something that the lessor was no more presumed to know than the lessees. It was nothing which concerned the title of the lessor, or the title he was about to pass to the lessees. It was a collateral fact,—something only within the knowledge and determination of a stranger to both parties; and, if material to either, I can see no obligation resting on either side to furnish to the other the information. It was not alleged that the lessor made any representations on the subject, or that there was any concealment of the information; or that any relation of trust and confidence existed between the parties; or that the lessees were misled by his silence, and entered into the contract under the belief that the vacant lot would not be occupied; or that they were in a position in which they could not by diligence have ascertained the fact for themselves, and that they were not legally bound to take notice of the probability that the ground would be occupied by buildings, and inquire for themselves. These were elements to be shown to constitute fraud, and make the testimony available.

"'The general rule, both in law and equity,' says Story on Contracts, (section 516,) 'in respect to concealment, is that mere silence in regard to a material fact which there is no legal obligation to disclose will not avoid a contract, although it operates as an injury to the party from whom it is concealed.' But the relation, generally, which raises the legal obligation to disclose facts known by one party to the other, is where there is some especial trust and confidence reposed, such as where the contracting party is at a distance from the object of negotiation, when he necessarily relies on full disclosure; or where, being present, the buyer put the seller on good faith by agreeing to deal only on his representations. In all these and kindred cases there must be no false representations nor purposed concealments; all must be truly stated and fully disclosed. 'The vendor and vendee,' says Atkinson on Marketable Titles, 134, 'in the absence of special circumstances, are to be considered as acting at arm's length. When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract.' Id. Illustrative of this is the celebrated case of Laidlaw v. Organ, 2 Wheat. 178. The parties had been negotiating for the purchase of a quantity of tobacco. The buyer got private information of the conclusion of peace with Great Britain, and called very early in the morning following the receipt of it on the holders of the tobacco, and, ascertaining that they had received no intelligence of peace, purchased it at a great profit. The contract was contested for fraud and concealment. Chief Justice Marshall delivered the opinion of the court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances which might influence the price, though it were exclusively in his possession. And Chief Justice Gibson, in Kintzing v. McElrath, 5 Pa. St. 467, in commenting on this decision, says: 'It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.' See also, Hershey v. Keembortz, 6 Pa. St. 129. When the information is derived from strangers to the parties negotiating, and not affecting the quality or title of the thing negotiated for, it is not such as the opposite party can call for. We see no error in the rejection of the evidence on account of this part of the proposition, as there was no moral or legal obligation for the lessor to disclose any information he had on the subject of the intended improvement of the adjoining lot. It was not in the line of his title. It was derived from a stranger; it might be true or false; and the lessees could have got it by inquiry, as well as the lessor.

"It is well settled that there is no implied warranty that the premises are fit for the purposes for which they are rented, [citing authorities,] nor that they shall continue so, if there be no default on the part of the landlord."

In the recent case of Viterbo v. Friedlander, 120 U. S. 712, 7 Sup. Ct. Rep. 962, Mr.

Justice Gray, who delivered the opinion of the court, said, in contrasting the doctrines of the common and civil law: "By that law (the common law, unlike the civil law) the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased."

The plaintiff's evidence failed wholly to show that there was any special and secret danger from snowslides which was known only to the railway company, and which *430 could not have been ascertained by the plaintiff. It was, indeed, alleged that "the section house was in a place of danger from snowslides;" but this was plainly the danger that impended over any house placed, as this one necessarily was, on a mountain side in a country subject to heavy falls of snow. The danger referred to was that incident to the region and the climate, and, in the eye of the law, as well known to the plaintiff as to the defendant.

On a careful reading of the plaintiff's evidence we are unable to see that the jury could have been permitted to find any positive act of negligence on the part of the railroad company, or any omission by it to disclose to the plaintiff any fact which it was the company's duty to disclose.

If, then, the plaintiff's case, as it appeared in her evidence, would not have justified a verdict on the ground of negligence or a fraudulent suppression of facts, and as the determination of the nature of the relation between the parties, as that of landlord and tenant, was clearly the function of the court, there would, in our opinion, have been no error if the court had really given a peremptory instruction to the jury to find for the defendant.

However, the record discloses that the court permitted the cases to go to the jury. It is true that the remarks made by the judge must have indicated to the jury that his own view was against the plaintiff's right to recover; but it has often been held by this court that it is not a reversible error in the judge to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jury are given to understand that they are not bound by such opinion. Baltimore & P. R. Co. v. Baptist Church, 137 U. S. 568, 11 Sup. Ct. Rep. 185; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. Rep. 171.

It is not necessary for us to review in detail the criticisms made in the several instructions, for, as we have seen, even if such instructions had amounted, in a legal effect, to a direction to find for the defendant, no error would have been committed.

It is obvious that these views of the case of Marcella Doyle, claiming for her personal injuries, are equally applicable to her suit, *431 under the statute, for the loss of her children. The latter must be regarded as having entered under their mother's title, and not by reason of any invitation, express or implied, from the railway company; and hence they assumed a like risk, and are entitled to no other legal measure of redress.

No error being disclosed by these records, the judgment of the court below is in each case affirmed.

(147 U. S. 375)

COOKE et al. v. AVERY.

(January 23, 1893.)

No. 72.

COURTS—BILLS OF EXCEPTIONS — JURISDICTION—FEDERAL QUESTION — JUDGMENT LIENS—TRESPASS TO TRY TITLE — COMMUNITY PROPERTY—DAMAGES—COSTS.

1. Under Rev. St. § 953, requiring bills of exceptions to be authenticated by the judge of the trial court, or by the presiding judge thereof, if more than one judge sat at the trial, the authentication of a bill of exceptions from the circuit court by the district judge raises a presumption that he alone sat at the trial, although the placita shows that both the circuit judge and circuit justice were also present at the opening of court, prior to the trial.

2. Under Rev. St. § 916, (Act June 1, 1872,) giving similar remedies, by execution or otherwise, to enforce judgments at law in the federal courts as are now provided by the laws of the state in similar cases, and authorizing the court, by general rules, to adopt subsequent state legislation upon the same subject, the remedies on federal judgments are such as were provided by the state laws in force when the act was passed, or re-enacted into the Revised Statutes, or by subsequent laws of the state, which have been adopted by rules of the federal courts.

3. While, under this section and section 967, judgments recovered in federal courts were liens in all cases where they were such by the laws of the states, these sections did not recognize any right in the states to regulate the operation of federal judgments; and, in a case where the laws of the state respecting the liens of judgments were changed after the enactment of these sections into the Revised Statutes, the question whether a judgment thereafter recovered in a federal court constituted a lien upon land was one which depended upon a construction of the federal laws and rules of court, and was therefore a question of federal jurisdiction.

4. Under Rev. St. Tex. arts. 3153–3155, requiring the filing of abstracts of judgments in a prescribed form in the clerk's office of the county court, in order to make such judgments a lien upon real estate, the entry in such an abstract of the names of plaintiffs as "Deere, Mansur & Co.," without giving their individual names in full, was not such a material omission as to be fatal to the lien.

5. In the statutory action of trespass to try title, as existing in Texas, it is unnecessary for plaintiff to deraign title beyond a common source, and he may prove a common source by introducing certified copies of defendant's title deeds; and defendant cannot question the validity of his grantor's title when he does not claim under a paramount title. It is no defense, therefore, to show an outstanding title emanating from the common source before either plaintiff's or defendant's title emanated therefrom.

6. In an action of trespass to try title under the Texas laws, defendant pleaded (1) not guilty; (2) for allowance of value of improvements; (3) title outstanding in a third person. *Held*, that the plea of the general issue was waived by the special plea of outstanding title, and that defendant, therefore, could not prove title in himself, or disprove the title relied upon by plaintiff. Joyner v. Johnson, (Tex. Sup.) 19 S. W. Rep. 522, followed.

7. The fact that defendant, in his plea of a claim for improvements, alleged that he purchased the property in good faith, believing that the same was the homestead of the vendor, and not subject to any judgment lien, (plaintiff claiming title pursuant to a sale under a judgment lien,) did not give defendant any right to prove the existence of the homestead for the purpose of invalidating plaintiff's title.

8. On the question of the right to compensation for improvements, it having appeared at the trial that defendant had not received his deed or paid the consideration for the lands one year or more before the commencement of the suit, as required by the statute, he offered to prove that he was in possession under a verbal contract to convey, and that he immediately entered upon possession, and commenced the erection of improvements, in good faith, and before he knew of any judgment lien. *Held*, that the court properly excluded this evidence, as it did not appear from the offer that any of the improvements were made before the date of the deed, or exactly when, except that it was before defendant obtained actual knowledge of the lien.

9. In Texas there is a prima facie presumption that property acquired after marriage is community property; and therefore, in an action of trespass to try title, brought against a husband and wife and their mortgagee, in respect to lands so acquired, the decision being in plaintiff's favor, it was proper to enter judgment against all the defendants for the recovery of title and possession. The mortgagee, however, was properly omitted in the recovery of damages, and it was error to enter a personal judgment against the wife for damages for use and occupation and for costs, in the absence of special circumstances justifying the subjection of her separate estate to such liability.

In error to the circuit court of the United States for the northern district of Texas.

Affirmed in part, and reversed in part.

Statement by Mr. Chief Justice FULLER:

This was an action of trespass to try title to a tract of land in Hunt county, Tex., brought by W. W. Avery, December 24, 1886, against J. H. Cooke, his wife, M. E. Cooke, and the Scottish-American Mortgage Company, in the circuit court of the United States for the northern district of Texas, the plaintiff alleging that he was a citizen of the state of North Carolina; that the defendants Cooke were citizens of the state of Texas; and that the mortgage company was an alien corporation, and a subject of Great Britain.

The petition averred that on the 25th of November, 1886, plaintiff was lawfully seised and entitled to the possession of the land in question, located in Hunt county, Tex., in the northern district of said state, and entitled to hold the same in fee simple, and that defendants Cooke unlawfully dispossessed him thereof, and still unlawfully withhold the same.

The mortgage company demurred, and also pleaded that on January 1, 1886, the defendants Cooke, who were at that time in possession of the land and seised of good title in fee simple, and had the right to convey the same, executed a deed of trust thereon to one Simpson, as trustee, to secure a loan of money made by the company to the Cookes. The other defendants answered to the merits, and subsequently, on February 13, 1888, defendant J. H. Cooke withdrew his answer, and filed a plea to the jurisdiction of the court, to the effect that the land had been conveyed to plaintiff by citizens of Texas on November 25, 1886, without consideration, and for the purpose of conferring jurisdiction; and on the same day, not waiving his plea to the jurisdiction, he answered: (1) Not guilty. (2) That he purchased the land in controversy from J. H. Payne, under whom the plaintiff claimed, "in actual ignorance of any lien upon said land, and in the belief that said tract of land was the homestead of said J. H. Payne, and that no creditor of said Payne could acquire a judgment lien thereon. That this defendant, for more than twelve months before the commencement of this suit, had actual adverse possession of said land in controversy, and that during said period defendant made upon said land permanent and valuable improvements, in good faith, as follows: [The alleged improvements were enumerated, and the total value stated to be $11,900.] That said tract of land, without said improvements, is of the value of $2,000, and by said improvements the same is enhanced in value by the cost or value, aforesaid, of said improvements. Defendant prays for the value of said improvements, if plaintiff recovers said land," etc.

On February 11, 1889, plaintiff filed his amended original petition, which further alleged that plaintiff and the defendants derived title from one J. H. Payne as a common source; that defendants deraigned title through a certain deed executed by Payne and his wife January 2, 1886, while the plaintiff claimed title under an execution sale upon a judgment recovered against Payne January 17, 1882, in case No. 198, in the circuit court of the United States for the northern district of Texas, at Dallas, in favor of John Deere, Charles H. Deere, Stephen H. Velie, Alvah Mansur, and L. H. Tibbetts, partners under the firm name of Deere, Mansur & Co., for the sum of $717.93 and costs of suit, all the proceedings upon and in reference to which were fully set forth. Plaintiff further alleged that by reason of certain laws of the United States and rules of the circuit court of the United States for the northern district of Texas, which were specifically referred to, the judgment was a lien upon the property from the date of its rendition, or became such on the date the abstract thereof was recorded and indexed in Hunt county, February 9, 1882, (as set out,) and continued to be a lien up to the date of the sale by the marshal, by reason whereof plaintiff had a superior title to the property, but that defendants denied that the judgment was ever a valid lien on the property under said laws and rules; and this constituted the controlling question in the case, upon the correct decision of which plaintiff's title depended. Plaintiff therefore averred that this suit arose under the laws of the United States and the rules of the circuit court, and that the circuit court at the institution of the suit

had, and still has, jurisdiction thereof, without regard to the citizenship of the parties thereto.

On June 8, 1889, the defendants Cooke demurred to that part of the amended original petition treating of jurisdiction, and further pleaded "that, if they are not the owners of the land in controversy, the title thereto is outstanding in one Y. D. Harrington, to whom it was conveyed by said J. H. Payne before the lien under which plaintiff claims attached; and defendants deny all the averments of said petition."

On the same day plaintiff demurred and excepted generally and specially to defendants' plea to the jurisdiction, and denied its allegations, and also replied to defendant J. H. Cooke's original answer by general and special demurrers or exceptions, and a general denial.

The cause came on for trial June 8, 1889, and, the court having heard and disposed of the several demurrers and exceptions, the trial was proceeded with.

The plaintiff introduced in evidence a judgment of the circuit court rendered January 17, 1882, in favor of John Deere, Charles H. Deere, Stephen H. Velie, Alvah Mansur, and L. H. Tibbetts, against J. H. Payne, in cause No. 198, for the sum of $717.93, of which the sum of $682.13 was directed to draw interest at the rate of 10 per cent. per annum, and the sum of $35.80 *376 at the rate of 8 per cent. per annum, and for costs; and also a general index of all judgments rendered in the court, which showed, under the proper letter, that the judgment in favor of Deere, Mansur & Co. against J. H. Payne was entered in Minute Book No. 1, p. 534; also an execution issued on the judgment March 3, 1882, returned, "No property found," and an execution issued August 11, 1886, under which the land in controversy was levied on by the marshal, August 12, and sold by him September 7, 1886, to Charles C. Cobb and John M. Avery; also the marshal's deed to said Cobb and Avery, made pursuant to the levy and sale, and dated September 7, 1886. Plaintiff also introduced the papers in case No. 198, including the original petition, which petition was indorsed: "In circuit court of United States. No. 198. Deere, Mansur & Company vs. J. H. Payne,"—which indorsement was also on all the other papers in the cause; and the citation which was duly served on Payne, notifying him to answer the suit in case "No. 198, of Deere, Mansur & Company, a firm composed of John Deere, Charles H. Deere, Stephen H. Velie, Alvah Mansur, and L. H. Tibbetts, against J. H. Payne, defendant." The petition showed that the suit was brought on a promissory note which was attached as an exhibit, and was dated April 16, 1880, executed by J. H. Payne, and payable to the order of Deere, Mansur & Co. Plaintiff further offered in evidence a certified copy of an abstract of the judgment in case No. 198, and a certified copy of the index of the abstract from the records of Hunt county. The certificate of the clerk of the county court of that county stated that said certified copies were true copies of the abstract recorded in the Judgment Record Book No. 1, p. 47, of Hunt county, and of the index, both direct and reverse, referring to said page 47 of said Judgment Record Book, as appeared from the index in his office. The certified copy of the abstract was as follows:

"Circuit court of the United States for the northern district of Texas, at Dallas.

"I, A. J. Houston, clerk of the circuit court of the United States for the northern district of Texas, at Dallas, do hereby certify that in said court, on Tuesday, January 17th, 1882, the plaintiffs recovered a judgment against the defendant for the sum of $717.93, of which the sum of $682.13 shall draw interest from said date at ten per cent. per annum, and the balance, $35.80, shall draw interest at eight per cent. per annum, together with the costs by plaintiffs incurred; all of which said judgment and costs is yet due and unpaid by the defendant in case No. 198, and styled Deere, Mansur & Company, Plaintiffs, vs. J. H. Payne, Defendant; all of which appears from the records of said court now in my office.

"In testimony whereof, I hereunto set my hand, and affix the seal of said court, at Dallas, Texas, this 6th day of February, A. D. 1882, and of the independence of the United States the 106th year.

[Seal of U. S. circuit court, at Dallas, Tex.]

"A. J. Houston,

"Clerk of said Court.

"Filed for record Feb'y 9th, 1882, at 10 o'clock A. M. Recorded same day and hour.

"A. Cameron,

"Co. Clerk, Hunt Co., Texas."

The certified copy of the direct and reverse index was as follows:

"Direct Index to Judgment Record, Hunt County, Texas.

"Plaintiffs' name: Deere, Mansur & Co.

"Defendant's name: J. H. Payne.

"Page of judgment record: 47.

"Reverse Index to Judgment Record, Hunt County, Texas.

"Plaintiffs' name: Deere, Mansur & Co.

"Defendant's name: J. H. Payne.

"Page of judgment record: 47."

The defendants objected to the introduction of the abstract because it did not correctly give the names of the plaintiffs in the judgment, and did not show the amount still due thereon, as required by law; and to the index, because it did not give plaintiffs' names. But the objection was overruled, and the abstract and index admitted, and defendants Cooke excepted.

Plaintiff then introduced a deed from Cobb and Avery to plaintiff dated November 25, 1886, and also, "for the purpose of proving

a common source of title, and for no other purpose," a certified copy of the deed from Payne and wife to defendant J. H. Cooke, dated January 2, 1886. It further appeared that the mortgage company claimed under a deed of trust of the same date, executed by Payne and wife to Simpson, as trustee, to secure a loan of money, and that Payne derived title through a deed from Crabtree and wife to him, dated August 16, 1867, and duly acknowledged and recorded in April, 1868.

Two rules of the circuit court for the northern district of Texas were then put in, to wit, rule No. 1, adopted by that court at Dallas, April 2, 1880, as follows, viz.: "Rule 1. The modes of proceedings prescribed by the laws of Texas, when they do not conflict with the laws of the United States or a rule of the supreme court of the United States or of this court, are adopted."

And also rule No. 1, adopted by the court at Dallas July 26, 1881, which is as follows, viz.: "Rule 1. All laws and rules of procedure and practice prescribed by the legislature of the state of Texas, as they now exist, or as they may be changed and amended from time to time, when the same do not conflict with the law of the United States, or a rule of the supreme court of the United States or of this court, are hereby adopted as the rule of practice in this court; and all suits, by attachments, sequestration, or otherwise, brought in this court, shall conform to the laws of the state of Texas in force at the time such suit is brought: provided the same does not conflict with a law of the United States, or a rule of the supreme court of the United States or of this court."

It was agreed that Y. D. Harrington, assignee, fully administered the trust created by Payne's deed of assignment, hereinafter mentioned, prior to July 1, 1881, and made final report of his proceedings thereunder to the proper court, and was discharged by said court prior to July 1, 1881, and ever since that date had ceased to act as such trustee. It was also agreed that, ever since the date of the assignment, Payne and Cooke, claiming under Payne, had consecutively held peaceable and adverse possession of the land in controversy in this suit, cultivating, using, or enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered; the deed to Payne antedating the deed of assignment, and that to Cooke, in evidence. It was further agreed that the assignee, Y. D. Harrington, never made any claim of title to the land by virtue of the deed of assignment or otherwise.

Plaintiff having closed, defendants Cooke moved that the cause be dismissed for want of jurisdiction. It was admitted that jurisdiction could not be maintained on the ground of the citizenship of the parties, and that upon a former trial of the cause defendants' counsel contended that, by a proper construction of section 916 of the Revised Statutes, and the rules of the circuit court, the laws of Texas, as they existed in 1873, governed the lien of the judgment, and that the lien was invalid thereunder because executions had not been issued on such judgment each year since its rendition, and that this was defendants' only contention on that trial in regard to the invalidity of said lien, while it was, on the other hand, insisted by plaintiff that the judgment lien was governed by the statute of Texas of 1879, under section 916 and the rules. The motion to dismiss was overruled, and the defendants Cooke excepted.

Thereupon defendants Cooke offered in evidence a general deed of assignment, under the law of Texas in that behalf, for the benefit of his creditors, from Payne to Harrington, dated October 16, 1880, which purported to convey to Harrington, for the benefit of such of Payne's creditors only as would accept its provisions, all Payne's property, real and personal, not exempt, but did not mention the land in controversy specifically, either in its body or in the inventory and exhibits attached. It provided for the disposition of the assigned property, and the rendition of the surplus to Payne, after paying the expenses and the creditors in full. The admission of this assignment was objected to by plaintiff, the objection sustained, and defendants excepted.

Defendants Cooke offered in evidence the original deed made by Payne and wife to Cooke, dated January 2, 1886, which was objected to on the ground that defendants, having specially pleaded an outstanding title as a defense, could not prove title in themselves, which objection was sustained by the court, the deed excluded, and defendants excepted. Defendants then offered the original deed from Payne to Cooke, under the plea that they had placed valuable and permanent improvements on the land, and had had adverse possession for more than 12 months before the commencement of the suit, and in that connection offered to prove that in October, 1885, defendant J. H. Cooke had by parol agreed with Payne upon terms of purchase, but no consideration was paid Payne until the date of the deed, and that, immediately upon making the agreement, Payne delivered to Cooke exclusive possession of the premises, and Cooke entered upon such possession, holding adversely and in good faith, and commenced the erection of improvements thereon which enhanced the value of the land in controversy. The evidence was excluded, and exception taken.

Defendants Cooke then offered to prove that from January 1, 1882, until the sale by him, Payne was the head of a family consisting of wife and children, and that the land was claimed and used by him as his homestead. The court sustained objection thereto, and defendants excepted.

Upon the conclusion of the evidence, the court instructed the jury to return a verdict for the plaintiff for the land, and for the

value of the rents and profits thereof from November 25, 1886, to the date of the trial, to which instruction defendants excepted. Thereupon a verdict for plaintiff was returned, with damages, and judgment entered by the court for the recovery from the defendants of the title and possession of the premises in question, together with the fixtures and permanent improvements thereon and appurtenant thereto, and that plaintiff have a writ of possession; and it was further adjudged that plaintiff recover of defendants *Cooke the sum found by the jury as damages, together with costs. *384

The mortgage company declining to join in the prosecution of the writ of error, an order of severance was entered, and this writ of error brought accordingly.

M. L. Crawford, for plaintiffs in error. John M. Avery, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The placita shows that the circuit court met at Dallas, in the northern district of Texas, on May 20, 1889, the United States district judge presiding, but that when the court assembled on June 8, 1889, pursuant to adjournment, the circuit justice, the circuit judge, and the district judge were all present. The bill of exceptions is signed by the district judge, and as it does not appear that the other judges were present at the trial, which ensued after the meeting of the court, we assume that it was had before the district judge alone.

Section 953 of the Revised Statutes provides for the authentication of bills of exception by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause; and therefore, if this trial had taken place before the circuit justice and one of the other judges, or before the circuit and district judges, the bill of exceptions would, of course, have been signed by the circuit justice or circuit judge, as the case might be. The motion to strike out the bill of exceptions upon the ground that it must be held that the judges who were present at the opening of the court were present on the trial is therefore overruled.

Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States. Osborn v. Bank, 9 Wheat. 738; Starin v. City of New York, 115 U. S. 248, 257, 6 Sup. Ct. Rep. 28. In Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. Rep. 1030, it was ruled that it was necessary that the construction either of the constitution, or some law or treaty, should be directly involved in order to give jurisdiction, although for the purpose of the review of the judgments of state courts, under section 709 of the Revised Statutes, it would be enough if the right in question came from a commission held or authority exercised under the United States. *385

Section 916 of the Revised Statutes is as follows: "The party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereinafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

This section was taken from the act of congress of June 1, 1872, entitled "An act to further the administration of justice," (17 St. p. 196, c. 255,) and was re-enacted in the Revised Statutes, which took effect as of December 1, 1873. The remedies upon judgments under the section are such remedies as were provided by the laws of the state in force when it was passed or re-enacted, or by subsequent laws of the state adopted by the courts of the United States in the manner provided for under that section. Lamaster v. Keeler, 123 U. S. 376, 8 Sup. Ct. Rep. 197.

On the former trial of this case the defendant contended that, under a proper construction of section 916 and the rules of the circuit court, the laws of Texas in force in 1873 governed the judgment lien under which plaintiff claimed title, and that by those laws the lien was lost because execution had not been issued each year prior to the issue of that on which the land was sold, while plaintiff contended that the statutes of Texas enacted in 1879 governed the lien, and under them the lien was not lost by failure to issue the execution each year. *386 *387

It is now insisted by defendants that the latter is the true view, and hence it is said that there is no real and substantial controversy arising under the laws of the United States. Clearly, the right of a plaintiff to sue cannot depend upon the defense which a defendant may choose to set up, and as on the first trial defendants relied on the decision of a federal question to defeat the action, such a concession of the existence of a federal ingredient in the cause might fairly be held to bind them when they subsequently abandon it, and seek to oust the jurisdiction upon the ground that there could be no real dispute as to the applicable law.

By section 34 of the judiciary act of 1789.

(1 St. p. 92,) carried forward into section 721 of the Revised Statutes, it was provided that the laws of the several states, except where the constitution, treaties, or laws of the United States might otherwise require or provide, should be regarded as rules of decision in trials at common law in the courts of the United States in cases where they applied.

Section 2 of the act of September 29, 1789, (1 St. p. 93,) provided that the forms of writs and executions and modes of process in the circuit and district courts in suits at common law should be the same in each state, respectively, as in the supreme courts of the same; and by the act of May 8, 1792, (1 St. p. 275,) these forms and modes of proceeding as then in use in the courts of the United States, under the act of 1789, were permanently continued, but it was declared that they were subject to such alterations and additions as the said courts should, respectively, in their discretion, deem expedient, or to such regulations as the supreme court of the United States should from time to time think proper, by rule, to prescribe to any circuit or district court concerning the same. This delegation of power has been repeatedly held to be perfectly constitutional, and that the power to alter and add to the process or modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied. Wayman v. Southard, 10 Wheat. 1; Beers v. Haughton, 9 Pet. 329, 359. The process act of May 19, 1828, (4 St. p. 278; Rev. St. § 913,) made similar provision, and declared that it should be in the power of the courts so far to alter final process therein as to conform the same to any change made by the state legislatures for the state courts.

By section 967, taken from the fourth section of the act of July 4, 1840, (5 St. pp. 392, 393, c. 43,) the judgments and decrees rendered in a circuit or district court within any state cease to be liens on real estate in the same manner and at like periods as the judgments and decrees of the courts of such state cease by law to be liens thereon.

Under this legislation, judgments recovered in the federal courts were undoubtedly liens in all cases where they were such by the laws of the states. Baker v. Morton, 12 Wall. 150, 158; Ward v. Chamberlain, 2 Black, 430; Massingill v. Downs, 7 How. 760. But no right in the states to regulate the operation of federal judgments was thereby recognized, and the lien of such judgments depended upon the acts of congress and the rules of the federal courts. There was no law of congress, however, prior to August 1, 1888, which expressly gave a lien to the judgments of the courts of the United States, or regulated the same; but on that day an act was approved which made such judgments liens on property throughout the state in which the federal courts sat, in the same manner, and to the same extent, and under the same conditions, only, as if rendered by the state courts. 25 St. p. 357, c. 729.

As we have seen, section 916 became operative as such December 1, 1873. The statute of Texas in force at that date provided that final judgments rendered by any court of record of the state should be a lien on all the real estate of the judgment debtor situated in the county where the judgment was rendered from the date of the judgment, and upon all his real estate situated in any other county from the time when a transcript of the judgment was filed for record in such other county, as provided, and that the lien should cease and become inoperative if execution were not issued upon the judgment within one year from the first date upon which the execution could by law be issued thereon. 2 Pasch. Ann. Dig. art. 7005.

The supreme court of Texas decided that under this law a judgment ceased to be a lien, for want of diligence, unless execution issued on it each year after it was rendered. Bassett v. Proetzel, 53 Tex. 569; Barron v. Thompson, 54 Tex. 235; Anthony v. Taylor, 68 Tex. 403, 4 S. W. Rep. 531.

In this case the judgment was rendered January 17, 1882, and execution issued thereon March 3, 1882, and no other, so far as appeared, until August 11, 1886; and if the lien of the judgment depended on the law of Texas as existing December 1, 1873, and the decisions of the supreme court of Texas were followed, the lien would have been lost by the failure to issue execution on it each year. By the Revised Statutes of Texas, passed in 1879, different provisions were made in relation to judgment liens. By articles 3153 and 3154 it was provided that each clerk of the county court should keep in his office a "judgment record," in which he should record all abstracts of judgments filed for record and authenticated as required, and deliver to the judgment plaintiffs abstracts of such judgments duly certified. Article 3155 was as follows: "The abstract provided for in the preceding article shall show (1) the names of the plaintiff and of the defendant in such judgment; (2) the number of the suit in which the judgment was rendered; (3) the date when such judgment was rendered; (4) the amount for which the same was rendered, and the amount still due upon the same; (5) the rate of interest, if any is specified in the judgment."

By article 3157 the clerk was required to file and immediately record the abstract provided for in the preceding articles, in the judgment record, noting therein the day and hour of the record, and entering it at the same time upon the index. Article 3158 was as follows: "The index to such judgment record shall be alphabetical, and shall show the name of each plaintiff and of each defendant in the judgment, and the number of the page

of the book upon which the abstract is recorded." By article 3159 any judgment recorded and indexed as provided should, from the date of such record and index, operate as a lien upon the debtor's real estate, which lien, by article 3160, was to continue for 10 years from that date, unless the plaintiff failed to have execution issued within 12 months after the rendition of the judgment. Article 3163 made provision for recording and indexing, in the same manner, abstracts of judgments rendered in the United States courts. 2 Sayles' Civil St. (Tex.) p. 93, tit. 61, c. 1.

To what extent, if at all, these articles were adopted by the rules of the circuit court, and whether or not the lien could only be originated by compliance with the requisition as to the record and index of the abstract, was for the circuit court to determine, in the first instance. Judgments, by the common law, were not liens upon real estate, but the lien arose from the power to issue a writ of elegit, given by the statute of Westminster, (13 Edw. I. c. 18.) Morsell v. Bank, 91 U. S. 357, 360; Massingill v. Downs, 7 How. 765; Shrew v. Jones, 2 McLean, 80. It is argued that the writ of elegit, and the lien resulting from the right to extend the land, never obtained under the laws of Texas, while on the other hand it is said that under the laws of congress this judgment was a lien throughout the jurisdiction of the circuit court, from the date it was rendered, without any abstract being recorded and indexed by a state officer.

In Massingill v. Downs, where the state statute made the judgment a lien upon the land of the debtor in the county wherein it was recovered, and required the judgment to be recorded in other counties in order to extend the lien on land therein, it was ruled that a judgment in the circuit court was a lien on the debtor's land in the district without such record; or, in other words, that the remedy for the enforcement of the judgment was coextensive with the process of the court. In *U. S. v. Scott, 3 Woods, 334, it was held by Mr. Justice Bradley, holding the circuit court for the western district of Texas, (June term, 1878,) that a judgment of that court was a lien on defendant's lands throughout the district, without being recorded in the several counties where they lay.

The argument is, however, that as by section 914 the practice, pleadings, and forms and modes of proceeding in the circuit and district courts are required to conform to those of the state courts, the rule of the circuit court of April, 1880, adopting the "modes of proceeding prescribed by the laws of Texas," cannot refer to the modes of proceeding of that section, and must be construed to mean laws prescribing remedies upon judgments subsequent to the enactment of section 916. Hence, that no lien could originate, except in strict accordance with the law of Texas of 1879. The view taken by the circuit court rendered a solution of this question immaterial, but the inquiry is significant, in its relation to jurisdiction.

It is unnecessary to pursue this branch of the case further. Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien, which he asserted, and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the circuit court, and their construction and application were directly involved. We are of opinion that jurisdiction, as resting on the subject-matter, was properly invoked.

Passing to the merits, we find that the rulings of the circuit court in reference to plaintiff's title were not based on any ground independent of the state statute of 1879, but assumed its applicability. The object of the provision for recording abstracts of judgments, and indexing the same, was to apprise subsequent parties—as, for instance, intending purchasers—of the existence and character of the judgments, if a reasonable amount of care and intelligence were exercised. The abstract in this instance gave the judgment debtor's name; the number of the suit in which the judgment was rendered; its date; the amount; the rate of interest; that the whole amount was still due and unpaid; and the name of the plaintiffs as "Deere, Mansur & Co." In all these particulars it was in accordance with article 3155, except that it did not give the individual names of the plaintiffs, although in giving the firm name it gave the surname of the plaintiff first in order. The index gave the defendant's name, and the number of the page of the book upon which the abstract was recorded, and the plaintiffs' name as Deere, Mansur & Co., and this both directly and in the reverse order. The only ground on which this abstract and index could be held insufficient was that the names of the plaintiffs were not given in full in either abstract or index. Was this omission fatal to the lien? The circuit court did not think so, and we concur in that view.

In Willis v. Smith, 66 Tex. 31, 17 S. W. Rep. 247, the supreme court of that state said: "The object of the statute is not to incumber the registry with full information, but to excite inquiry, and indicate the source of full information."

It appears to us that the source of full information was so indicated in this instance that no reasonably prudent or cautious inquirer could go astray.

In Putnam v. Wheeler, 65 Tex. 522, the petition stated the names of the plaintiffs to be Royal T. Wheeler and Harry W. Rhodes, copartners as lawyers, but without giving the style of the firm, and the citation described the plaintiffs as "Wheeler and

Rhodes." This was held sufficient, and the supreme court said: "Giving the firm name of the plaintiffs was not such defect in the citation as required the reversal of the judgment."

Article 2281 of the Revised Statutes of Texas, prescribing the requisites of an execution, states that it shall, among other things, correctly describe the judgment, stating the court wherein, and the time when, rendered, the names of the parties, the amount actually due thereon, and the rate of interest. In Smith v. Chenault, 48 Tex. 455, the title of the judgment was "A. T. Chenault & Co. vs. Smith and Young," and the judgment ordered that the plaintiffs recover of the defendants, but the names of neither plaintiffs nor defendants were given, while the execution recited that "whereas, A. T. Chenault and John O. McGhee * * * recovered a judgment against Elial M. Smith and Hugh F. Young;" and the court held that the execution sufficiently described the parties to the judgment.

In Hays v. Yarborough, 21 Tex. 487, the judgment described the plaintiffs as "Yarborough and Ferguson," and it was held to be a sufficient description. These decisions are in harmony with the conclusion of the circuit court, and have not been overruled or disaffirmed, so far as we are informed.

Since this writ of error was pending the supreme court of Texas has, indeed, held in Gin Co. v. Oliver, 78 Tex. 182, 14 S. W. Rep. 451, that where the index failed to give the individual names of the defendants in a judgment, but only the firm name, it was fatally defective; and to the same effect is Pierce v. Wimberly, 78 Tex. 187, 14 S. W. Rep. 454, although in the latter case the full names of the plaintiffs were not given in the index. The court referred to Nye v. Moody, 70 Tex. 434, 8 S. W. Rep. 606, but in that case the abstract of the judgment had not been indexed at all. The distinction in importance between giving the individual names of the defendants and those of the plaintiffs is obvious.

Both parties claimed title from J. H. Payne as a common source, and defendants offered the assignment to Harrington to prove outstanding title without showing, or attempting to show, any connection of their title with his. The action was the statutory action of trespass to try title, (2 Sayles' Civil St. [Tex.] tit. 96, c. 1, arts. 4784–4812,) and was not made otherwise, or the issues changed, by the averments of the amended petition introduced for the purpose of maintaining the jurisdiction. Under article 4802 it was not necessary for the plaintiff to deraign title beyond a common source, and proof of a common source might be made by plaintiff by certified copies of the deeds showing defendants' chain or claim of title emanating from such common source. Defendants could not question the validity of their grantor's title at the time of the conveyance to them, in a contest with plaintiff, claiming under the same grantor, unless, indeed, they claimed under a paramount title, which they had acquired or connected themselves with. This was so ruled in Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. Rep. 962, where the decisions of the supreme court of Texas bearing on the point are fully cited. The assignment was properly excluded.

Defendants had pleaded (1) not guilty; (2) for allowance of value of improvements; (3) title outstanding in Harrington. Defendants offered the original deed from Payne to Cooke, dated January 2, 1886, which was objected to on the ground "that, said defendants having specially pleaded an outstanding title, the defendants could not prove title in themselves." This objection was sustained, and the deed excluded. Defendants also offered to prove that from January 1, 1882, until the sale to Cooke, Payne was the head of a family, and that the land was claimed and used by him as his homestead, and was therefore not subject to the judgment lien, execution, levy, and sale through which plaintiff claimed. The same objection was made to this evidence and sustained.

The rule seems to be well settled that in this statutory action, if the defendant pleads his title specially, he waives the general issue, and is confined to the defense thus specially pleaded. In Joyner v. Johnson, 19 S. W. Rep. 522, the supreme court of Texas said: "The principle which underlies this doctrine is that when a party, either plaintiff or defendant, in an action of trespass to try title, pleads his title specially, he gives his adversary notice that he rests his case upon the title so pleaded, and it is to be presumed that he relies upon no other." Shields v. Hunt, 45 Tex. 424; Custard v. Musgrove, 47 Tex. 217; Railroad Co. v. Whitaker, 68 Tex. 630, 5 S. W. Rep. 448. Apart from this, as we have held that the lien of the judgment was valid, the exclusion of the deed was immaterial. As to the suggestion in relation to the homestead, this was an affirmative defense, and could not be made under the pleadings as they stood. The plaintiff was not required to offer in chief any proof as to the homestead, in respect of which, indeed, he had been given no notice that it would be relied on; and the evidence offered by defendants was not in rebuttal of plaintiff's proof, but to establish an independent ground for invalidating the lien. No such defense was specially pleaded, while the general issue had been waived. The reference to the homestead in the plea for the allowance of improvements had relation to that subject only, and could not be resorted to for any other purpose.

The provisions of the statutes of Texas on the subject of the allowance for improvements in actions of trespass to try title are contained in articles 4813–4821, inclusive, (2 Sayles' Civil St. [Tex.] p. 639,) and are set forth at length, and considered, in Cox v. Hart, 145 U. S. 376, 390, 12 Sup. Ct. Rep.

962. It must be alleged in the pleadings that the defendant and those under whom he claims have had adverse possession, in good faith, of the premises in controversy, for at least one year next before the commencement of the suit, and that he and those under whom he claims have made permanent and valuable improvements on the land sued for during the time they have had such possession. It is clear that the defendants Cooke were not in possession for 12 months before the commencement of the suit, under any written evidence of title; for their deed was dated January 2, 1886, and the suit was commenced December 24th of that year; but they proposed to prove that they were in possession prior to the execution of the deed, under a verbal contract to convey, although they admitted that the consideration was not paid until the date of the deed. The evidence offered was to the effect that Cooke, after making his bargain with Payne, "immediately" entered upon possession, and "commenced" the erection of improvements, and that he erected improvements of large value upon the land, in good faith, after the commencement of his possession, and before he knew of any judgment lien. There is a lack of definiteness in this offer, which, under the circumstances, probably did not commend it to the circuit court; for it did not appear therefrom that any of the improvements were made before the date of the deed, or exactly when, except that it was before Cooke obtained actual knowledge of the judgment lien.

In Elam v. Parkhill, 60 Tex. 581, it is said: "To entitle a party to a recovery for the value of improvements, it is essential that he be a possessor in good faith. * * * While title is not essential upon which to predicate a claim for the value of improvements, it is necessary that the party should enter and claim under color of title; that is, the party must claim under an apparent title, which he in good faith believes to be the real title to the land." So in Morrill v. Bartlett, 58 Tex. 644, it was held that "a claim under the statute, by a defendant sued for land, that he had made permanent and valuable improvements thereon, cannot be regarded when there is no evidence that he ever paid anything for the land, or received a deed therefor, and when he was informed of the controversy which jeopardized his possession before improving the land."

Many decisions of the supreme court of Texas to the same effect are cited by counsel. House v. Stone, 64 Tex. 685; Hatchett v. Conner, 30 Tex. 104; Powell v. Davis, 19 Tex. 380; Armstrong v. Oppenheimer, (Tex. Sup.) 19 S. W. Rep. 520.

We are satisfied that the defendants were chargeable with notice of the judgment lien, and did not, as against the plaintiff, occupy the position of adverse possessors under a claim of title, made in good faith, prior to the deed of January 2, 1886. Moreover, no evidence was offered to prove the value of the land without regard to the improvements, an essential condition to the application of the statute. Cox v. Hart, supra. When and how far the remedy for valuable improvements may be sought in the courts of the United States, otherwise than in equity, we do not consider.

Judgment was correctly entered against all the defendants for the recovery of the title and possession of the land, and, as the mortgage company was only interested through the deed of trust to Simpson, it was properly omitted in the recovery of damages.

It is conceded that the defendant M. E. Cooke was the wife of her codefendant J. H. Cooke. The claim under the deed from Payne must be presumed to have been in community; it being the settled law of Texas that property purchased after the marriage is prima facie such, whether the conveyance be in the name of the husband or of the wife, or in their joint names. Veramendi v. Hutchins, 48 Tex. 550; Cooke v. Bremond, 27 Tex. 460; Mitchell v. Marr, 26 Tex. 330. But it does not follow that a general personal judgment, in damages for use and occupation, under the statute, and for costs, could be rendered against Mrs. Cooke. The record disclosed nothing to justify the subjection of her separate estate to such a liability, and there was error in the judgment in this particular. Linn v. Willis, 1 Posey, Unrep. Cas. 158; Garner v. Butcher, Id. 430; Haynes v. Stovall, 23 Tex. 625; Menard v. Sydnor, 29 Tex. 257. This does not involve the disturbance of the verdict, or a reversal of the judgment in any other respect.

The judgment will therefore be affirmed, except as to the recovery of damages and costs against M. E. Cooke; and that part thereof will be reversed as to her, with costs, and the cause remanded, with a direction to the circuit court to order the judgment to be modified so as to conform to the conclusion above announced.

Ordered accordingly.

(147 U. S. 370)

WALTER et al. v. NORTHEASTERN R. CO.

(January 23, 1893.)

No. 1,206.

CIRCUIT COURTS—JURISDICTIONAL AMOUNT—HOW DETERMINED.

In a suit by a railroad company against the treasurers of a number of counties through which the railroad runs, to enjoin the collection of taxes, the jurisdictional amount cannot be made up by taking the sum of the amounts in respect to which the several treasurers are sought to be enjoined; but the jurisdiction as to each treasurer must be determined by the amount in controversy between him and the railroad company.

Appeal from the circuit court of the United States for the district of South Carolina. Reversed.

Statement by Mr. Justice BROWN:

This was a bill in equity filed by the Northeastern Railroad Company of South Carolina against the treasurer and sheriff of Charleston, Berkeley, Williamsburg, and Florence counties, through which the plaintiff's road passes, to enjoin them from issuing executions against or seizing the property of the plaintiff, for the purpose of collecting a tax based upon an assessment alleged to be unconstitutional and void.

The substance of the bill was that the constitution of the state provided for a uniform and equal rate of assessment and taxation; that real estate is assessed for taxation once in five years at a uniform rate of from 50 to 60 per cent. of its actual value; that personal property is assessed every year at the same rate, or less; that this rate has become a uniform rule, and was accepted and acted upon by the assessing officers and boards of the state; that plaintiff returned its property at a valuation of from 60 to 65 per cent. of its actual value; and that the state board of equalization for railroads arbitrarily assessed the property of this company at a much higher rate, although prior to the year 1891 it had accepted and acted upon a uniform rule of assessment; but that at its meeting in 1891 it abandoned the rule theretofore accepted, and assessed railroad property at a rate exceeding its actual value, and in some cases doubled and trebled the previous rate, with intent to cast upon it a greater proportion of taxation, although no change was made in the assessment of other real and personal property; that the plaintiff, in common with the other railroads of the state, tendered in payment of its taxes the amount due under the levy estimated upon the value of its property as theretofore assessed, under the rule prevailing in that state, and set forth in its sworn return, and brought this bill to enjoin the taking possession of or selling its property under a tax execution to collect the excess.

Defendants demurred to this bill upon the grounds (1) that the court had no jurisdiction, by reason of the insufficient amount in controversy; (2) that the plaintiff had a complete and adequate remedy at law; (3) for want of equity. The case was heard upon this demurrer, and a decree was rendered overruling the demurrer, and enjoining the collection of the taxes. See Railroad Co. v. Blake, 49 Fed. Rep. 904. Defendants appealed to this court under the fifth section of the court of appeals act of 1891.

Samuel Lord and Ira B. Jones, for appellants. W. Hugh Fitz-Simons and Henry A. M. Smith, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

Objection was taken to the jurisdiction of the court below upon the grounds—First, that the matter in controversy with each of the defendants was less than $2,000; and, second, because the plaintiff had a complete and adequate remedy at law.

With regard to the amount in controversy, it is averred in the bill that the plaintiff returned, as required by law, its real and personal property for taxation at a "valuation of the same according to and under the uniform rules and methods of valuation adopted for the taxation of similar real and personal property," and tendered to the county treasurers of the several counties the amounts due for taxes upon such valuation as returned, such amounts aggregating over $18,000, and in addition thereto tendered to the county treasurer of Charleston county $813.87, for the expenses of the railway commission, but that the defendants refused to receive the same unless plaintiff would also pay the taxes claimed to be due in excess of the amount so tendered, which were as follows: In Charleston county, $177.67; in Berkeley county, $1,511.16; in Williamsburg county, $1,332.50; and in Florence county, $571.33,—making the total amount claimed $3,592.66. It was further alleged that of these taxes 4¾ mills were levied for state purposes, 2 mills for school purposes, and from 1⅞ mills to 5¾ mills, in the different counties, for county and all other purposes. It appears, then, that, while the total amount involved in this litigation is $3,592.66, there is no claim made by the county treasurer of either county which is not less than $2,000, and that, of the entire claim of $3,592.66, the state taxes represent but $1,473.38. The residue is assessed for school and local purposes, is disbursed by the county commissioners, and is never paid into the state treasury at all. In short, the amount in dispute in each county is not only less than $2,000, but is compounded of a state, school, and county tax, most of which is collected and paid out by the county authorities for local purposes.

Under these circumstances, it is entirely clear that, had these taxes been paid under protest, and the plaintiff had sought to recover them back, it would have been obliged to bring separate actions in each county. As the amount recoverable from each county would be different, no joint judgment could possibly be rendered. So, had a bill for injunction been filed in a state court, and the practice had permitted, as in some states, a chancery subpoena to be served in any county of the state, these defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county.

Is the plaintiff entitled to join them all in a single suit in a federal court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2,000? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, unite, for the convenience of litigation, in a single suit, it can only be sustained in the court of original jurisdiction, or on ap-

peal in this court, as to those whose claims exceed the jurisdictional amount, and that, when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in Seaver v. Bigelows, 5 Wall. 208; Russell v. Stansell, 105 U. S. 303; Trust Co. v. Waterman, 106 U. S. 265, 1 Sup. Ct. Rep. 131; Hawley v. Fairbanks, 108 U. S. 543, 2 Sup. Ct. Rep. 846; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. Rep. 1163; Gibson v. Shufeldt, 122 U. S. 27, 7 Sup. Ct. Rep. 1066; Clay v. Field, 138 U. S. 464, 11 Sup. Ct. Rep. 419.

As illustrative of the rule as applied to cases of joint defendants, it was held in Stratton v. Jarvis, 8 Pet. 4, that where a libel for salvage was filed against several packages of merchandise, and a decree was rendered against each consignment for an amount not sufficient in itself to authorize an appeal by any one claimant, the appeal of each claimant must be treated as a separate one, and, the amount in each case being insufficient, this court had no jurisdiction of the appeal of any claimant. A similar ruling was made in Spear v. Place, 11 How. 522. In Paving Co. v. Mulford, 100 U. S. 147, a bill, filed against two defendants, alleging that each held certificates of indebtedness belonging to the plaintiff, was dismissed on final hearing, and plaintiff appealed; and it was held that as the recovery, if any, must be against the defendants severally, and as the amount claimed from each did not exceed the requisite sum, this court had no jurisdiction. In Schwed v. Smith, 106 U. S. 188, 1 Sup. Ct. Rep. 221, certain creditors recovered separate judgments against a debtor, amounting in the aggregate to more than *$5,000, but none of which exceeded that sum, and filed a bill against him and a preferred creditor to subject to the payment of their judgment goods which had been seized upon a prior judgment, in which they succeeded, and defendant appealed. The appeal was dismissed; the court holding that, if the decree were several as to the creditors, it was equally so as to their adversaries. "The theory is that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action." So in Henderson v. Wadsworth, 115 U. S. 264, 6 Sup. Ct. Rep. 40, it was held that where a suit was brought against several heirs to enforce their liability for the payment of a note on which their ancestor was bound, and separate judgments were rendered against each for his proportionate share, this court had jurisdiction in error only over such judgments as exceeded $5,000; and again, in Ex parte Phoenix Ins. Co., 117 U. S. 367, 6 Sup. Ct. Rep. 772, that distinct decrees against different parties on a single cause of action, in which there were distinct liabilities, could not be joined to give this court jurisdiction on appeal. In that case the suit was brought upon a single policy of insurance written by four different companies, and the decree was against each company severally for its separate obligation.

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In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff. The disposition we have made of this question renders it unnecessary to consider the others.

Upon the whole, we are of opinion that this bill ought not to have been sustained, and the decree of the court must therefore be reversed, and the case remanded, with directions to dismiss the bill for want of jurisdiction.

(147 U. S. 374)

KEELS et al. v. CENTRAL R. CO. OF SOUTH CAROLINA.

(January 23, 1893.)

No. 1,207.

Appeal from the circuit court for the district of South Carolina. Reversed.

Samuel Lord and Ira B. Jones, for appellants. J. T. Barron and Henry A. M. Smith, for appellee.

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Mr. Justice BROWN. As the facts of this case are substantially the same as the one just decided, (13 Sup. Ct. Rep. 348,) the decision must be the same.

The decree of the court below will therefore be reversed, and the case remanded, with directions to dismiss the bill.

(147 U. S. 360)

GLENN v. GARTH et al.

(January 23, 1893.)

No. 1,160.

SUPREME COURT—JURISDICTION—APPEALS FROM STATE COURTS.

Where the highest court of a state, in determining the effect of a statute of another state, does not question its validity, but merely determines its construction, there is no ground for reviewing the cause in the supreme court of the United States, on the theory that the court failed to give such statute the full faith and credit which it was entitled to in the state where it was enacted, and thus denied to the defeated party a right claimed under the constitution or laws of the United States; especially when the construction adopted is not inconsistent with the construction placed upon the statute by the courts of the state in which it was enacted.

In error to the supreme court of the state of New York. Writ dismissed.

Burton N. Harrison and John Howard, for plaintiff in error. Wm. C. Clopton, Robert Lewis Harrison, and John R. Abney, for defendants in error.

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

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This was an action commenced October 28, 1886, in the supreme court of the city, county, and state of New York, by John Glenn, as trustee, against David J. Garth, Robert A.

Lancaster, and Samuel J. Harrison, impleaded with others, to recover the amount of two assessments made by the courts of the state of Virginia upon the stock and stockholders of the National Express & Transportation Company, a corporation of that state.

The defendants denied that they had at any time become the holders or owners of shares of the capital stock of the corporation by assignment and transfer from the original subscriber or subscribers for said shares, or otherwise, and denied that they at any time became and were received and accepted by the corporation as stockholders in and members thereof for the number of shares alleged, or any shares whatsoever.

The record of the judicial proceedings of the courts of Virginia put in evidence established the basis of plaintiff's right to recover against the stockholders of the company for the assessments in question, and evidence was adduced on both sides bearing on the question of the liability of defendants as stockholders.

The trial court directed a verdict for the plaintiff, and, on motion of defendants' counsel, ordered their exceptions to be heard in the first instance at the general term, and that judgment be suspended in the mean time. At the general term defendants moved on their exceptions for a new trial, and the supreme court sustained the exceptions, set aside the verdict, and granted a new trial. From this order the plaintiff appealed to the court of appeals, giving the stipulation exacted by the New York statute in that behalf, that if the order granting a new trial should be affirmed there should be judgment absolute against him. The court of appeals affirmed the order appealed from, with judgment absolute against the plaintiff. The remittitur and record were sent down to the supreme court, with directions to enter the judgment and to proceed according to law, whereupon the supreme court directed the judgment of the court of appeals to be made the judgment of that court, with costs to be *362 adjusted, and that defendants have execution. The costs were adjusted, and *judgment therefor entered, May 10, 1892. Application was made in the court of appeals for a reargument, which was refused in due course. A writ of error from this court to the supreme court of New York was then allowed, and now comes before us on motion to dismiss.

The opinion of the supreme court in general term is given in the record, though not reported, as appears in 60 Hun, 584, 15 N. Y. Supp. 202. The case is therein stated in substance as follows: Defendants Harrison, Garth, and Lancaster were engaged in the business of bankers, and brokers in stocks, bonds, and securities, in New York, under the firm name of Harrison, Garth & Co. They had a customer named Ficklin, who desired to purchase shares of the National Express & Transportation Company upon a margin. Garth agreed to carry the shares for Ficklin, that is, to pay for them as Ficklin purchased them, upon receipt of a sufficient margin to secure the firm against loss. This stock was not listed upon the New York Stock Exchange, but Ficklin informed Garth that he could pick the shares up at Baltimore and other places. Some time after the making of this arrangement several lots of the shares were purchased, presumably on Ficklin's orders, through McKim & Co., brokers in Baltimore, and, in accordance with Garth's promise to carry them, Harrison, Garth & Co. settled the account of McKim & Co. for what they had disbursed in the transaction. The certificates of stock were sent on from Baltimore by McKim & Co. to Harrison, Garth & Co., as security for the advances thus made by the firm to Ficklin. The invariable custom in such cases is for the seller to deliver the certificates to the broker, with a blank assignment and power of attorney to transfer on the books of the company indorsed thereon. Such a thing as placing stock in the name of the firm, when thus acting as brokers, had never once occurred in all its business life. Instead of following the custom, and forwarding the ordinary and proper documents, McKim & Co. had the shares transferred on the books of the company into the name of Harrison, Garth & Co., and it was the certificates naming the firm as the owners of the shares which were sent on to defendants. This act of McKim & *363 Co. was not only contrary to *precedent, but as a matter of fact entirely unauthorized. The moment Garth observed the forms of the certificates, he repudiated the transfer to his firm, and endeavored to effect a retransfer. He knew that the stock was assessable, and liability might result from the acceptance of the certificates made out in the name of his firm, but at the same time he could not prudently return the certificates to the company and demand their cancellation, for the reason that the firm had advanced their money upon the security of the shares. He notified Ficklin, and required him to have the stock taken up and transferred from the firm's name. He also returned the certificates to McKim & Co. with instructions to have them sold, and transferred from the name of the firm. There was no delay or hesitation; disaffirmance followed at once upon notice of the unauthorized act. Some attempt was made upon the trial to prove that Harrison, Garth & Co. dealt directly with McKim & Co., but the evidence was insufficient even to amount to a conflict on that point.

The court ruled that no person could be made a stockholder without his knowledge or consent; that there is nothing in any statute which makes the books of a company incontrovertible evidence on that head; that the actual fact may always be inquired into, and, if it be shown that the transferee upon

the books never consented to accept the shares, the transfer to him is simply null and void; that these defendants had not by any neglect or default brought themselves within any just principle of estoppel; and upon a careful review of all the evidence adduced upon the trial the court found "that the defendants never became stockholders of the corporation represented by the plaintiff, and consequently are not responsible for the unpaid assessments sought to be recovered in this action."

The opinion of the court of appeals is reported in 133 N. Y. 18, 30 N. E. Rep. 649, and 31 N. E. Rep. 344. The case was fully considered and discussed, and the same conclusions arrived at. Among other things, the learned judge who delivered the opinion of the court said: "But it is further claimed *304 that under the statutes of Virginia, as expounded by their courts, the transfer upon the books of the company is conclusive upon the defendants, and makes them stockholders, at least as to creditors, irrespective of the circumstances of the registry. It is obvious that any enactment which enabled a wrongdoer to load upon a stranger the heavy responsibilities of a stockholder without his knowledge or assent would be an outrage upon the rights of the individual not to be expected. The statutes of Virginia accomplish no such wrong, but operate reasonably within certain well-defined limits. We are referred to the Code of 1860, c. 57, § 7. That regulates the rights of the assignor of stock, appearing as owner upon the corporate books, relatively to his assignee, who does not so appear, and to the creditors of and subsequent purchasers from the former, and vests the title in the assignee, not, let it be observed, for all purposes, but 'so far as may be necessary to effect the purpose of the sale, pledge, or other disposition,' and subject to the provisions of the 25th section. That is in these words: 'A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as regards the company.' The plain meaning is that the corporation which has acknowledged the ownership, and accepted its evidence and admitted it upon its records, shall not be at liberty to dispute it. Its meaning is not that it shall be conclusive against the alleged stockholder. Indeed, in Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. Rep. 806, the court state the rule to be that the record upon the corporate books is prima facie evidence of the ownership, and after examining all the cases referred to I find none which venture any further."

And in the opinion upon the motion for reargument it was further said: "Of course, the question discussed is vital to the controversy. Under the law, both of this state and of Virginia, one may be, as we said in the former opinion, a holder of stock without being, in the full sense of the term, a 'stockholder.' Our statute of 1848 as to manufacuring corporations, (chapter 40, § 16,) and that of 1850 as to railroads, recognized that a person may hold shares as collateral without being liable to assessment; and it rests upon the obvious ground that the pledgor, in whose name the stock is registered, remains the general owner, notwithstanding the pledge, and the company cannot treat him otherwise, nor practically claim that both pledgor and pledgee are at the same time stockholders of the same stock. The pledgor remains liable; the pledgee never becomes so. The statute of Virginia (Code 1860, c. 57, § 25) makes those, and only those, stockholders, 'as it respects the company,' whose names are registered on its books as such; and that enactment, thus requiring an acceptance and recognition of the stockholder by the corporation, shows that it is a contract relation which is contemplated, and involves an actual assent on both sides. The seeming intimation ventured on behalf of the appellant that the effect of that act is to make one conclusively a stockholder whose name was registered, whether he knew and asented or not, is too plainly unendurable to require serious discussion. No one can be made a stockholder without his consent, express or implied, and so there is no view of the subject which can dispense with proof of that assent by the defendants as a vital and necessary element of the plaintiff's case." *305

*We are unable to discover any sufficient ground upon which to rest jurisdiction of this writ of error. The requirement of section 1 of article 4 of the constitution, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," is referred to by counsel, as also section 905 of the Revised Statutes, which provides for the authentication of the acts of the legislature, and of the records and judicial proceedings of the courts, of any state or territory, and concludes: "And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." And it is contended that the New York courts did not give to the statutes and jurisprudence of Virginia, and to the judicial proceedings in Virginia, the faith, credit, and effect that they had by law and usage at home. As to judicial proceedings, the action of the Virginia courts was in no manner questioned by the decision under consideration. There was no judgment against the defendants in personam in Virginia, and their liability as stockholders was not determined by the decrees which had passed there against the company; nor were the validity and effect of the statutes of Virginia denied, although, so far as relied on, their proper construction and operation were considered by the court of appeals.

Our attention has been called to no case in which it has been held by the highest

tribunal of Virginia that the statutes referred to (Code Va. 1860, cc. 56, 57; Code 1873, c. 57) were intended to be conclusive of the liability of a party, who had never subscribed for stock or been a transferee thereof in fact, because of the presence of his name upon the books of the company without his consent or assent thereto.

In Vanderwerken v. Glenn, 85 Va. 14, 6 S. E. Rep. 806, the decision was, as stated by the court of appeals, that the appearance of the name of the party, sought to be charged, on the company's books as a stockholder, was prima facie evidence of his being such, and this was conceded by the New York court. It is said that that was a mere common-law, legal presumption, and had nothing to do "with the statutory rights and obligations of actual dealers in the stock whose names appeared upon the books as holders of the stock with their knowledge and without dissent on their part, so far as the company and its creditors were concerned;" and that the New York court "went off upon the common-law rule of evidence as to the appearance of stock upon the stock books in respect of strangers, and utterly ignored and rejected the constitutional credit and effect due to the said statutes of Virginia in respect of persons actually dealing in such stock, and whose names appeared upon the books of the company as holders and owners of stock in the ordinary and regular course of its business as conducted under those statutes." But this involves in large part a consideration of the case upon the merits, and begs the question whether upon the facts these defendants occupied the position plaintiff ascribes to them.

If we were to assume jurisdiction of this case it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If, every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that, if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.

The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court. Railroad Co. v. Hopkins, 130 U. S. 210, 9 Sup. Ct. Rep. 503, and cases cited. In Banking Co. v. Marshall, 12 How. 165, the case was brought up from the supreme court of Louisiana, and involved an assignment by a corporation of Mississippi under the laws of that state. Mr. Chief Justice Taney, delivering the opinion of the court, after stating that "in order to give this court jurisdiction the record must show that the point was brought to the attention of the state court, and decided by it," for the obvious reason that "the party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the constitution or laws of the United States, but if he omits to claim it in the state court there is no reason for permitting him to harrass the adverse party by a writ of error to this court, when, for anything that appears in the record, the judgment of the state court might have been in his favor if its attention had been drawn to the question," goes on to say that "it appears that the decision turned upon the construction (not the validity) of the act of Mississippi of 1840, and upon a question of merely local law, concerning the right by prescription claimed by the trustees. Nothing is said in relation to the constitutionality or validity of this act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided." The writ of error was therefore dismissed for want of jurisdiction. It does not seem to have occurred to the chief justice that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi statute by the construction given by the Louisiana court.

This record may be searched in vain for any proof that, as matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York; nor can the contention of counsel, that the Virginia statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the constitution or laws of the United States. Writ of error dismissed.

(147 U. S. 531)

HAMBLIN v. WESTERN LAND CO.

(February 6, 1893.)

No. 1,042.

SUPREME COURT—JURISDICTION—PUBLIC LANDS—GRANTS IN AID OF RAILROADS.

1. The supreme court has no jurisdiction of a writ of error to review the judgments of state courts unless a real, and not a fictitious, federal question is involved. Millinger v. Hartupee, 6 Wall. 258; New Orleans v. Waterworks Co., 12 Sup. Ct. Rep. 142, 142 U. S. 79, followed.

2. Where the location of a railroad line, whether valid or not, is approved by the land office, land withdrawn to satisfy a grant, as determined by such location, is not thereafter open to entry under the pre-emption or homestead laws; and a person attempting to make a homestead entry thereon cannot question the legal title of the railroad. Wolcott v. Des Moines Co., 5 Wall. 681; Wolsey v. Chapman, 101 U. S. 755; Bullard v. Railroad Co., 7 Sup. Ct. Rep. 1149, 122 U. S. 167; U. S. v. Des Moines, etc., Co., 12 Sup. Ct. Rep. 308, 142 U. S. 510, followed.

3. Where the legal title to certain land has been in controversy between two railroads, each claiming under a land grant, a third party, who has attempted to make a homestead entry on the land after the location of the two lines of railroad has been approved by the land office and the land withdrawn from sale, cannot question the force and effect of a decree determining the controversy in favor of one of the railroads.

In error to the supreme court of the state of Iowa.

Petition by the Western Land Company against Howard M. Hamblin in the district court of O'Brien county, Iowa, to recover possession of certain land. Judgment for plaintiff. Defendant appealed to the supreme court of Iowa, which affirmed the judgment. 44 N. W. Rep. 807. Defendant brings error. Affirmed.

Statement by Mr. Justice BREWER:

This case is submitted on a motion to dismiss or affirm. The facts are these: Defendant in error, the Western Land Company, on August 24, 1887, filed its petition in the district court of O'Brien county, Iowa, to recover from the defendant, Hamblin, now plaintiff in error, the possession of the N. E. ¼ of section 1, township 95 N., range 41 W., fifth P. M. Defendant appeared and answered. A trial was had, and on April 23, 1888, judgment was rendered in favor of the plaintiff, the Western Land Company, for the possession of the property. From this judgment Hamblin appealed to the supreme court of the state, which on February 10, 1890, affirmed the judgment of the district court. Thereupon Hamblin sued out a writ of error from this court.

The land company's record title consisted of a patent from the United States to the state of Iowa, dated June 17, 1873, conveying the land to the state for the use and benefit of the Sioux City & St. Paul Railroad Company; a decree of the circuit court of the United States for the southern district *532 of Iowa, of May 18, 1882, (Chicago, M. & St. P. Ry. Co. v. Sioux City & St. P. R. Co., 10 Fed. Rep. 435,) modified on May 21, 1886, in pursuance of a mandate from this court, (Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co., 117 U. S. 406, 6 Sup. Ct. Rep. 790,) by which the title of this land was adjudged held by the state in trust for the Chicago, Milwaukee & St. Paul Railroad Company; a patent from the state of Iowa to the Chicago, Milwaukee & St. Paul Railroad Company, of date September 27, 1886; and a warranty deed from the latter company to the Western Land Company, of date May 26, 1886.

Hamblin's claim to the land rests upon the fact that in February, 1884, nearly 11 years after the issue of the patent, he took possession and made application to enter it under the homestead laws of the United States. This application apparently failed, and he made a second application in September, 1885. He built a house upon the land, and made other improvements, and has resided on it since March, 1884. It does not appear that the land department ever recognized any right in him to enter the land; so that his only claim is based upon the fact of occupation, made, as he says, with a view to entering it as a homestead.

Wm. L. Joy, for plaintiff in error. John S. Monk, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

It is doubtful whether there is a federal question in this case. A real, and not a fictitious, federal question is essential to the jurisdiction of this court over the judgments of state courts. Millinger v. Hartupee, 6 Wall. 258; New Orleans v. Waterworks Co., 142 U. S. 79, 87, 12 Sup. Ct. Rep. 142. In the latter case it was said that "the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." *533 *Now, in ordinary cases, it would not be doubted that a party entering upon vacant land, the title to which had been conveyed from the general government by patent to an individual, could not create a federal question, such as to give this court jurisdiction over the judgment of the highest court of the state, by simply averring that such possession was taken with a view of entering the land under the homestead laws of the United States, and that he went through the form of making application to the local land office for permission to make such entry; for if he could, as is suggested in the foregoing quotation from 142 U. S., 12 Sup. Ct. Rep., almost any case in ejectment could be taken from the supreme court of a state to this. In order that such claim of the party in possession may raise a genuine federal question, there must be some reason to believe that the apparent legal title transferred by the patent from the United States was wrongfully conveyed, and that the real title in fact remains in the government; and whether there be such shadow upon the legal title of the land company that the denial of Hamblin's right to enter the land as a homestead presents a genuine, rather than a fictitious, federal question is a doubtful matter. We must therefore investigate, not merely the instruments by which the legal title passed to the land company, but the legislation and proceedings claimed to give authority therefor.

On May 12, 1864, congress passed an act granting lands to the state of Iowa to aid in the construction of two railroads. 13 St. p. 72. So much of the first section as is material for the question here involved is as fol-

lows: "That there be, and is hereby, granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the state of Minnesota, at such point as the said state of Iowa may select between the Big Sioux and the west fork of the Des Moines river; also to said state for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said state." It will be noticed that the road of the McGregor Company was to proceed westerly, on or near the forty-third parallel, to an intersection with the Sioux City road, in the county of O'Brien. On August 30, 1864, that company filed in the general land office a map of the definite location of its line. This line extended westwardly to a point in section 19, township 95, range 40, in O'Brien county, where it was then expected that a junction would be formed with the Sioux City road. In July, 1867, the Sioux City Company filed its map of definite location. Both of these maps were approved. The line of the Sioux City Company ran through the northwest corner of O'Brien county, and the western terminus of the McGregor Company's line, as located, was about 9 miles south and 12 miles east of the point at which the Sioux City line entered O'Brien county on the west. The McGregor line did not, therefore, intersect with the Sioux City line in O'Brien county, nor come nearer to it than 17 or 18 miles. It will be noticed that, under the statute, the Sioux City line was not to be located so as to intersect with the McGregor line, but the latter was to proceed in a westerly direction, and intersect the Sioux City line. In other words, the Sioux City Company had the primary right of location, the McGregor Company the subordinate, and the latter company was to locate its line in a westerly direction, so as to connect with the Sioux City line wherever located in O'Brien county. So, although the McGregor Company's map of definite location was approved when filed, yet, after the filing and approval of the map of definite location of the Sioux City Company's line, the location made by the McGregor Company was questioned as not in conformity with the terms of the act; and on September 2, 1869, a new map of definite location was filed, and this has since been recognized by the land department as the true line of definite location. On March 15, 1870, and May 11, 1870, the local land offices were instructed by the commissioner of the general land office to recognize this as the true line, and to restore to the public domain such lands reserved upon the location in 1864 as did not come within the 10-mile limit of the location of 1869. In other words, so far as it could, the land department set aside the location made in 1864, and approved and adopted that made in 1869. The land in controversy is within 10 miles of the line of the McGregor Company's line as located in 1869, but is west of the terminus of the McGregor Company's line as located in 1864, and therefore not within the place or indemnity limits as determined by that location. It is also within the indemnity limits of the Sioux City Company's line. It appears from the recitals in the patent to the state in 1873 that the land in controversy was selected as indemnity land for the Sioux City Company, and was patented to the state for the use and benefit of that company. With reference to the subsequent proceedings, it is sufficient to say that the Chicago, Milwaukee & St. Paul Railroad Company succeeded, under legislation of the state of Iowa, to the rights of the McGregor Company, and constructed its road on nearly the line of 1869, and so as to intersect with the Sioux City road; that the litigation in the circuit court was between the Sioux City Company and the Milwaukee Company; that the outcome of that litigation was an adjudication of the rights of the Milwaukee Company to this land; and that, in pursuance of that litigation, the legal title thereto was conveyed by the state to the Milwaukee Company.

Now, the contention of plaintiff in error is that, after the approval by the land department of the map of definite location filed in 1864 by the McGregor Company, the powers of that company in respect to a location were exhausted, and as authority therefor reference is made to the cases of Van Wyck v. Knevals, 106 U. S. 360, 366, 1 Sup. Ct. Rep. 336, and Walden v. Knevals, 114 U. S. 373, 5 Sup. Ct. Rep. 898. In the former of these cases this court said: "But when a route is adopted by the company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established. It is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent." Congress never having assented to a change, it is claimed that the only valid location was that in 1864, and that the land in controversy, not being coterminous with the line as then established, never came within the terms of the grant, but remained absolutely the property of the government, notwithstanding the error of the ministerial officers of the government in executing a patent to the state. It may be observed in reply, first, that in all the cases in which this question of the finality of a location has been before this court, the line as located conformed to and satisfied all the terms of the granting act, and the decision was that such a line, having been once definitely located, could not be changed; while in the case at bar the

line as located in 1864 did not satisfy the terms of the act, because it failed to intersect in O'Brien county with that of the Sioux City Company. Of course, until the line of the Sioux City Company was definitely located, it was impossible for the McGregor Company to determine where it could intersect with it, and it may be that the line of 1864 was justly considered as only a temporary and provisional one; so, at least, it seems to have been regarded by the land department, and we are not prepared to say that its decision was not correct.

But it is unnecessary to decide, and we do not rest the case upon, this question. It is referred to as perhaps throwing such a shadow upon the record title of the land company as to justify us in holding that a real, and not fictitious, federal question was presented, for on other grounds the ruling of the supreme court of Iowa was unquestionably correct. In the first place, whether the location of the line in 1869 was of any validity or not, it was in fact accepted by the land department; and by the letters of March 15 and May 11, 1870, the land in controversy was, with others, withdrawn to satisfy the grant as determined by that location, and such a reservation by the interior department, it is well settled, operates to withdraw the land from entry under the pre-emption or homestead laws. Wolcott v. Des Moines Co., 5 Wall. 681; Wolsey v. Chapman, 101 U. S. 755; Bullard v. Railroad Co., 122 U. S. 167, 7 Sup. Ct. Rep. 1149; U. S. v. Des *537 Moines, etc., Co., 142 U. S. 510, 12 Sup. Ct. Rep. 308. As, therefore, the land was so situated that Hamblin could not make a valid homestead entry, it follows that he is not in a position to question the conveyance of the legal title by the patent from the government.

But, further, the land was within the indemnity limits of the Sioux City road. It was therefore land which might be selected by that company to supply any deficiency in the granted lands, and the patent from the United States shows that it was so selected, and it was patented to the state for the use and benefit of that company. There is nothing in the record to show that such selection was not properly made, or that the land was not rightfully conveyed to the state for the benefit of that company, unless it be the decree of the circuit court; and that decree, if conclusive in this litigation, establishes the validity of the line located in 1869, and the rights of the Milwaukee Company to the land by virtue of the grant and that location. Of course, Hamblin is in no position to insist upon any rights of the Sioux City Company, and the case stands thus: The patent to the state for the use and benefit of the Sioux City Company was valid, unless the location in 1869 of the McGregor Company's line was valid. If the latter was valid, then the patent should have been issued to the state for the benefit of the Milwaukee Company. The question of right as between the two railroad companies has been settled by judicial decision, and Hamblin is in no position to question the force and effect of that decision. The judgment of the supreme court of Iowa was unquestionably right. Affirmed.

(147 U. S. 337)

LUXTON v. NORTH RIVER BRIDGE CO.

(January 16, 1893.)

No. 1,106.

EMINENT DOMAIN — CONDEMNATION BY FEDERAL COURT — STATE PRACTICE — APPEAL — FINAL JUDGMENT.

1. In the act of July 11, 1890, (26 St. at Large, p. 268,) which incorporates the North River Bridge Company, gives it power to condemn lands, and provides that the compensation therefor shall be ascertained according to the laws of the state in which they are situated, the provision of section 4, that the condemnation proceedings in the federal circuit court shall conform "as nearly as may be to the practice in the courts of the state," must, like Rev. St. § 914, relating to practice and pleadings in actions at law, be construed to be an adoption of the state laws only when they are consistent with the federal legislation, and therefore a circuit court should not follow the provisions of the New Jersey statutes requiring the condemnation commissioners appointed by the court to file the report of their assessment in the county clerk's office, but the same should be filed in the clerk's office of the circuit court; and, if a trial by jury should be had by way of appeal, as allowed by the state statutes, such trial must likewise be had in the circuit court.

2. The New Jersey practice, whereby the action of the state courts in appointing condemnation commissioners, as well as the award of damages made by the commissioners, may be reviewed by the state supreme court on certiorari, is also inapplicable to condemnation proceedings in the federal circuit court; and such proceedings can only be reviewed by a writ of error taken from a final judgment.

3. In such a proceeding, the case throughout, from the application for the appointment of commissioners until the entry of judgment upon their award or upon the verdict of a jury assessing damages in case of appeal, remains in the circuit court of the United States, and under its supervision and control; and therefore a mere order appointing the commissioners is not a final judgment from which a writ of error will lie, since it neither vests in the plaintiff title in the land to be taken, nor adjudicates the right of the owner to damages. Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 11 Sup. Ct. Rep. 301, 138 U. S. 287, distinguished.

In error to the circuit court of the United States for the district of New Jersey. Writ dismissed.

Gilbert Collins, for plaintiff in error. Joseph D. Beale, for defendant in error.

Mr. Justice GRAY delivered the opinion of the court.

This is a writ of error to reverse an order made by the circuit court of the United States for the district of New Jersey on the petition of the North River Bridge Company, appointing commissioners to assess damages for the appropriation and condemnation of land of the plaintiff in error in the city of Hoboken, county of Hudson, and state of

New Jersey, for the approaches to a bridge across the North or Hudson river between the states of New York and New Jersey, under the act of congress of July 11, 1890, c. 669, (26 St. p. 268,) entitled "An act to incorporate the North River Bridge Company, and to authorize the construction of a bridge and approaches at New York city, across the Hudson river, to regulate commerce in and over such bridge between the states of New York and New Jersey, and to establish such bridge a military and post road," the constitutionality of which, as authorizing such appropriation and condemnation, is denied by the plaintiff in error.

*At the threshold of the case lies the inquiry whether the order of the circuit court appointing commissioners to assess damages for the taking by the petitioner of the respondent's land is a final judgment upon which a writ of error will lie. This depends upon the terms and effect of the act of incorporation of the petitioner by the congress of the United States, taken in connection with the general railroad law of the state of New Jersey.

By section 4 of the act incorporating the petitioner, congress has enacted that the compensation for property, real or personal, appropriated and condemned under the act, shall "be ascertained according to the laws of the state within which the same is located;" that, "in case any litigation arises out of the construction, use, or operation of said bridge or approaches thereto and railroads thereon, or for the condemnation or the appropriation of property in connection therewith, under this act, the cause so arising shall be heard and tried before the circuit court of the United States for the judicial district in which the bridge or one of the approaches is located;" and that "applications for condemnation or appropriation of property shall be made in the circuit court of the United States for the district in which such property is situated, upon the petition of said company, and the hearing and trial of all other proceedings thereon shall conform as nearly as may be to the practice in the courts of the state in which such district is situated in the case of condemnation or appropriation of property for railroads." 26 St. pp. 269, 270.

This direction that the proceedings in the circuit court of the United States shall "conform as nearly as may be to the practice in the courts of the state" must, of course, like the corresponding direction as to practice, pleadings, and procedure, in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of congress. Railroad Co. v. Horst, 93 U. S. 291; Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. Rep. 150; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44.

By the general railroad law of New Jersey, any railroad corporation, which cannot* 339 agree with the owner of land required for the construction of its road, is to present an application, containing a description of the land, to a justice of the supreme court of the state for the appointment of three disinterested, impartial, and judicious freeholders, residents in the county in which the land lies, to examine and appraise the land, and to assess the damages. The commissioners so appointed are to make a report in writing of their assessment, and to file it, together with the description of the land, in the clerk's office of the county, to remain of record therein. Either party aggrieved by the decision of the commissioners may appeal to the circuit court for the county, and there have the damages ascertained by the verdict of a jury, upon which judgment is to be entered; and the report so recorded, with proof of payment or tender by the corporation of the damages assessed by the commissioners, or found by the jury on appeal from their decision, is to be plenary evidence of the company's right to the land. Laws N. J. 1873, §§ 12, 13, c. 413, pp. 94, 95; Rev. St. 1877, pp. 928, 929.

The description and report, so filed and recorded, have been declared by the supreme court of the state to be equivalent to a deed from the owner. Hetfield v. Railroad Co., 29 N. J. Law, 571, 574; Taylor v. Railroad Co., 38 N. J. Law, 28.

By the practice in the courts of New Jersey, either the appointment of commissioners or their award of damages may be reviewed by the supreme court of the state on writ of certiorari. Matters affecting the validity or the regularity of their appointment may be considered on certiorari to the justice appointing them, after the order of appointment, and before they have acted; and questions of law affecting the power or the action of the commissioners may be determined on certiorari to them, after their award has been filed and not appealed from. Morris & Essex R. Co. v. Hudson T. R. Co., 38 N. J. Law, 548; Lehigh Valley R. Co. v. Dover & R. R. Co., 43 N. J. Law, 528; Central R. Co. v. Hudson Terminal Ry. Co.,* 46* 340 N. J. Law, 289; De Camp v. Railroad Co., 47 N. J. Law, 43, 518, 4 Atl. Rep. 318.

There are reasons why a writ of certiorari to review the appointment of the commissioners before they have acted may be allowed in the courts of New Jersey, under the law of the state, which can have no application to proceedings in the circuit court of the United States under the act of congress. The appointment of commissioners under the state practice is made by a justice of the supreme court of the state as a judge and not as a court, and is the first and last step to be taken by him. The award of the commissioners is not to be returned to him or to that court, but to the office of the clerk of the county in which

the land lies, and is subject to appeal to a distinct tribunal,—the circuit court of the county. Besides, the supreme court of New Jersey has power to issue writs of certiorari, according to the course of the common law; and a writ of certiorari to quash proceedings before a special tribunal for want of jurisdiction, or to bring them up to be completed, may issue at any stage of the proceedings, differing in this respect from a writ of error. Hoxsey v. Paterson, 39 N. J. Law, 489; Mowery v. Camden, 49 N. J. Law, 106, 6 Atl. Rep. 438.

But under the act of congress the application for the appointment of commissioners, and the order appointing them, are required to be made, not to and by a judge sitting at chambers, but "in the circuit court of the United States." The award of the commissioners so appointed must be filed and recorded somewhere, in order to preserve the proof of the rights of both parties under it. To infer that it should be filed and recorded in the office of the clerk of the county in which the land lies would be most incongruous, for that would either subject an award of commissioners appointed by a court of the United States to appeal and review in a court of the state, or else require an award recorded in the clerk's office of a court of the state to be reviewed in the circuit court of the United States. The provisions of the statute of the state in this particular being inapplicable, and the act of congress containing no special direction on the subject, the *341 only reasonable conclusion is that the report of the commissioners appointed by the circuit court of the United States must be returned to the court which appointed them, be made matter of record therein, and be subject to be confirmed or set aside by that court. Boston & W. R. Corp. v. Western R. Corp., 14 Gray, 253, 258. And if a trial by jury should be had by way of appeal from the assessment of the commissioners, it must likewise be in the same court. The case throughout, from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken until judgment upon the award of the commissioners or upon the verdict of a jury, assessing those damages, remains in the circuit court of the United States, and under its supervision and control.

The action of that court in this case, as in other cases on the common-law side, is not reviewable by this court by writ of certiorari, (U. S. v. Young, 94 U. S. 258,) but only by writ of error, which does not lie until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error. Act Sept. 24, 1789, c. 20, § 22, 1 St. p. 84; Rev. St. § 691; Rutherford v. Fisher, 4 Dall. 22; Holcombe v. McKusick, 20 How. 552, 554; Bank v. Whitney, 121 U. S. 284, 7 Sup. Ct. Rep. 897; Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. Rep. 32; McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. Rep. 170.

As by the proceedings in the circuit court of the United States, in the case at bar, neither the title of the corporation in the land to be taken, nor the right of the owner to damages for taking it, would be adjudicated or established before the return of the award of the commissioners, it necessarily follows, under the acts of congress and the decisions of this court, that the order appointing commissioners was interlocutory only, and that this writ of error was prematurely sued out, and must be dismissed for want of jurisdiction.

The case of Wheeling & Belmont Bridge v. Wheeling Bridge, cited by the plaintiff in error, is distinguishable from the present case. Jurisdiction of a writ of error to the supreme court of appeals of West Virginia, affirming an order appointing commissioners under a somewhat similar statute, was there entertained by this court solely because that order had been held by the highest court of the state to be an adjudication of the right to condemn the land, and to be a final judgment, on which a writ of error would lie, and could therefore hardly be considered in any other light by this court in the exercise of its jurisdiction to review the decisions of the highest court of the state upon a federal question. 138 U. S. 287, 290, 11 Sup. Ct. Rep. 301. To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the constitution and laws of the United States; for, if the highest court of the state held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the circuit court of the United States.

Writ of error dismissed for want of jurisdiction.

(147 U. S. 467)

CLEMENT et al. v. FIELD et al.

(January 30, 1893.)

No. 111.

RES JUDICATA—REPLEVIN—SET-OFF.

1. In an action to recover damages for breach of warranties in the sale of a mill, it appeared that defendants had formerly brought an action of replevin against the plaintiffs, to recover possession of the mill, on the ground of breach of conditions in the chattel mortgage given as security for the deferred payments; that in such action the present plaintiffs had introduced evidence of damages for the breaches

of warranty constituting the basis of the present suit; that the court had instructed the jury that such alleged damages might be set off against the deferred payments, and that if the damages equaled or exceeded the amount of the notes still due the verdict should be for defendants. It further appeared that at that time the amount of the deferred payments was $1,350, and that the jury found for the plaintiffs in replevin for $1,151.20, thus indicating that they had allowed the difference as a set-off by way of damages. *Held*, that the replevin suit was a complete bar to the pending suit for damages.

2. In Kansas unliquidated damages due for breach of warranties in the sale of a machine may be set off in favor of defendant in an action of replevin brought by the seller on the ground of alleged breach of conditions in the chattel mortgage given to secure the deferred payments, since the plaintiff's claim in such case is really founded on contract, though the action, in form, is for a tort. Gardner v. Risher, 10 Pac. Rep. 584, 35 Kan. 93, followed. Kennett v. Fickel, 21 Pac. Rep. 93, 41 Kan. 211, distinguished.

In error to the circuit court of the United States for the district of Kansas.

Action by Clement Eustis & Co. against J. A. Field & Co. to recover damages for alleged breach of warranties in a contract of sale of a sugar mill. The case was tried by the court without a jury, and judgment was rendered for defendants on the ground that a prior suit in replevin brought by defendants against the complainants constituted a complete bar to the present suit. A motion for a new trial having been denied, plaintiffs sued out this writ of error. Affirmed.

Statement by Mr. Justice SHIRAS:

This action was commenced in the district court of Rice county, Kan., August 10, 1885, by the plaintiffs in error, and in the following month, after the pleadings were filed, was removed into the circuit court of the United States for the district of Kansas. The essential averments of the petition are that on or before June 22, 1883, W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name of Clement, Eustis & Co., were engaged in raising sorghum cane, and manufacturing sugar and molasses therefrom, in Rice county, Kan., and that J. A. Field and Alexander McGee, of St. Louis, Mo., partners doing business under the firm name of J. A. Field & Co., were engaged in making cane mills; that on or about that date Clement, Eustis & Co., the plaintiffs, employed J. A. Field & Co., the defendants, to make for them a certain kind of cane mill, to be delivered on board the cars in St. Louis on or before August 1, 1883, and agreed to pay for the same the sum of $1,850,—$500 cash in hand, $500 on November 1, 1883, and $850 on November 1, 1884,—with interest at 6 per cent. per annum on the second deferred payment from the said date of shipment; and that promissory notes were given by the plaintiffs for the deferred payments, secured by a chattel mortgage on the mill. The plaintiffs averred that the defendants warranted the mill to be as good, and to be capable of doing as much work, and as good work, as any mill made, and promised, in case of its failure to operate as warranted, to replace it, at their own expense, with a mill that would so operate, or refund the purchase money; that the mill proved not to be as warranted; that the defendants failed, neglected, and refused to perform their contract regarding the said warranty; and that the mill was not delivered on board the cars in St. Louis until August 15, 1883, by reason of which delay, as well as by the said breach of warranty, the plaintiffs were deprived of profits which they should have realized, and were compelled to incur certain expenses, whereby they sustained damages which they sought in the action to recover.

The answer denied generally the averments of the petition, and contained several special defenses, one of which was, that on October 2, 1884, the said defendants brought an action against the said plaintiffs in the circuit court of the United States for the district of Kansas, to recover possession of the said mill, alleging that they were entitled thereto by reason of an alleged breach of the conditions of said chattel mortgage, and that their interest in the mill amounted to the value of the said promissory notes, with interest, or $1,450; that the plaintiffs filed an answer to that petition, alleging that the defendants had no interest in the mill, and that nothing was due on account of the notes, for the reason that the mill was not shipped on August 1, 1883, and that it did not prove to be as warranted, whereby the defendants became liable to the plaintiffs for damages in a sum greater than the amount of the notes and interest; and asking that the alleged damages might be set off against the notes and interest, and that the plaintiffs might have judgment for such balance over the amount of the defendants' claim.

The answer averred that the action of replevin was tried upon its merits before the court and jury; that the jury found that the defendants were entitled to possession of the mill, and that the value of their interest therein was $1,151.20; that, in accordance with the verdict, judgment was duly entered; and that by reason thereof the plaintiffs had had a former recovery against the defendants upon the cause of action set out in the petition to which the answer is addressed.

The reply of the plaintiffs admitted that the defendants brought the action of replevin, and that the plaintiffs appeared therein, and sought to have judgment for their damages sustained by reason of the said breach of contract and warranty, but averred that they were not permitted by the court to make such defense to the action, and that their damages were not therein adjudicated

The case came on for trial December 7, 1887, in the said circuit court of the United States, and, a jury being waived, was tried by the

court. The defendants produced for the inspection of the court the record in the replevin action, and offered other evidence, which, in the opinion of the court, showed that the property sought to be recovered in that action was the same property mentioned in the petition in the present case; that the notes and chattel mortgage in the action of replevin were the same notes and mortgage described in the said petition; that the claims for damages in that action were based upon the same grounds as the causes of action set out in the said petition; that the replevin action was tried upon its merits, and submitted to a jury upon the evidence and the instructions of the court, and determined as stated in the answer in the present suit; that the defendants in that action (plaintiffs in this case in the court below) *470 introduced evidence tending to establish their said claim for damages; and that *none of the evidence offered in support of such claim for damages was ruled out by the court, or excluded from the jury.

The court thereupon decided that the plaintiffs had had a former recovery against the defendants upon the cause of action set up and tried in the replevin proceedings; that the proceedings and judgment therein constituted a complete bar to the plaintiffs' cause of action herein; and gave judgment for the defendants.

The plaintiffs then moved for a new trial. This motion was overruled, whereupon they brought the case before this court upon a writ of error.

A. P. Jetmore, for plaintiffs in error. S. N. Taylor, for defendants in error.

*472 *Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

This was an action to recover damages for an alleged breach of warranty, and we are called upon to consider the legal effect of a plea to the action setting up a former recovery by the plaintiffs.

The transaction out of which the controversy arose was a sale by J. A. Field & Co., defendants in error, to Clement, Eustis & Co., plaintiffs in error, of a cane mill, for the sum of $1,850, whereof $500 was payable in cash, and the rest in notes secured by a chattel mortgage on the mill. One of the terms of the sale was a warranty by the vendors that the mill would do as good work as any other mill for a similar purpose, and should be of good material and workmanship.

Payment of the notes not having been made, J. A. Field & Co. brought an action of replevin, under the provisions of the chattel mortgage, to recover possession of the mill, or, in default of recovering actual possession, to recover a money judgment for the unpaid purchase money, amounting to $1,350, with interest. To the declaration in replevin, Clement, Eustis & Co. pleaded that by reason of delay in *delivering the mill,* and of its failure to come up to the terms of the warranty, they had been damaged in an amount largely in excess of the unpaid purchase money.

The issue thus raised was submitted to the jury, with the following instructions:

"The defendants' damages would be, if entitled to damages, the whole of the cane lost by the delay caused by plaintiffs' fault, and failure of the mill to work up to its capacity, and also the loss of juice, during that time, caused by the fault of the mill, in not properly pressing it from the cane, and any expenses incurred in repairs.

"And should you find damages for defendants, and that such damages equaled or exceeded the entire debt due on the mill, then you will find for the defendants.

"If you find damages, but they do not equal plaintiffs' debt, then you will find for plaintiffs, and state the value of plaintiffs' interest in the mill, which would be their debt and interest, less the damages."

Under these instructions the jury found for the plaintiffs, and assessed the value of the plaintiffs' special interest in the property at the sum of $1,151.20.

As the amount of plaintiffs' unpaid purchase money at the time of the trial was $1,350, with interest, it is obvious that the jury allowed the defendants, as a set-off, damages in an amount of between $200 and $300.

Subsequently Clement, Eustis & Co. brought the action which is now before us, claiming damages, in a large sum of money, arising out of an alleged delay in the delivery of the mill, and by reason of an alleged breach of the warranty that the mill would do its work as well as any other mill, and be of good material and workmanship.

To this action J. A. Field & Co., the defendants therein, pleaded a former recovery by Clement, Eustis & Co., in that, in the previous suit in replevin, they had set up the same claims for damages asserted in the present action, and had been allowed credit for them by the jury in finding their verdict.

The parties waived a jury, and agreed that the action might be tried by the court. *474 *Thereupon J. A. Field & Co., to sustain their plea of a former recovery, put in evidence the record of the suit in replevin. The court was of opinion that the record of the proceedings in the replevin suit sustained defendants' plea of a former recovery, and was a complete bar to the plaintiffs' cause of action in the present case, and entered judgment accordingly in defendants' favor.

It is claimed in this court that the court below erred in its judgment sustaining the plea of a former recovery, because the record in the replevin suit shows that the question of damages for breach of contract and of warranty was withdrawn from the jury by the court, except to prevent a recovery therein.

We do not so read the record. On the contrary, it plainly appears that the court instructed the jury that they were at liberty to find damages in defendants' favor, and to set off the amount of such damages against the plaintiffs' debt. It is true that the court told the jury that, should they find damages for defendants equaling or exceeding the entire debt due on the mill, they should then find for the defendants. This instruction may have been understood to mean that if defendants' damages exceeded the amount of plaintiffs' claim the jury could not go further, and find a verdict in defendants' favor for the amount of such excess; and in such an event it may be that, so far as defendants' damages exceeded the plaintiffs' debt, the defendants would not have been precluded from maintaining a subsequent action for such excess.

But the jury's verdict shows that, while they allowed damages in defendants' favor, they found such damages to have been far less than the amount of plaintiffs' debt; and accordingly, if the defendants were bound by that finding of the jury, there was no excess of damages on which they could base a subsequent suit.

In Burnett v. Smith, 4 Gray, 50, it was ruled that, in an action to recover damages for a false representation as to the value of certain corporation stock, it was competent for the plaintiff to avail himself of such false representation in reduction of damages in the action on the note given for the stock.

*475 Another objection urged to the judgment of the court below is that the action in replevin was an action founded upon tort, and not upon contract; that a set-off can, under the Code of Kansas, only be pleaded in an action founded on contract; and that hence the defendants in the replevin suit in question could not legally plead a set-off of the damages caused by the breach of warranty.

The supreme court of Kansas disposed of this contention in Gardner v. Risher, 35 Kan. 93, 10 Pac. Rep. 584, which, like the present, was a case wherein the plaintiff sought, by a writ of replevin, to enforce the provisions of a chattel mortgage, and the defendant set off against the notes secured by the mortgage certain damages incurred by reason of breaches of a contract. The court held that, as the plaintiff's claim was really founded on contract, the defendant could, notwithstanding that the form of the action was replevin, avail himself, by way of set-off, of damages caused by the failure of the other party to the chattel mortgage to comply with his contract.

The later case of Kennett v. Fickel, 41 Kan. 211, 21 Pac. Rep. 93, is cited on behalf of plaintiffs in error as holding that a set-off cannot be pleaded as a defense in an action of replevin, because such an action is founded upon the tort or wrong of the defendant, and not upon contract. An examination of these two cases satisfies us that they are not irreconcilable. They were both suits in replevin, but in the earlier case the plaintiff's cause of action originated in the provisions of a chattel mortgage, and the suit in replevin was resorted to in pursuance of one of those provisions, and was regarded by the court as in substance founded on contract. The later case was founded on a wrongful taking by the defendant of property of the plaintiff, and was therefore, in substance as well as form, an action ex delicto.

The replevin suit pleaded in answer in the present case was substantially a proceeding in enforcement of contract provisions, and therefore within the decision in Gardner v. Risher, 35 Kan. 93, 10 Pac. Rep. 584.

Moreover the record shows that in point of fact the defendants did plead a set-off in the replevin suit, and had the benefit of such a plea, and it seems to us that they cannot *476 now be heard to say that the plea was not allowable in such a case. There is high authority for saying that, as that question was a subject of judicial inquiry in the action of replevin, it would not be open elsewhere, even in behalf of the plaintiffs in replevin, against whose contention the set-off was allowed. Bartlett v. Kidder, 14 Gray, 450; Merriam v. Woodcock, 104 Mass. 326.

Much less can the defendants in the replevin suit, at whose instance and in whose favor the set-off was allowed, be permitted afterwards to escape from the effect of a judicial inquiry invoked by themselves. The use of a so-called action of replevin as a mode of enforcing provisions of a contract in writing seems scarcely consistent with the nature and purpose of that form of action, as understood and enforced in England and the older states of this Union; but, as the supreme court of Kansas, in the case already cited, has approved of such a proceeding, and has likewise held that it is competent for a defendant in replevin to set up as a defense unliquidated damages arising out of a breach by the plaintiff of the contract, and as the plaintiffs in error in the present case themselves resorted to such a defense, and obtained its benefits, it was not error in the circuit court of the United States for the district of Kansas to hold that the plaintiffs in error were precluded by the verdict and judgment in the replevin suit.

The judgment of the circuit court is affirmed.

(147 U. S. 282)

SHOEMAKER et al. v. UNITED STATES, on Petition of the Commission to Select the Land for the Rock Creek Park.

(January 16, 1893.)

No. 1,197.

EMINENT DOMAIN —PROCEDURE—COMPENSATION—MEASURE OF DAMAGES—MINING RIGHTS IN THE DISTRICT OF COLUMBIA.

1. Land taken in a city for public parks and squares, advantageous to the public for recreation, health, or business, is taken for a

public use, and the power of eminent domain extends thereto.

2. A question whether the use for which private property is authorized by the legislature to be taken is in fact a public use is one for the courts to determine, but the extent to which property shall be taken for such use rests wholly in the legislative discretion, provided that just compensation is made for all so taken.

3. The United States, by virtue of the constitutional grant of power to exercise over the District of Columbia "exclusive legislation in all cases whatsoever," (article 1, § 8, cl. 17,) possesses, not only political, but municipal, authority over the District, and therefore has authority to condemn lands lying within the District for a public park.

4. Nor was the power thus granted in any way limited by the provision in the Maryland act of cession (Act Md. 1791, c. 45) that nothing in that act should be so construed as to vest in the United States any right of property in the soil so as to affect the right of individuals therein "otherwise than the same shall or may be transferred by such individuals to the United States." Chesapeake & O. C. Co. v. Union Bank of Georgetown, 4 Cranch C. C. 75, approved.

5. Act Sept. 27, 1890, (26 St. at Large, p. 492,) authorizing the establishment of a public park in the District of Columbia, provided that the chief of engineers of the United States army, and the engineer commissioner of the District of Columbia, with three citizens appointed by the president, should be a park commission. *Held*, that the act was constitutional, and not an attempt by congress to exercise the appointing power, since its effect was merely to lay upon the two engineers, being officers already appointed, new duties germane to their offices.

6. The act further provided for condemning land for such park if the owners thereof and the park commissioners could not agree upon the price, and in such case the value fixed by appraisers was to be submitted to the president of the United States, and, if by him approved as reasonable, was to be binding. *Held*, that the act was constitutional, and did not impose a judicial function upon the president, whose duty was merely to decide whether the United States would take the land at the appraised value, and not to decide whether such value was reasonable, as respects the property owner.

7. The act appropriated a fixed sum to pay all expenses of the park commission, including the cost of lands taken. *Held*, that this was merely a limitation of the amount to be expended by the government, and could not be construed as a direction to the appraisers appointed by the court to keep within any given limit in valuing any particular piece of property, and that the act, since it did not arbitrarily fix the value of the property taken, was constitutional.

8. The act further provided for the assessment of a proportional part of the cost upon property specially benefited by the improvement, but in the condemnation proceedings held thereunder no special request as to the legal effect of this provision was made to the trial court, and there was no specific assignment of error as to it, nor was any person actually assessed for special benefits a party to the writ of error. *Held*, that the court was not called upon to consider the constitutionality of such provision.

9. The court refused to administer to the appraisers an oath to fix the value of the lands to be taken upon the whole evidence, guided by the rules of law furnished by the court, but instead administered an oath to faithfully and impartially appraise the value to the best of their skill and judgment. The statute did not prescribe any form for the oath. *Held*, that this was a rightful exercise of the court's discretion, and that the oath actually administered did not leave the appraisers at liberty to make their appraisement at their discretion, without regard to the evidence.

10. An instruction by the court to the appraisers, directing them to rely, not merely upon the evidence brought before them, but also upon their own powers of judgment and observation, was proper.

11. A further instruction to fix the value of the lands to be taken at their market price for residence, agriculture, or other purposes, but excluding speculative values based upon the anticipated effect of the condemnation proceedings, was a proper one. Kerr v. Commissioners, 6 Sup. Ct. Rep. 801, 117 U. S. 379, followed.

12. Where the report of appraisers in condemnation proceedings under the right of eminent domain contains no gross error in valuation, showing prejudice or corruption, a court will not correct such report, especially where the evidence is conflicting; nor are the appraisers bound by the opinions of experts, or by the apparent weight of evidence, but may give their own conclusions.

13. The third section of the act of 1890, for establishing a park in the District of Columbia, provided that the park commissioners should cause to be made a map of the park, showing the location, quality, and character of each parcel of land to be taken, which map should be filed in the public records of the District, and that from and after the date of filing said map the lands embraced in the park should be held as condemned for public use, and the title thereof vested in the United States, subject to the payment of just compensation. The commissioners made and filed the map, but it was found that the compensation for the lands included therein would exceed the authorized expenditure, and thereupon they designated a smaller area upon the map, as to which condemnation proceedings were had. *Held*, that such proceedings for the reduced area were valid, since the map did not bind the commissioners to take all the parts included in it.

14. The owners of land taken for the park, who received the rents and profits therefrom during the time occupied in fixing the amount of compensation, should not be allowed interest on the valuation of their land from the date of filing the map, for the inconveniences to which they were subject during the time so occupied are presumed to have been considered and allowed for in fixing the amount of the compensation.

15. The grant by the English crown to the lord proprietor of Maryland conveyed all precious metals in the province, subject to a rent of one fifth of all the gold and silver ore there found. A grant by the lord proprietor in 1760 did not reserve the right to precious metals, but a new grant in 1772 of the same property did reserve such right. *Held*, that the new grant necessarily involved the surrender of the original title, and therefore the grantee under the patent of 1772 had no right after such date to the precious metals which might be found within the limits of his grant.

16. In 1780 the state of Maryland confiscated all the proprietor's interests in the province, and the reserved rent of one fifth of the ores passed to the state by the Revolution. The proprietary grant of 1772 was to two grantees, as tenants in common, the estate of one of whom was confiscated as property of a British subject, and was thereafter, in 1792, conveyed by the state without any reservation of mines. *Held*, that such conveyance did not purport to transfer anything else than the property confiscated, and that all precious metals therein remained the property of the state.

17. In 1791 Maryland ceded to the United States territory for the District of Columbia, and in 1803 the holder under the patent of 1772 and the grant of 1792 took a resurvey patent from the state of Maryland, wherein

there was no reservation of mines; such patent being upon a warrant of resurvey issued May 12, 1800,—nine months before congress assumed jurisdiction over the District of Columbia. *Held* that, under the law of Maryland, no equitable title to the land could be created until the return of the certificate of survey to the land office, and that as the patent did not show that this certificate was so returned, and as the party obtaining the warrant had, under the law, two years in which to make such return, the presumption would be that such return was not made until after congress assumed jurisdiction, in 1801, and therefore that the grantee could take no title whatever from Maryland under the patent of 1803, and that the right to all mines in such property was vested in the United States.

18. The state of Maryland could grant no title to lands within the District of Columbia after the act of cession in 1791, and the proviso in that act continuing the jurisdiction of the laws of Maryland until congress should provide for the government thereof applied only to laws affecting private rights, and did not continue the land laws of Maryland as to public lands owned by the state within that territory.

In error to the supreme court of the District of Columbia.

Proceeding on behalf of the United States for the condemnation of certain lands for the purpose of establishing a park known as "Rock Creek Park," in the District of Columbia. By a final judgment of the court below the title was declared to be vested in the United States, and from that decree certain of the property holders bring error. Affirmed.

264 Statement by Mr. Justice SHIRAS:

*Under the title of "An act authorizing the establishing of a public park in the District of Columbia," an act of congress was approved on September 27, 1890, (26 St. p. 492.) directing that a tract of land lying on both sides of Rock creek, and within certain limits named in the act, be secured as thereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States. The act provides that the whole tract to be selected and condemned shall not exceed 2,000 acres, and that the cost thereof shall not be in excess of a certain amount appropriated.

It is provided that the chief of engineers of the United States army, the engineer commissioner of the District of Columbia, and three citizens to be appointed by the president by and with the advice and consent of the senate, be, and they are by the act, created a commission (a majority of which shall have power always to act) to select the land for the said park, of the quantity and within the limits prescribed, and to have the same surveyed by the assistant to the said engineer commissioner of the District of Columbia in charge of public highways.

The means to be employed in the ascertainment of the value of the lands to be selected, and in the acquirement of ownership and possession thereof by the United States, are provided for in sections 3, 4, and 5 of the act, which are as follows:

"Sec. 3. That the said commission shall cause to be made an accurate map of said Rock Creek park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek park shall be held as condemned for public uses, 265 and the title thereof *vested in the United States, subject to the payment of just compensation, to be determined by said commission, and approved by the president of the United States: provided, that such compensation be accepted by the owner or owners of the several parcels of land.

"That if the said commission shall be unable, by agreement with the respective owners, to purchase all of the land so selected and condemned, within thirty days after such condemnation, at the price approved by the president of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

"Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, so far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such application, without delay to notify the owners and occupants of the land, if known, by personal service, and, if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court; and when the value or values of such land are thus ascertained, and the president of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if, in any case, the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee simple shall in like manner be vested in the United States.

"Sec. 4. That said court may direct the time and manner in which the possession of 266 the property condemned shall be *taken or delivered, and may, if necessary, enforce any

order or issue any process for giving possession.

"Sec. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property, or the part in dispute. In all cases, as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America, and managed by the commission."

It is made the further duty of the commission, when they have ascertained the amount required to be paid for the land, and for expenses, to assess the same upon the lands, lots, and blocks, situated in said district, specially benefited by reason of the location and improvement of said park, in proportion to such benefits to said property; and it is provided that, if the commission shall find that the benefits are not equal to the cost and expenses of the land obtained for the park, they shall assess each tract specially benefited to the extent of the benefit thereto. If the proceeds of the assessment exceed the cost of the park, the excess is to be used in its improvement, if such excess shall not exceed the amount of $10,000; any part above that amount to be refunded ratably. The commission shall give due notice of the time and place of their meeting for the purpose of making such assessment for benefits, and all persons interested may appear and be heard. This assessment being duly made, it becomes the duty of the commission to apply to the supreme court of the District of Columbia to have it confirmed. The court is given power, after notice duly given to all parties in interest, to hear and determine all matters connected with said assessment, and to revise, correct, amend, and confirm the same, in whole or in part, or order a new assessment in whole or in part, with or without further notice, or on such notice as it shall prescribe. The act also prescribes the mode in which payment of the assessment for benefits shall be made after it is confirmed, and provides for the enforcement of such payment in the manner employed in the District for the collection of delinquent taxes. All payments under said assessment shall be made to the treasurer of the United States, and all money so collected may be paid by the treasurer, on the order of the commission, to any persons entitled thereto as compensation for land or services.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other expenses incidental thereto, the sum of $1,200,000 is appropriated out of any money in the treasury not otherwise appropriated, one half of which, as well as one half of any sum annually appropriated and expended for the maintenance and improvement of the park, is made a charge upon the revenues of the District of Columbia.

The act finally provides that the public park authorized and established thereby shall be under the joint control of the commissioners of said District and the chief of engineers of the United States army; and it is made their duty, as soon as practicable, to render the park fit for the purposes of its establishment, and to make and publish such regulations as they deem necessary or proper for the care and management of the same.

On May 20, 1891, the commission appointed under the provisions of the act filed a petition in the supreme court of the District of Columbia, setting out therein that they had caused a map to be made of the lands selected by them for the park, showing the location, quantity, and character of each tract or parcel of property to be taken therefor, and that they had filed and recorded the map in the public records of said District on April 16, 1891. The petitioners stated that immediately upon the filing of the map they made to each of the owners of said tracts of land an offer to purchase his property at a definite sum fixed by the commission and approved by the president of the United States, and that they had not been able, within the time limited for such purpose, to purchase, by agreement with the owners, any of the lands, except 5 of the 84 tracts selected; and the petitioners therefore prayed the court for the appointment of three competent and disinterested commissioners to appraise the land so selected, and to return the appraisement to the court. The court directed that the petition be filed in general term, and ordered that the persons named as respondents to the petition, and all others interested, or claiming to be interested, in the land described, or in any part thereof, as occupants or otherwise, appear in court on or before June 15, 1891, and show cause why the prayer of the petition should not be granted, and why the court should not proceed at that time as directed by the act of congress. The court further directed that a copy of this order be served upon such of the named respondents as should be found in said District at least seven days before June 15, 1891, and that a copy thereof be duly published in the periodical press of the District.

After the petition was filed, Pierce Shoemaker, one of the respondents thereto, died; and, his death being suggested to the court, Louis P. Shoemaker, Francis D. Shoemaker, Abigail C. Newman, and Clara A. Newman, heirs at law and devisees of the said Pierce Shoemaker, deceased, were on June 2, 1891, made parties respondent in his place and stead.

The said Louis P. Shoemaker and Francis D. Shoemaker, executors of the last will and testament of the said Pierce Shoemaker, deceased, appeared in court June 15, 1891, and moved that the petition be dismissed. This motion was based upon various grounds, each one of which impeached the constitutionality of the said act, and the validity of proceedings under it. These grounds were, in substance, that two members of the commission were appointed by congress, and not by any executive officer or court; that the act provides that the president shall perform a judicial function in participating in the appraisement of the several tracts of lands to be selected for the park, and in adjudicating upon awards respecting the same; that the approval or disapproval of the said appraisement is left to the president, who is
*269 virtually a party to the condemnation proceedings, and not left to an *impartial judicial tribunal to decide upon the question of just compensation for the property; that the amount to be paid for the property is limited to a fixed sum, regardless of its adequacy as just compensation therefor; that congress, by the act, attempts to exercise the right of eminent domain within the District of Columbia for purposes foreign to the needs and requirements of its exclusive power therein; and that such exercise is in violation of its compact made with the state of Maryland upon the cession of territory thereof to the United States, that nothing contained in the act of cession passed by the assembly of Maryland, should "be so construed to vest in the United States any right of property in the soil, as to affect the right of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States."

This motion was denied, the court being of opinion that it is not unconstitutional for the legislature to intrust the performance of particular duties to officials already charged with duties of the same general description, and that, besides, as the majority of the commission is empowered by the law to act in all cases, the three civilian members might legally discharge the duties of the commission, independently of the two army officers, if the appointment of the latter was irregular; that no judicial power is devolved upon the president by the act, he being only vested with authority either to acquiesce in the judgment of the assessors, or to decline on behalf of the United States to accept the property, and having no power to take the property in disregard of their assessment; that the limitation by the act of the amount to be paid for said lands is not unconstitutional, as the appraisers are bound, as competent and disinterested commissioners, to return what they believe is the just value of the properties, regardless of any restriction in the act as to the cost thereof; that the condemnation of land for a public park is a taking of property for public uses within the meaning of the constitution; that no relinquishment of the federal power of eminent domain can be deduced from the legislation relating to the acquisition of said territory from the state of Maryland by the United States; and that the United States could not have bound itself by any such condition, even though distinctly set forth in the act of cession. U. S. v. Cooper, 19 Wash. Law Rep. 466.

The said respondents thereupon asked leave to file a demurrer to the petition. This being refused, they prayed in open court the allowance of a writ of error, returnable to this court, to review the judgment of the general term overruling the motion to dismiss the petition. This application was denied because that judgment was interlocutory. Application was then made to one of the justices of this court, and he denied it.

The court of the District of Columbia then made an order appointing three citizens of the District, whom it adjudged to be competent and disinterested, to appraise the values of the land selected for the park, with directions to return the appraisement into court, and to perform all other duties imposed upon them by the act of congress.

The said respondents, who are the present plaintiffs in error, then presented to the court of the District a form of oath which they prayed might be administered to said appraisers, and also certain instructions which they prayed the court to give them. The court refused to administer the oath, and to give the instructions, proposed by plaintiffs in error, and a different oath was administered, and different instructions given to said appraisers by the court. Exceptions to this action of the court were filed by plaintiffs in error August 1, 1891.

The said appraisers entered upon the discharge of their duties. At the hearing before them evidence was offered by the plaintiffs in error for the purpose of sustaining certain allegations of the existence of gold in paying quantities in the tract of land shown on the map as tract No. 39. This evidence having been received by the appraisers, the United States moved the court to strike it from the record. This motion was sustained, and the appraisers were directed not to consider that evidence in making up their award. The court held that, if any deposits
*270 of gold exist in said land, they are the *property of the United States; that the state of Maryland was the owner of all mines of gold or other precious minerals within its borders, by virtue of its confiscation of the property of the lord proprietary in 1780, who had never parted with his title, held under his charter from Charles I., to such mines; and that the legislature of the state of Maryland, by its act of cession, transferred its interest in any possible gold mines in the ceded territory to the United States. During the argument upon that motion the plaintiffs in error showed the court that any resurvey

patent granted by the state of Maryland in 1803, under which the plaintiffs in error immediately claim title, there is no reservation of mines, and contended that as this patent was based upon a warrant of resurvey dated May 12, 1800, nine months before congress assumed jurisdiction in the District of Columbia, the grantee under it acquired an equitable title to the land patented by virtue of that warrant. The court held that under the law of Maryland no equitable title could be created until the return of the certificate of survey to the land office, and that, as the patent does not show that such certificate was returned to the office, and as the party obtaining the warrant had, under the law, two years in which to have the certificate returned, the presumption would be that it was not returned until after 1801, and that, therefore, the grantee could take no title whatever under the patent until its issue in 1803, and, further, that the state of Maryland could grant no title to lands within the ceded territory after the act of cession in 1791, and that the proviso therein with reference to the continuance of the jurisdiction of the laws of Maryland over persons and property in the ceded territory until congress should provide for the government thereof applied only to laws affecting private rights, and did not continue the operation of the land laws of Maryland as to public lands owned by the state within that territory.

The plaintiffs in error then applied to the appraisers, November, 1891, for permission to offer newly-discovered evidence relating to the ownership of the alleged gold deposits, to the end that they might move the court in general term, upon the strength of such evidence, to rescind the order directing the appraisers to strike out of the record the evidence relating to the existence of gold in the property, and requested the appraisers to submit their application to the court, in general term, for further instructions. This application was submitted to the court; and the plaintiffs in error, on December 4, 1891, moved that the appraisers be instructed to receive the additional evidence touching the ownership of the alleged gold deposits in said tract No. 39, which motion was overruled. The new evidence tended to show that certain lands which the court had held to be subject to a reservation of "royal mines" in a patent granted by the lord proprietary in 1772 were covered in part by a patent granted by him in 1760, which did not contain such reservation. The plaintiffs in error therefore contended that, though the patent of 1772 was original as to part of the lands described therein, it was, with reference to the lands granted in 1760, which lands include the said tract No. 39, a patent of confirmation only, and as such did not create a new estate, but simply recognized or reaffirmed the former one. The new evidence further tended to show that the grantee under those patents conveyed his estate to two persons as tenants in common; that the estate of one of these persons was confiscated as property of a British subject, and was afterwards, in 1792, conveyed by the state to the mediate grantor of the plaintiffs in error, without any reservation of said mines. The court was of opinion that the acceptance of a new grant from the lord proprietary, such as that described, necessarily involved the surrender of the original title, and therefore the patent of 1772 was original as to all the land it purported to grant or confirm, and that the conveyance made by the state in 1792 did not purport to convey anything else than the property confiscated, which was held subject to the reservation aforesaid, and that such conveyance made after 1791 could not be operative.

On December 19, 1891, the appraisers submitted their report, and a copy of the proceedings before them, to the court, and the court ordered that the report, together with the testimony and exhibits, be filed.

The plaintiffs in error filed their exceptions to this report January 4, 1892, said exceptions being based upon the grounds, among others, that the act of congress is unconstitutional, and all proceedings based thereon void; that the aggregate of the values, found by the assessors, of the lands included in the park, is in excess of the appropriation made by congress; that the actual values of the lands are largely in excess of the values fixed by the appraisers; that the commissioners, in appraising the values of the property, disregarded certain parts of the evidence in respect thereto; that the attorney representing the government did not produce witnesses to impartially testify touching the value of said lands, but on the contrary placed a list of prices fixed by said park commission in the hands of divers persons proposed to be used as witnesses, for the purpose of affecting their judgment as to values, and to guide them in reaching values to correspond with those thus furnished them.

The plaintiffs in error contended that into the present act should be read the sundry civil appropriation act of August, 1890, wherein it is provided that the valuation by appraisers to be appointed by the court, of lands to be purchased for the government printing office, shall be confirmed by the court,—said appropriation act providing that after its passage, in all cases of the taking of property in said District for public uses, its provisions respecting such condemnation and appraisement shall operate,—and contended that under said appropriation act the court should review the evidence and proceedings before the appraisers appointed in the present instance, and decide whether the values fixed by them afforded just compensation for the property taken.

These exceptions were overruled, and the report confirmed. The constitutional questions involved having been already passed

upon, the court decided, in overruling said exceptions, that the restriction in the act as to the cost of the lands is not a restriction upon the duty of the court to confirm the appraisement, but a restriction upon the government's finally securing the land, since it cannot be discovered whether or not the value is in excess of the appropriation until the court has discharged its duty of assessing the land; that as the evidence before the appraisers was conflicting, and the result simply an estimate based upon a comparison of the opposing opinions of witnesses, it cannot be said that the verdict was contrary to the evidence; that, as to the objection that lists of values fixed by the park commission were furnished to witnesses, an expert witness has a right to qualify himself by comparing his views with those of others, and to enlighten his judgment by any means which conduce to the formation of a reliable opinion, as, after all, he simply gives an opinion; that as a general rule the court has no right to review an appraisement simply because of error of judgment, if such has been manifested, on the part of the appraisers, as to value, and the said sundry civil appropriations act does not modify the rule; and that under said appropriations act the court must confirm the appraisement, as a matter of course, if the appraisers have discharged their duty, and if there is no legal ground for setting their report aside.

The park commission, in consideration of the limitation in the act with the respect to the amount to be paid for the lands, and the difficulties resulting from an appraisement of values, which, when added to the amount paid for tracts purchased and for expenses, would exceed the appropriation, on March 11, 1892, submitted for the inspection of the president a copy of the map, showing by red lines thereon the boundaries of a reduced area within the limits of the lands first selected, formed by the omission of certain tracts originally included. A letter of the park commissioner anticipating these difficulties has been referred to the attorney general; and in his opinion thereon, dated April 10, 1891, he states that, if the assessed value of the land in the court proceedings exceeds the appropriation, the commission may exercise its discretion to pay for the land they regard as most desirable.

In conformity with this interpretation of the act, the park commission reduced the area of the land proposed to be taken to within the limits indicated by red lines on the said map, and having shown to the president the cost of the lands within the reduced area, together with all expenses, requested him to decide the values appraised to be reasonable. In response to this, by his letter to the park commission dated April 13, 1892, the president states his decision that the values fixed by the appraisers appointed by the supreme court of said District under the act are reasonable.

The park commission then filed a petition in said court April 19, 1892, presenting the decision of the president, and showing that each and all the owners of said parcels, the assessed values of which had been so decided to be reasonable, had failed and neglected to demand or receive from the court those values, and that said owners claimed interest on their respective assessments from the date of the filing of the said original map. The petitioners therefore prayed the court to pass an order authorizing them to pay into court the assessed values of all of said parcels of real estate.

On May 2, 1892, the said respondents, now plaintiffs in error, moved to dismiss the petition on the grounds, among others, that the assessment of only a part of the lands shown on the map as originally prepared had been acted upon by the president; that no proceedings had been instituted on the basis of the reduced area, nor any map filed other than the original map; that the park commission, having selected lands for the park, and filed a map thereof, had no power to reduce the area of the lands; and that, for about a half mile along said Rock creek, lands taken for the park lie upon only one side thereof, whereas said act provides that the park is to lie on both sides of said creek.

The court denied the motion, interpreting the act to express an absolute intent that there shall be a park on Rock creek, and to give authority to the park commission, after making their original selection of lands for the park, to amend their work by abandoning such parcels as they were not authorized by the appropriation to purchase. The operation of the order denying this motion was suspended, however, so far as it might affect the property of the plaintiffs in error, until the further order of the court.

The plaintiffs in error then presented to the court an answer to the petition, setting up the same grounds of objection thereto as urged by them in their motion to dismiss the last-named petition, and requested that the answer might be filed. The court, finding no point presented in the answer not already passed upon, denied the request to have the same filed, and ordered, May 24, 1892, that the United States pay forthwith into the registry of the court the values, without interest thereon, appraised by the appraising commissioners theretofore appointed by the court, including the values of the property of plaintiffs in error.

Upon motion of the park commission the court, on July 13, 1892, granted an order to show cause why the title in fee simple to the property of plaintiffs in error should not be declared by the court to be vested in the United States. The plaintiffs in error filed an answer to this rule, reserving therein all the objections theretofore taken by them during the progress of the said proceedings. The court overruled the objections, and ordered and decreed, July 16, 1892, that the

fee-simple title to each and all of the tracts of land represented by plaintiffs in error is vested in the United States, and that the owners of said tracts forthwith deliver up possession of their respective holdings to the park commission, or its executive officer. On July 19, 1892, upon application of the United States, a special auditor was appointed to ascertain and report to the court the names of the persons respectively entitled to the appraised values of the tracts of lands selected for said park, claimed by the plaintiffs in error, and to report separately upon each tract or road within the boundaries thereof.

Thereupon plaintiffs in error sued out a writ of error to bring this final judgment and the record in the condemnation proceedings before this court for review.

In addition to the alleged errors above indicated, the plaintiffs in error now say—First, that the United States had no right, after filing the first map of the land selected, to abandon the taking of any part of the land condemned; and, secondly, that the assessment for benefits provided for by the act of congress is beyond the power of the government, and that, therefore, the act is void.

Opinions Delivered in the Supreme Court of the District.[1]

The following is the opinion delivered in the supreme court of the District on the motion to dismiss the petition for condemnation. This opinion was preceded by a statement of facts, which it is unnecessary to reproduce, except as to the grounds of the motion. These grounds were as follows:

"(1) Because the said commission—the petitioners above named—have no legal existence, and are without authority to act in the premises, because two members thereof, to wit, Thomas Lincoln Casey, under the designation of 'Chief of Engineers, United States Army,' and Henry M. Roberts, under the designation of the 'Engineer Commissioner of the District of Columbia,' assume to act by virtue of the pretended appointment of the congress of the United States, without the intervention, co-operation, or action of the president of the United States, or of any court, or of any executive officer of the United States, thereunto lawfully authorized.

"(2) Because, in and by said act, the congress have devolved on the president of the United States, as such, the performance of the essentially judicial function of participating in the appraisement and of adjudicating upon the awards to be made by the commissioners of appraisement in respect of the several parcels or tracts of land designed to be appropriated for the public use designated by said act.

"(3) Because, under the constitution and law, for the purpose of ascertaining what is a just compensation for said property, the respondent is entitled to have the judgment of an impartial and disinterested judicial tribunal, whereas the said act of congress devolves upon the president of the United States, as such, the right to participate in determining what is a just compensation, and to review and approve or disapprove the award; the president, as chief executive of the United States, being not disinterested, but virtually a party to the suit.

"(4) Because, in and by said act, the congress have assumed to control the action of the commissioners designated to appraise the value of the property to be condemned, and to restrict the rights of the respondent, by limiting the amount which shall be allowed in the aggregate for the payment of property embraced within the limits designated as a public park.

"(5) Because, in and by said act, the congress have undertaken to acquire the property within the prescribed limits of the proposed Rock Creek park without the consent of the owners, and upon a compensation limited therein to a fixed sum, to wit, to the sum of $1,200,000, regardless of the adequacy of said sum to fulfill the constitutional requirement of being a just compensation therefor.

"(6) Because, in and by said act, the congress attempt to exercise the right of eminent domain within the District of Columbia for purposes foreign, manifestly, to the needs and requirements of its exclusive legislation therein, and in violation of the solemn compact and agreement in that behalf made upon the cession of said District by and between the United States, the state of Maryland, and the citizens of the ceded territory, which is set forth and exhibited by the reciprocal legislation of the state of Maryland in 1788, and the second section of the act of the legislative assembly of that state in November, 1791, by the act of congress of the United States approved July 16, 1790, and by the proclamation of the president of the United States, issued in pursuance and approval of said legislation, to wit, on the 24th day of January, 1791."

(July 8, 1891.)

"Mr. Justice HAGNER. It is proper to consider first the last objection of the series, which denies entirely to the general government the power to condemn property for public uses within the District of Columbia, since, if this position is well taken, it will render unnecessary the examination of any other of the constitutional difficulties relied on by the respondents. This objection is based upon an alleged reservation by the state of Maryland, in the act of 1791, c. 45, § 2, of any authority to exercise the right of eminent domain by the United States within the District of Columbia. It needs no citation of authority to show that the right to take private property for public uses, in exercise of the right of eminent domain, belongs inherently to every nation justly call

[1] The following opinions were not in the statement of Mr. Justice SHIRAS.

ing itself independent and sovereign; that the power is so far-reaching that it extends, in case of necessity, to the right of disposing of all the wealth of the country; that this authority belongs to every state in the Union; that it existed in the general government independently of, and before the adoption of, the fifth amendment of the constitution, which only imposed a limitation upon its exercise; and that, in the language of the supreme court, in Cherokee Nation v. Southern Kan. Ry. Co., 135 U. S. 641, 10 Sup. Ct. Rep. 965, 'all lands held by private owners, everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it, provided they are not taken without just compensation being made to the owner.' In this declaration of the universal powers of the government, there is no foot of land, from the Atlantic to the furthermost limits of the Aleutian islands, which is excepted. But, if the contention now under consideration be correct, this District, the seat of government and center of the power whose pulsations are felt to its remotest frontiers, is alone exempt from its influence. It would result that if the government, in anticipation of war, believed it expedient or necessary to the public welfare to possess itself of an advantageous strategic point within this territory, placed by the constitution under its exclusive jurisdiction, and fortify it, in advance of the threatened danger, the avarice or disloyalty of the owner could absolutely prevent its acquisition. Of course Maryland now can have no such right in the ceded territory, and hence the private property here would be held by a tenure different and superior to that known, probably, in any civilized country.

"In support of a proposition leading to such astonishing results the strongest arguments should be presented. That the government would have consented to take possession of the District when ceded by Maryland, hampered by any such condition, is incredible. There were too many offers of territory from different states for its seat of government to render it important for the United States to accept any offer accompanied by any such harmful limitations. After the congress had been besieged by a mob of soldiers in Philadelphia, it became convinced that the seat of government should not be located in a large manufacturing or commercial city. The different states at once became competitors for the establishment of the capital within their borders, and in 1783 Maryland offered Annapolis to the congress of the confederation, accompanied by the pledge of a large sum of money for public buildings; and from that time it was most anxious to secure the location within its own territory.

"Nor could the United States have bound itself to any such condition, however distinctly set forth in the act of cession. The exercise of the right of eminent domain by a sovereign cannot be the creation of grant or compact. It inheres in the existence of an independent government, and comes into being eo instanti with its establishment, and continues as long as the government endures. The United States did not derive the right to exercise it in Louisiana from France, or in Florida from Spain, or in California from Mexico, or in Alaska from Russia. The right was coeval with its proprietorship as sovereign. And the United States could no more have abandoned the exercise of this right within the District of Columbia than it could have bound itself not to declare war or levy taxes without the assent of the legislature of Maryland. But in our opinion no such relinquishment of power can be deduced from the legislation referred to. As soon as the promulgation of the constitution had disclosed the requirements of the United States as to the territory for the seat of government, the state of Maryland, by chapter 46 of 1788, required its representatives in congress to cede to the congress of the United States any district in the state, not exceeding ten miles square, which congress might fix upon and accept for that purpose. The contest respecting the location of the required territory was acrimonious and prolonged, and it was not until July, 1790, that congress accepted portions of the lands tendered by Maryland and Virginia, making together the ten miles square. After the exact boundaries selected had been ascertained and promulgated by the president, on the 21st of December, 1790, Maryland passed an act giving authority to condemn lands in the ceded territory, if necessary, for the erection of the public buildings. By proclamation of President Washington, an amendment was made in the former survey, and thereupon the principal proprietors of the Maryland portion of the territory executed an agreement by which they undertook to convey their lands to the president, or to such person as he might select, in trust for the use of the city; and these conveyances were executed to Messrs. Beall and Gantt, the selected trustees. It then became requisite that Maryland should recognize the specific appropriation of the reduced amount of its territory in lieu of its former offer of the entire ten miles square; and for this and other purposes connected with the new territory the act of 1791, c. 45, was passed December 19, 1791. The first section recited the proclamations; the conveyances to Beall and Gantt as trustees; that some of the proprietors in the villages of Carrollsburg and Hamburg, as well as some of the proprietors of other lands, had not, from imbecility and other causes, come to any agreement; but that, as a great proportion of all had agreed to the terms recited, the president had directed a city to be laid out, with boundaries

designated in the act, etc.; and it was thereupon enacted, in section 2, 'that all that part of said territory, called "Columbia," which lies within the limits of this state, shall be, and the same is hereby acknowledged to be, forever ceded and relinquished to the congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the constitution of government of the United States.' Nothing more explicit could be desired, unless an enumeration of the rights ceded was to be attempted.

"But it is argued that the following proviso effectively contains the limitation contended for: 'Provided, that nothing herein contained shall be so construed to vest in the United States any right of property in the soil, so as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States.' But it is clear the power to exercise the right of eminent domain within the District could not be dependent for its creation or consummation upon the words of the act; for as it was an inseparable incident of independent sovereignty, proprio vigore, it was already applicable to this territory, even while it remained a part of Maryland, as it was to all the other lands within the bounds of the Union. Such a power would not, therefore, be included as one of those 'therein contained' in the statute of 1791, c. 45. But the words in the proviso, doubtless, were considered necessary, and were inserted only to protect private rights of property in such proprietors as had 'not come to any agreement,' because, as the act had already recognized, the agreement had not been signed by all, but only 'by a very great proportion of the landholders,' and that this action of the majority had induced the president to lay out the city without waiting for the assent of the others. The right of the minority to refuse the terms offered by the authorities was thus properly recognized and secured. But this was very far from a purpose to declare that, in case those owners should not assent to the terms proposed, the United States should not exercise the sovereign right of condemning the property for the public use.

"If the question otherwise admitted of any doubt, that would be removed by a consideration of the twenty-fourth section of the same act, which authorized the commissioners referred to in the act to issue a process, directed to the sheriff of Prince George's county, to summon five freeholders to value the land of such persons as still refused to accept the terms agreed to by the other proprietors, and declared that upon payment of such valuation the said lands should be vested in the commissioners for the use of the city; and the last section of the act repealed the former law of 1790, which for two years had authorized the condemnation of lands for public buildings. It is true the machinery to be used for this condemnation was that of the state, as the United States had not yet organized the local government in the new territory; but the United States, in making condemnations, may use any proper agencies, whether of the several states, or such as may be devised by itself for the purpose. It is inconceivable that the state of Maryland, while specially providing in the act of 1791 for the condemnation of property in the District, as it had previously done by the act of 1790, should have introduced the proviso referred to, with the purpose of withholding from the general government the power to do that which every independent nation must enjoy as undeniably as it possesses the right to coin money or build ships of war. This act of 1791 was recognized in supplementary acts passed in 1792 and 1793.

"We have been referred to the case of Chesapeake & O. C. Co. v. Union Bank, 4 Cranch, 57, as recognizing in some way the construction of the proviso contended for. It is true Mr. Key, who was of counsel in the case, presented this contention, but it is equally true that the judges who sat in the case unanimously overruled it. The argument of counsel, however eminent, can scarcely prevail over the decision of the court. Canal Co. v. Key, 3 Cranch, C. C., 600, contains the report of a similar appeal for a condemnation in behalf of the canal company of Mr. Key's own land, in which no such point was made. The contention, repeated in the present case, that constitutional rights formerly possessed by Maryland, unless expressly enumerated, did not pass by the cession, is answered by the decision in Alexandria Canal Co. v. City of Georgetown, 12 Pet. 94, where it was held that the bottom of the Potomac, though not mentioned in the act of cession, passed to the United States, without express grant, so as to entitle it to allow to the canal company the privilege of building its piers in the bed of the river. The court of appeals of Maryland, in U. S. v. Manufacturing Co., 21 Md. 119, cites this case with approbation, thus evincing the adoption by the Maryland courts of the principles of the decision.

"But the very Chesapeake & Ohio Canal Cases demonstrate that more than sixty years ago the government regarded itself as entitled to exercise, and did exercise, the right within the District. The charters granted by Virginia and Maryland authorized the construction of the canal, with power to condemn requisite land along its route; but its arrival at tide water depended upon the assent of congress, which was granted by the statute in 1825, though without an express authorization therein to the company to make condemnations. A large number of condemnation proceedings

were conducted before our courts in the name of the company, which resulted in the acquisition by the canal of the parcels of land within the District required for its purposes. The proceedings could only have been prosecuted under the authority of the United States; and the government could not have empowered the canal company to conduct such proceedings in its own name, unless it possessed the power itself, since it could not communicate to the company an authority not possessed by the government. The power given by congress, from time to time, to the District of Columbia and to railroad companies to make condemnations in their respective names, is equally evincive of the understanding of congress that the power resided in the United States. The power has also repeatedly been exercised in this District, in the name of the United States, without question. Thus in 1858 (11 St. p. 263) condemnation proceedings were authorized to acquire lands within the District for the Washington aqueduct and numerous awards were made by juries in that year, and confirmed by the circuit court, in cases instituted in the name of the United States, and no objections were interposed by counsel upon the ground now referred to. Under an act of 1872, c. 140, (17 St. p. 83,) condemnations have twice been made in the name of the United States, to enlarge the grounds of the capitol, by commissioners appointed by this court,—the last in 1878. The same statute was invoked in 1857 to acquire the north embankment of the aqueduct bridge in Georgetown, in the name of the United States, under the act of that year. 24 St. p. 85. These acts of congress are referred to as evidence of contemporaneous legislative construction by the government, and acquiescence in their enforcement by all defendants, for so long a period that their correctness should only be questioned upon cogent necessity. State v. Mayhew, 2 Gill, 497.

"More recent instances of the exercise of this power in the name of the United States are shown in the act of 1886, (24 St. p. 13,) authorizing a condemnation by a jury of seven of land for the congressional library; in the act authorizing the secretary of the treasury to purchase or acquire by condemnation, as this court should direct, additional ground for the bureau of engraving and printing, (25 St. p. 511;) in the act of 1890, June 25, (1 Sess. 51 Cong.) authorizing the secretary of the treasury to acquire by condemnation a square of ground in the city for the purposes of a city post office, by commissioners appointed by this court; and in the act of August 30, 1890, (1 Sess. 51 Cong. 413,) authorizing the board therein named to acquire by condemnation additional lands for the use of the government printing office, through three commissioners to be appointed by this court. Indeed, it is difficult to find a power of government whose exercise in this jurisdiction is more amply allowed and justified by statute and practice of the government than this, the constitutional existence of which has been so positively challenged. We have been thus at what may appear to be needless pains to examine the objection, because, if well founded, it was high time it should be speedily acknowledged, that timely constitutional measures might be adopted to rescue the essential rights of the government in this asserted derelict territory from so exceptional a condition. Fortunately we are entirely satisfied the contention is wholly unfounded. The language of Chief Justice Cranch in Canal Co. v. Key, 3 Cranch, C. C. 605, is so well expressed and forcible that it deserves to be recalled in any discussion of this subject in this tribunal:

" 'The public right is as much common right as individual right. This public right is not a power exercised merely because the sovereign power cannot be controlled, and therefore in derogation of common right, but it is a constitutional power, primarily assented to by the people themselves, in their original primitive sovereignty, not applicable to any particular individual, but extending equally to all, and creating a lien upon all property, into whose hands soever it may come. The contemplated canal is intended to be a great highway, and no man can be ignorant that he holds his lands always subject to the right of the public to make a highway through it whenever the great interests of the nation or of the state may require it.'

"2. It is next objected that the law is unconstitutional because congress thereby designated the chief of engineers of the army and the engineer commissioner of the District, as members of the commission appointed by the law to select land for the park, and to perform various duties with respect to that function, whereas it is insisted the president, and not congress, has the sole right to appoint officers to discharge such duties. In the consideration of this and the other objections made to the constitutionality of the law before us, we have had in mind the importance of the inquiry; the caution with which even the supreme court approaches such objections, to be heard only by a full bench; and its refusal, in any but a clear case, by sustaining them, to impute to the legislature an infraction of the constitution. Justice Story, in pointing out the true meaning of the principle of the separation of the powers of the government, (which is not declared in the federal constitution in direct words, as in most of the state constitutions, but is enjoined, practically, by assignment of the different powers to the three departments,) declares: 'We are to understand this rather in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of communication or depend-

ence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free constitution.' 2 Story, Const. 525.

"Such an entire separation is never found in practice under any constitution, however positively it may be commanded. The executive, in approving laws, is really acting as a part of the legislature, and the president and the legislature constantly decide many questions judicial in their character. The legislative and judicial branches of the government have the right to make appointments to many offices. Indeed, the power of appointment to office is not a function so intrinsically executive that it necessarily belongs to that department, although its nature is executive, whether it be exercised by a court or by the legislature or the president. Baltimore v. State, 15 Md. 455. Judge Cooley (Const. Lim. 115) makes this comment on the subject before us: 'The authority that makes the laws has large discretion in determining the means through which they shall be executed, and the performance of many duties which they may provide for by law they may refer either to the chief executive of the state, or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty.'

"In conformity with this principle, congress has, in the most marked instances, in a multitude of statutes, specially intrusted the performance of particular duties to officials already charged with duties of the same general description. The most important of these instances are those affecting the judiciary. Among them are the early act of 1802, which directed the justices of the supreme court to sit in the circuit courts, and the recent law of March 3, 1891, which authorizes the justices of the supreme court, and the existing circuit judges, to sit in the newly-established circuit courts of appeals with the district judges and the newly-created circuit judges. It would be endless to refer to the cases at hand in which this has been done. By various provisions of the Revised Statutes of the United States and of the District, the chief of engineers is intrusted with a variety of duties,—among them, the charge of the public buildings and grounds in the District of Columbia; of the Washington aqueduct; of the electrical apparatus of the rooms in the capitol; of suits respecting the obstruction of streets, etc. In the recent legislation of congress the requirement that particular officials shall perform designated duties is frequently repeated; as in 25 St. p. 523, the chief of engineers is required to take charge of the construction of the congressional library. By the act of August 30, 1890, the secretary of the treasury, the public printer, and the architect of the capitol are empowered to take measures to acquire additional lands for the government printing office; and similar provisions might be indefinitely cited. The duties required of these two army officers in this law are in no degree foreign to their usual and appropriate sphere. Surely they are more germane to the functions of the chief of engineers than the control of electrical lines; and to those of the engineer member of the board of District commissioners, than the granting of liquor licenses, the regulation of hackney coaches, or the appointment of policemen. If the duties of the park commission are really of the multiform and inconsistent character represented in the argument, it is difficult to imagine how one set of men could be found able, constitutionally or mentally, to perform them all. If these army officers are now serving as members of the park commission at the seat of government, it must be assumed they are so acting with the assent and under the orders of their commanding officer, the president, who must be aware of their present occupation. Besides, as the majority of the board is empowered by the law to act in all cases, the three civilian members might legally discharge the duties of the commission, independently of the two army officers, if their appointment were irregular.

"3. It is next objected that the statute is invalid because by it the president is intrusted with certain duties connected with the proceedings to acquire the park. It is insisted, first, that these duties are judicial in their character, and cannot properly be devolved upon the executive; and, next, that his co-operation in the proceedings in the manner provided destroys their essential character of impartiality. There can be no doubt the proceedings to condemn lands in exercise of the right of eminent domain are quasi judicial in character, and have been held as included within the designation of trials at law. But we do not see that the statute enjoins upon the president, or allows him, to participate at all in those trials. The first duty devolved upon him by the law is the appointment of the park commission,—a function which is not obnoxious to either branch of this objection. In the first and second paragraphs of the third section this commission is authorized to negotiate for the purchase of the lands, by agreement with the owners, within thirty days after the filing of the map, at a price to be approved by the president. As this provision applies entirely to a purchase by agreement, and the defendants all refused to sell, its force as to them may be considered as exhausted, and the provision as obsolete, and it cannot possibly operate to their disadvantage. In the concluding paragraph of the third section, authority is given to this court for the

appointment of three commissioners of appraisement, to ascertain and assess the value of the lands, and return the appraisement to the court. When this duty has been performed by the commissioners of appraisement the 'quasi judicial proceeding' or 'trial' is at an end; and nothing more remains to be done by those commissioners with reference to that particular finding. Up to that point the president has nothing whatever to do with the proceeding, and he has neither the right nor the opportunity to interfere in any degree with the action of the commissioners in making their valuation. It is only after this quasi judicial act has been accomplished by the assessors that the president's function comes into activity. That duty is thus defined in the law: 'And when the values of such lands are thus ascertained, and the president of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner.' Is this duty thus devolved upon the president, in the sense of the constitution, judicial? We have seen it does not derive such quality from any connection with the deliberations of the jury, since with those he has absolutely no more to do than the treasurer who has to pay the amount of their valuation. What he is thus empowered by the statute to perform is precisely what every corporation instituting condemnation proceedings has a right to do, irrespective of statute, after the jury has returned the award, if it shall decide the valuation is not reasonable; namely, to decline to take the property at all. This is perfectly well-settled law, and it scarcely needs the citation of authorities. Railroad Co. v. Nesbit, 16 How. 396; Steuart v. Mayor of Baltimore, 7 Md. 516; Graff v. Mayor of Baltimore, 10 Md. 552. The condemnation, until the acceptance of the award and payment of the money, is merely tentative; and the right of abandonment is subject only to the duty of reparation to the property owner for any damage occasioned him by the institution of the proceedings.

"This undoubted right would not be at all impaired if the existence of its right on the part of a corporation to refuse to take the particular property should happen to be declared in the act authorizing the condemnation. The acknowledgment in the act of a plain right could not destroy it. The same right of abandonment resides in the United States in the present case; and that right, also, cannot be affected by the provision in the act authorizing the United States to exercise it by declining to take the property unless the president shall decide that the valuation is reasonable. Where the United States is the promoter of the condemnation, it must act by an agent in deciding whether to accept the award; and congress, doubtless, thought it wisest to devolve this duty upon this high official, whose position, in itself, would seem to furnish a guaranty of perfect impartiality and of independence in the discharge of the duty assigned. The legality and propriety of such a provision in the law are well explained by the supreme court in the case of Garrison v. City of New York, 21 Wall. 204, where an award against the city for property taken for public use had been set aside by the court under the authority of a special statute authorizing a rescission of a former order of approval, and a re-examination of the award. Mr. Justice Field there said: 'The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can, to that end, vacate or authorize the vacation of any inquest taken by her direction to ascertain particular facts for her guidance, where this proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest: provided, such methods of procedure be observed as will secure a fair hearing from parties interested in the property.' 'Nor do we perceive how this power of the state can be affected by the fact that she makes the finding of the commissioners upon the inquest subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings.'

"The president is given by the act no power to take the property against the verdict of the assessors. He is only vested with the authority either to acquiesce in their judgment, or to decline to accept the property. The latter course, certainly, should not be disapproved of by such of the proprietors as really object to the taking of their land for the park. Such authority has been constantly given to the president by congress, without any suspicion that it was in such wise judicial, that the executive could not constitutionally execute it. The acts of Maryland and Virginia, and of congress, about the close of the last century, committed to the president many duties connected with the location and acquisition of the District of Columbia, and the building regulations of the new city, which were much more obnoxious to such a charge, but they were performed without criticism by the courts. After establishing the boundaries of the District, the president changed them by proclamation so as to embrace territory below the mouth of the eastern branch. The plans for laying out the lands were declared to be such 'as the president should approve;' the public appropriations for parks were designated by him; and most of the building regulations in force here to-day were promulgated by Gen. Washington. Repeatedly provisions of law in statutes have been suspended because of

discretionary powers given by acts of congress to the president to suspend their operation, if he should think the public interest required such action. Such were the cases under the Mexican and American joint commission. By subsequent statute it was declared that if the president should be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, required that the awards made by that joint commission in the Cases of Weil and La Abra Co. should be reopened, he was authorized to withhold payment of those awards. His course in concluding to do so was approved by the supreme court in Frelinghuysen v. Key, 110 U. S. 63, 3 Sup. Ct. Rep. 462, notwithstanding the contention that it was in inexcusable contempt of international awards; and it was further declared by the court that the president would have had the right to act as he did in the absence of a statute. The question came up again in U. S. v. Blaine, 11 Sup. Ct. Rep. 607, (not yet reported,) where the same doctrine was announced. In U. S. v. Chandler, 2 Mackey, 527, this court justified the secretary, under the orders of the president, in refusing to expend $200,000 to purchase land at Chiriqui for a naval station, under an act of congress authorizing him to establish stations and depots for coal at the Isthmus of Panama. Under the recent tariff and copyright acts, discretionary powers were committed to the president which might equally be called judicial, in that their performance involved the exercise of judgment and grave discretion. The presidents have approved and disapproved, as they saw fit, from the beginning of the government, the sentences of courts-martial, thus directly exercising what would have been properly called judicial power, if exercised by a reviewing court. Since the argument of this case the president has, by proclamation, declared that the United States has accepted the property in this city condemned for a city post office under a provision of the act of June, 1890, similar in terms to the language of the act before us. A similar requirement appears in the act of August 30, 1890, authorizing the acquisition of land for the use of the government printing office; and the provisions of that act are made applicable to all future proceedings for taking property for public use in this District.

"4. The constitutionality of the law is assailed, finally, upon the ground that the amount of compensation to be paid for the land needed for the park is therein limited to $1,200,000, the sum appropriated by the act. It is argued that this provision is an admonition, if not a command, given in advance to the appraisers, that it would be unlawful for them to assess the aggregate cost at a larger amount than that named in the statute, and that they will not be considered as having found a just compensation if it exceeds that sum. The words of the act afford an answer to these positions. This court is authorized and required to ascertain and assess the value of the land 'by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court.' The duty required of the appraisers is to appraise the value of the land, and to return to the court an appraisement not differing from their belief of its value, but in accordance with that belief. If they believe the aggregate value exceeds the amount named in the act, how can they escape the obligation to say so? If the law limited the expense to $10,000,000, would the appraisers be justified in valuing the land up to the entire amount merely because that limit was named in the law? Or if the sum named was $10,000, could it be supposed they would conform their valuation to what they plainly saw was an inadequate sum?

"We do not agree to the suggestion of defendant's counsel that the entire appraisement and award must be a unit. On the contrary, the adjudication of the value of each property must be separate. Whether the amount of the separate appraisement of the reasonable values of the several properties may exceed or may fall short of the sum appropriated, the appraisers must equally return what they believe is their just value, as competent and disinterested commissioners are bound to do. The idea suggested, that the $1,200,000 will be inserted in the precept issued to them as the limit of their finding, is altogether imaginary. The citation from Cooley (page 563) adduced to show that the legislature cannot fix the amount of the valuation in advance, has no application to a case like the present. In the Bridge Co. v. Warren, 11 Pet. 571, relied on by Cooley for the statement, Justice McLean declared that the provision in the charter of the new bridge company requiring it to pay a definite sum per annum to the old company as compensation for the injury to its property was an inadmissible mode of attaining the end designed, because, as expressed by him, 'by this provision it appears the legislature has undertaken to do what a jury of the county only could constitutionally do,—assess the amount of compensation to which the complainants are entitled.' The same reason is given for the use of a similar expression in Pennsylvania R. Co. v. Baltimore & O. R. Co., 60 Md. 269. There the legislature authorized any railroad to use five miles or less of the track of any other railroad, upon making compensation for its use at a rate per mile fixed in the statute itself. It was in reference to this exaction the court said: 'The legislature, in exercising the right of eminent domain, cannot, in the law itself, fix the compensation to be paid. Such compensation, in case of disagreement between the parties, must, in this state, be awarded by a jury.' But in the case at bar the statute appoints a tribunal of three com-

missioners, the acknowledged legal equivalent of a jury in condemnation proceedings, and by that commission alone is the just compensation to be appraised.

"That the naming of a fixed sum in the act can operate as a limitation to prevent congress from increasing it, if it should think proper, is of course incorrect, and not justified by the course of congress in other cases. By the act of 1886, c. 50, (24 St. p. 13,) a large sum was appropriated to acquire land for the congressional library building. The awards for the land found by the jury overran that sum, and a subsequent appropriation was made to complete the payment. By the act of 1888, c. 1069, a designated sum was appropriated for the purchase of land for the use of the bureau of engraving and printing. It was represented to congress that the award would probably exceed that amount, and at the last session, by chapter 542, a further sum was appropriated for the purpose. We, of course, have no thought of intimating any likelihood that such excess of valuation may occur, or that the appraisers can lose sight of the double responsibility that must weigh upon them with equal weight,—the duty to protect the people among whom they live from excessive exactions,—and the equal duty to allow to the owners a just value for their lands. We have only spoken thus to show that the act has not left the landowners in the helpless predicament stated. That the government is bound to make just compensation for whatever it shall take from the individual is undoubted; and in the words of the supreme court in Great Falls Manuf'g Co. v. Attorney General, 124 U. S. 596, 8 Sup. Ct. Rep. 631: 'It is to be assumed that the United States is incapable of bad faith, and that congress will promptly make the necessary appropriations whenever the amount of compensation has been ascertained in the mode prescribed.' We believe the citizen may well confide in the ultimate justice of his government,—the most generous, as it is the happiest and the most powerful, on the earth.

"5. The further objection was presented by the answer, though not argued at length, that the appropriation of these lands for the purposes of a public park was not a 'public use,' in the sense of the constitution. It must be conceded that in a case like the present the legislature is the competent judge to decide this point. Upon all the authorities, it is also well settled that the condemnation of land for the purpose of a park is within the principle. If no other ground existed for its exercise, we think the duty of the government to obtain control of the entire course of Rock creek, within the boundaries of the District, to prevent its waters from being polluted by the offal of slaughterhouses and of disgusting factories, bringing their abominations into the midst of the city to poison and infect the air, would afford sufficient justification for this attempt to save the community from such dangers. The objections being all overruled, the court will proceed to act, as requested by the petition."

The following is the opinion delivered in the supreme court of the District on the motion to strike out the evidence relating to the existence of gold mines in certain of the tracts in question:

(November 17, 1891.)

*307 note

*"Mr. Justice COX. We have had under consideration the motion made in this matter by the petitioners, and that motion is that the court strike out all the evidence introduced by the defendants Shoemaker and Truesdell relating to the existence of gold mines in tracts 39 and 42 on the map filed by said petitioners, on the ground that, if any gold mines exist therein, the title thereto is in the United States. In order to solve this question, we are compelled to go somewhat into the history of titles in Maryland. All land titles in the District are derived primarily from Maryland. We all know that the history of the title to real estate in Maryland commenced with the charter to Caecilius Calvert, Lord Baltimore, by Charles I., in the eighth year of his reign. That charter defines the limits of the province of Maryland, and grants and confirms unto the said Caecilius Calvert, baron of Baltimore, his heirs and assigns, the lands and waters included within those limits, and goes on to say: 'And moreover all veins, mines, and quarries, as well opened as hidden, already found or that shall be found within the region, islands, or limits aforesaid of gold, silver, gems, and precious stones, and any other whatsoever, whether they be of stones or metals or of any other thing or matter whatsoever.' They were granted to him, his heirs and assigns, forever, 'to hold of us, our heirs and successors, kings of England, as of our castle of Windsor, in our county of Berks, in free and common socage, by fealty only for all services, and not in capite knight's service, yielding therefor unto us, our heirs and successors, two Indian arrows of those parts, to be delivered at the said castle of Windsor every year, on Tuesday in Easter week, and also the fifth part of all gold and silver ore, which shall happen from time to time to be found within the aforesaid limits.'

*308 note

*"The right to mines of gold and silver was considered one of the jura regalia under the common law of England. In this country we have no jura regalia. Whoever owns the land owns everything contained in it, including mines, unless they be expressly reserved, and the same law is applicable to a transfer by the federal government. This matter of the ownership of mines was discussed in the case of Moore v. Smaw, 17 Cal. 199, where the court, in its opinion as delivered by the chief justice, says: 'In the great case of Reg. v. Earl of Northumberland, 1 Plow. 310, which was argued before the barons of

the exchequer and all the justices of England, it was held, by their unanimous judgment, "that by the law all mines of gold and silver within the realm, whether they be in the hands of the queen or of the subjects, belong to the queen, by prerogatives, with the liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore;" and also "that a mine royal, either of base metal containing gold or silver, or of pure gold and silver only, may, by the grant of the king, be severed from the crown, and be granted to another, for it is not an incident inseparable to the crown, but may be severed from it by apt and precise words." This case was decided in 1568, during the reign of Queen Elizabeth, and continues until this day an authoritative exposition of the doctrine of the common law. It is conclusive to the point that the right to the mines was not regarded by that law as an incident of sovereignty, but was regarded as a personal prerogative of the king, which could be alienated at his pleasure.' The title to mines in Maryland was vested by the charter in the 'lord proprietary,' as he was called, subject only to a royalty of one fifth part of them in favor of the crown. In an exposition by Kilty of 'original titles as derived from the proprietary government, and more recently from the state of Maryland,' called the 'Landholder's Assistant,' and which has been referred to by counsel on both sides in the argument as a work of authority, it appears that the proprietary formulated from time to time rules and regulations for the disposition of his land, called 'conditions of plantations, instructions, etc.' These 'conditions of plantations, instructions,' etc., became matter of record, and, so far as extant among the public records of the state in the year 1808, are printed in the work referred to, which was issued in that year, and were originally carried into effect by some one or other of his lordship's agents and chief officers in the province, such as his 'lieutenant general,' his 'chief governor,' his 'lieutenant governor,' and later by the governor and council, and others charged with the management of land affairs. Three steps were necessary for transferring the title from the proprietary to the individual seeking the patent. The first was a warrant issued by the *proper officer, and which was the authority to the surveyor of the county to survey and lay off the particular quantity of land; the next step was the returning by the surveyor of his certificate of survey; and the third step was the issue of the patent. In the course of time another form of warrant came to be issued, called the 'warrant of resurvey.' Parties having several contiguous tracts by patent from the land office procured from it a warrant of resurvey, authorizing the surveyor to resurvey those tracts, the grounds assigned for which were the uncertainty of existing bounds, and the desire of the parties to connect several adjoining tracts in one survey. At first the privilege of taking in adjoining vacancy over and above the quantities originally granted did not attach to this kind of warrants, but this subsequently became the main object of these resurveys. On resurveys lands included in elder surveys were excluded, and allowance made for the deficiency, either in contiguous vacancy or elsewhere. On the other hand, where land had been included in surveys beyond the quantity to which the party was entitled, the excess, denominated 'surplus land,' was claimed by the proprietary; and, as this surplusage was more common than vacancy, it gave rise to numbers of warrants, sometimes demanded by parties when they found that the excess of their grants could not be concealed, and on other occasions issued by direction of the government where information of surplusage was obtained. In 1735 it was determined to grant warrants to the first discoverers, enabling them to make resurveys on the lands of other persons, and to become purchasers of the surplusage found therein.

*309 note

"All the patents that were issued by the proprietary contained an exception of royal mines, and we understand those terms to mean mines of gold and silver; and the consequence, was that they did not pass by these grants, but remained in the proprietary, as his separate property. Notwithstanding the common-law maxim as to the ownership of property, 'cujus est solum, ejus est usque ad cælum,' there may be two separate owners of the same land. A man may own the surface of the ground, and underneath the surface may be owned by another person; so that, as the patent issued with that reservation, the proprietary remained the owner of the mines. The present owners of the land, deriving title by mesne conveyances from the patents, claim that they are entitled to the mines; but, as the patentee did not take the mines of gold and silver, I do not see how the last owner has acquired title thereto. There can be no question here of adverse possession, or title by adverse possession, in the position taken by the claimants to these mines. The then proprietary was divested of his title by the American Revolution. When the Revolution broke out, the British subjects left this country,—perhaps for their country's good; and the effect of the Revolution, I might say, with regard to the royalty that had been reserved by the king, was to transfer it to the state, and the property of the proprietary was confiscated by an act passed by the state in 1780, c. *45, of the session of that year. When you contrast this act of confiscation with the act passed by the congress of the United States during the late Civil War, it will be seen that the latter act subjected the property of those in hostility to the government to seizure and condemnation by judicial proceedings and sale, and directed that the proceeds of the sale should be

paid into the treasury of the United States. If any property was seized, and such legal proceedings were not taken, the title never was passed, but remained in the owner. The act of Maryland is much stricter in its terms.

"After a long recital of grievances committed by England, the act of Maryland declares: 'And it is hereby enacted and declared that all property within this state, debts only excepted, belonging to British subjects, shall be seized, and is hereby confiscated to the use of this state.' In section 7, on the assumption that the title was at once vested in the state by the preceding enactments, the act goes on, and directs that certain property, being certain iron works, lands, and stock therein mentioned, 'shall be, and are hereby, appropriated and set apart as a fund for making good and sinking certain bills of credit which had been emitted by the state.' The act further enacted 'that all British property confiscated in virtue of this act, and not thereby appropriated for the redemption of the bills of credit lately emitted by this state, and for the payment of debts, shall be subject to the disposal of the general assembly.' To remove any doubt of the meaning of the law, in chapter 49 of the same session, it is enacted that certain commissioners shall be appointed, 'for the purpose of preserving all British property seized and confiscated by the act of the present session,' just before referred to, 'and that the said commissioners shall be, and are hereby declared to be, in the full and actual seisin and possession of all British property seized and confiscated by the said act, without any office found, entry, or other act to be done, and the said commissioners shall and may, as soon as may be, appoint proper persons, in all cases that they may think necessary, to enter into and take possession of any part of the said property,' etc. This was a complete divesting, at once, of the title to the property owned by British subjects, and vesting it in the state, or in the commissioners to represent the state. Chapter 51 of the same session goes on, and appropriates the manors owned by the late lord proprietary in several counties to certain purposes; and it provides 'that this state will forever warrant and secure to the purchasers and their heirs any British property sold in pursuance of this act, and will protect them in the peaceable possession thereof.' This was followed by another act, relating to forfeited estates and sales of reversionary rights, where they were estates tail. There was another act in relation to claims against forfeited property by individuals, and section 2 of the latter act provided for the confiscation of the property of British subjects which may be in the possession of others without any proper claim upon them. All of which shows the scope of the confiscation, and that these acts were intended to reach every piece of property that belonged to British subjects. This intent runs all through them, in fact, and it is not necessary to refer to them in further detail. It is sufficient to say that it was the effort of the state to appropriate everything —every species of property—that belonged to British subjects; and of course that would include mines, as well as anything else. Certain grace was given to the owners of the property. They were allowed a certain time in which to come forward and swear fealty to the state and in that way save their property.

"During the argument an inquiry was made whether the state of Maryland had ever made any reservation, in her patents issued since the Revolution, of mines and quarries, or whether its legislation was silent on that subject, from which it might be inferred that she never intended to confiscate that species of property. A partial answer to that inquiry, at least, is found in chapter 20 of the act of 1783, relating to the sale of confiscated property, by which it is enacted 'that in all sales of the said lands there shall be a reservation of one fifth part of all mines of gold or silver found thereon to this state, which reservation shall be expressed in the deeds for the said lands.' That showed that the subject of the ownership of mines was brought to the attention of the legislature, and that the state assumed itself to be the owner of the mines, as well as of the surface of the land, and hence assumed that granting it would pass the mines, unless there was a reservation; and so the state reserved one fifth in all mines that might be found on this confiscated property. Now, it is true that there is no mention in the legislation of the state in regard to mines or mineral lands, except in connection with the sale of the property, and the only object of any legislation would be directed towards a sale of the property; and it would have been useless to direct any sale of mines in the state at that time, which would account for the absence of legislation on that subject. It was not suspected at that time that any mines existed in the state. If there had been any idea that there were mines existing, there is no room for doubt at all, in view of the spirit manifested in this legislation in the series of acts running nearly twenty years, that the state would have been prompt in declaring as forfeited the interests of British subjects therein. It appears that nothing was ever done by the state that amounted to a relinquishment of any rights that were vested in it by confiscation. If there were any mines, however, they were the property of the state, by another act of the state, which act assumes that the state was the owner of the same by reason of the action taken, which I have before referred to. In the case that I have heretofore cited (Moore v. Smaw) there was no hesitation at all upon the part of the justice, in delivering the opinion of the court, in holding that, 'at the date of the cession of California to the United States, no minerals of gold or silver had been discovered in the land embraced by the

grant to the Fernandez or by the grant to Alavrada, and of course no proceedings had been taken by which any individual interest in them was acquired from the government. They constituted, therefore, at that time, the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States.' Under the common law of England, there was an implied reservation of mines of gold and silver. Looking at the terms of the cession under the act of 1791, we will find that they are much stronger than those employed in the act of cession of property in California to the United States, because they contained absolute words of cession, while the other does not. The language is 'that all that part of the said territory called "Columbia" which lies within the limits of this state shall be, and the same is hereby, acknowledged to be forever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction,' as well as of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States.' These words, of course, are to be taken distributively. Congress and the government were given the full and absolute right over persons, and they are given the full and absolute right to the soil, and exclusive jurisdiction over both person and soil. It is rather difficult to see how they could be more specific in conveying whatever rights the state had in the land and soil. The state, of course, could only transfer to the United States the interest which it had; and to make the matter as clear as possible and remove doubt, a proviso was added: 'That nothing herein contained shall be so construed to vest in the United Staes any right or property in the soil, so as to affect the rights of individuals therein.' In other words, the state did not undertake to grant away the rights of individuals, but did undertake to give to the United States all her rights, both as to soil and persons who resided in the part of the state ceded. The state relinquished all rights which she had, and at the same time provided that the United States should not have any right in the soil that would affect the rights of individuals. The history that I have given of this property excludes all idea that the law did vest in the individuals the right to the mines. Nobody can doubt that the public domain passed to congress, and that it has always acted upon that assumption in granting patents to vacant land that it has sold; and we can see no reason to doubt that the right of the state to any mines on the land separate from it also passed, by this grant of the territory 'in full and absolute right, and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon.' We cannot escape from the conclusion that all public property of the state of Maryland, within the District, passed by the cession, and that the legislature, by its act of cession, transferred all interests in any possible gold mines in this District to the United States.

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"But a patent was introduced at the argument, of a later date, from the state of Maryland to Robert Peter, under whom these present owners claim title, and that patent has no reservation of any gold or silver mines; and it was claimed that, for this reason, whatever interest the state formerly had in these mines passed by this patent. That patent was dated in 1803. It will be remembered that the congress of the United States assumed formal jurisdiction over this District, and provides for its government, by the act of February 27, 1801, three years before the date of this patent. The state of Maryland, of course, could not convey land that had already been ceded to the United States. But this paper suggests certain serious inquiries. The patent was a resurvey patent based upon a warrant dated the 12th day of May, 1800, which was nine months before the actual assumption of jurisdiction here by congress; and the first inquiry is whether that did or did not give the parties equitable title, being prior to the time that the land was actually taken possession of under the cession by the congress of the United States. That inquiry suggests one or two questions. The first is: Under the law of Maryland, did the land laws remain in force in that part of the territory ceded until the removal of the seat of government; and, if so, did the issuing of this warrant give an inchoate title,—an equitable title which would prevail against the subsequent acquisition of the same legal title by the United States? The letter of the law seems to be that in all cases of resurveys no equitable title is created until the certificate of survey is returned to the land office. Upon the issuing of the warrants of resurvey the party had two years, under the law, within which to have the survey returned, and pay the fees. It seems to me that no equitable charge could be laid against this property by reason of the issuing of the warrant of resurvey. The patent does not say that that survey was returned to the surveyor's office. The warrant was not issued until 1800, and the patent was not issued until 1803, and the presumption would therefore be that the certificate of survey was not returned until after 1801; so that there is nothing upon the face of this patent which would justify us in saying that there could be an equitable title acquired through the warrant.

"There is a still more important question, and that is whether the state of Maryland at that period could convey any interest, legal or equitable, in the property. In the act of 1791, ceding this property to the United States, there is this proviso: 'That the jurisdiction of the laws of this state over the persons and property of individuals re-

siding within the limits of the cession aforesaid shall not cease or determine until congress shall by law provide for the government thereof, under their jurisdiction, in manner provided by the article of the constitution before recited.' Now this continues in force the jurisdiction of the laws of the state of Maryland over the persons and property of individuals residing therein. To make that applicable to the present case, it would be necessary to have extended it to the property held by the state, but it seems to me that that extended no further than to say that the laws that affected private rights should continue in force until proper provision was made by congress. See what the consequence would be if another construction had been given to it. The state of Maryland extended to the Virginia shore; and suppose that after this cession, and before 1801, the state of Maryland had undertaken to cede to the state of Virginia the whole bed or bottom of the Potomac river, from its source to its mouth, including that part in the District of Columbia. Doubtless congress could have had something to say about it after the cession had been made. We are satisfied, therefore, that the proviso does not continue in operation the land laws of the state of Maryland, and consequently no title could be derived at the date of this survey and patent, or at the date when the warrant upon which it was based was taken out. We are satisfied that the proviso does not continue in operation the land laws of the state of Maryland as to the public lands owned by the state within the said District, and that consequently no title to such lands could be obtained by patent from the state after the act of 1791.

"At a much later time a citizen of Maryland who owned a tract of land in this District died, making a will disposing of his land, and appointing an executor, and, the executor having declined to act, the chancellor appointed a trustee to carry out the trusts of the will, and the title was declared vested in that trustee, and a sale directed to be made; and the proceedings were in accordance with the law of Maryland. But this court had no hesitation in declaring the whole proceedings null and void, for want of jurisdiction in the chancellor to give the relief asked for.

"Upon the whole case, therefore, we are of the opinion that, if there are any deposits of gold in this ground, they are the property of the United States. This motion upon the part of the government is granted."

The opinion of the supreme court of the District on the motion to rescind the order directing the commissioners to disregard the evidence relating to the existence of gold deposits was as follows:

(December 14, 1891.)

"Mr. Justice COX. In this matter a motion has been made to rescind the order heretofore passed by this court directing the commissioners to disregard the evidence as to the deposits of gold in two of the tracts, numbered 39 and 42, the former being the property of Shoemaker, and the latter that of Truesdell. It will be remembered that the conclusion announced by the court was founded upon a patent which was introduced on the part of the government, and dated in 1772, from the proprietor to one White, by which the royal mines—that is, the mines of gold and silver—were expressly reserved to the proprietor, and our argument was that they were derived through confiscation by the state and on behalf of the United States through the cession of 1791, and, if such gold deposits existed there, they were the property of the United States. The present motion is based upon additional evidence said to have been discovered since the first order.

"The first patent granted to White affecting the premises was on a resurvey in 1760, in which the land was granted without any reservation of royal mines, and it is supposed that those claiming under White were allowed to refer their title back to the first muniments of title, and that it is not affected or vacated by the subsequent patent of 1772, in which there was an express reservation of all royal mines. As to the character of the tenure of land in this country since the Revolution, it has been said that it has become allodial. That is all true, but it must be remembered that at the date of the commencement of these tenures all land in Maryland was held as essentially feudal. In the first place, the charter of Lord Baltimore conveyed to him this land, not to be held by knight's service, but by fealty, and a certain proportion of the precious metals that might be discovered on the land was reserved; and, if Lord Baltimore granted this land in fee simple afterwards, the grantee held, not of the crown, but of him,—the lord proprietor. In this charter it is expressly stated that, notwithstanding the statutes of quia emptores, Lord Baltimore was authorized to create minor court barons, and grant patents to lands to be held in fee simple, but upon the rendition of such services, customs, and rents as he should think proper, to be laid by him, and not by the crown, and in all these patents issued by him in fee simple there was that reservation and fealty, at least generally, in place of any other service, so that relation, as to the tenure by which the land was holden, existed all through between the lord proprietor and his grantees, just as it did under the feudal system.

"Now, to go back to the common law. A lessee for life or years could surrender his estate, and take a new estate from the reversioner. Not only could that be done by the tenant, but the acceptance of a new estate by the grantee was itself a surrender of the old one, and that, upon the principle that the two could not consistently stand together, and the acceptance of the latter one neces-

sarily involved a surrender of the first. For instance, if a lessee for years should take a lease for his own life, or that of another man, the acceptance of the latter would necessarily be a surrender of the first; or if a lessee for forty years accept one for twenty-five years, or if a lessee for life accept a lease for years,—say a lease for twenty years,—the acceptance of the one would involve a surrender of the other. Upon the question of what shall be considered in law a surrender of lands it is said in Sheppard's Touchstone, (page 302, Ed. of 1826, with notes by Atherly:) 'If lessee for life or years take a new lease of him in reversion of the same thing in particular contained in the former lease for life or years, this a surrender in law of the first lease, (14 Hen. VIII. c. 15; Wrotesley v. Adams, 1 Plow. 194; Abbot of Westminster v. Clerke, 1 Dyer, 28; Case of Church Wardens, 10 Coke, 67;) as, if lessee, for his own life or another's life, in possession or reversion, take a new lease for years, or a lessee for forty years takes a new lease for fifty years, the first lease in both these cases is surrendered. And this rule holdeth, albeit the second lease be for a less time than the first, as if lessee for life accept a lease for years, or lessee for twenty years accept a lease for two years. Perk, § 617; Ive's Case, 5 Coke, 11; Fitz. Sur. 3; Co. Litt. p. 218, b; 37 Hen. VI. c. 17. And albeit the second lease be avoidable, as being made upon condition; as if lessee for twenty years take a new lease for twenty years, upon condition that, if such a thing happen, the second lease shall be void, and the thing do after happen, in this case both these leases are become void; as where the lessor doth grant the reversion to the lessee upon condition, and, after, the condition is broken. Whitley v. Gough, 2 Dyer, 140, 141. Or if the second lease be made by tenant entail, or the like; as, if a man made a lease for years of land, and then made a feoffment to another of the land, and then take back an estate to him and his wife of the land, and then make a new lease to the lessee for ten years, this is a surrender in law of the first lease; but, if the second lease be merely void, then it is otherwise. Cardinal v. Sackford, 3 Dyer, 272; Wrottesley v. Adams, 2 Dyer, 177, 178; Knight's Case, 5 Coke, 54, 55, Kellw. 70. And therefore, if the lessor do, by words of covenant only, promise to his lessee that he shall have a new lease, and do never actually make it, this is no surrender in law. Whitley v. Gough, 2 Dyer, 140, 141. And this rule, as it seems, holdeth also, albeit the second lease be to the lessee and a stranger, or to the lessee and his wife; and albeit the second lease be by word only, and the first lease be by deed, if so be the thing granted by the lease be such a thing as may pass by word without writing; and albeit the second lease be in another's right, as if the husband have a lease for years in the right of his wife, and then take a new lease to himself in his own name; and albeit the first lease be to begin presently, and the second be to begin at a day to come, or e converso; and albeit there be a mean estate between, as if the land be let to A. for years, and after let to B. for years, to begin after the first term, and the assignee of A. doth take a new lease. Wrottesley v. Adams, 2 Dyer, 178, Pasch. 40 el; Co. Litt, p. 238; Sir Moyle Finch's Case, 6 Coke, 69; Lampet's Case, 10 Coke, 53a; Case of Church Wardens, Id. 67; Ive's Case, 5 Coke, 11; Corbet's Case, 3 Dyer, 280a; Woodhouse's Case, 1 Dyer, 93b; note, 2 Dyer, 112. So, if one demise land for ten years to one, and, after, demise it for ten years to another, to begin at Michaelmas, and, after the first lessee, accept a new lease, in all these cases there is a surrender in law of the first leases. Herreyong and Goddard's Case, 1 Dyer, 46a; Wiscot's Case, 2 Coke, 60. And if there be two lessees for life or years, and one of them take a new lease for years, this is a surrender of his moiety. Whereby it doth appear that a surrender in law may be made of some estates which cannot be surrendered by a surrender in fait; for "fortior est dispositio legis quam hominis." And hence it is that a corporation aggregate may take a surrender in law without deed, although it cannot make an express surrender without deed. Sir Moyle Finch's Case, 6 Coke, 69; Case of Church Wardens, 10 Coke, 67.

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"Now, technically, there was no surrender of such a thing as a fee-simple estate at common law. The owner of the estate might reconvey to his grantor or the latter's legal successor, and take a new title. There may have been some particular object in doing that, though, of course, he is supposed to have taken the whole title in the first instance. I do not know that there are any examples of this since the days of the Saxons surrendering their estates to William the Conqueror, and taking them back again under the conditions of feudal tenure imposed by him. Still such a thing could be done as the owner of a fee simple granting back his title, and taking a new grant, if there was any object in doing it. Under the rules promulgated by the proprietary of Maryland, that very thing was permitted; that is, the practice of surrendering the original grant in fee simple, and taking a new title from the lord proprietor. Under these rules the owner of two contiguous estates who might desire to have them resurveyed might surrender them, and take a new title for the two consolidated into one, or the owner of one estate might surrender his grant, and take a new one and of the contiguous vacant land as a new entirety. The rules above referred to expressly provided that special warrants might be issued to resurvey two or more contiguous tracts for the person owning the same, and to lay them out in one entire tract.

"The third section of the instructions issued by the proprietary May 5, 1684, to certain persons whom he, by commission of that ——, appointed a land council, and by which their powers and authority were defined, reads as follows: 'To any person or persons haveing two or three or more tracts of land contiguous or adjoining one to the other, you may (upon suit made) grant special warrant to resurvey and lay out the same into one entire tract, with liberty of takeing in or adding thereunto what waste land shall be found contiguous, and grant pattent for the same upon such conditions and tearms as you shall seem meete and reasonable, the person sueing for the same surrendering up the several former grants thereof to our chancellor or chancellors for the time being to be vacated upon record.' Now, here is an express provision that the grantee of the fee simple might surrender his title to the lord proprietor, and take a new title, and for the same reason that at common law prevailed in reference to leases for life and for years; but in that case the provision was not necessary, because, when a new lease was made, it necessarily involved a surrender of the original title,—the original possession. Every one of these grants was a grant of the entire thing, for the whole property right; and, when one grant was surrendered, a new grant was taken for additional land. The second grant was made upon an entire resurvey of the land. The two estates were different, and the party could not hold both estates. They were not consistent, and that is the result in this very case. Here, in the first place, in 1760, was a patent for six hundred and eighty-one acres granted upon a warrant of resurvey. Upon a resurvey of said patent, in 1772, it was discovered that the land embraced in it was covered in part by patents of several prior patentees; that it contained portions of several older grants, which had been improperly included in it, by the lines of one of which older grants it was divided into two distinct and unconnected parts. The surveyor thereupon, in his return of the resurvey, included the one of said parts nearest the beginning, which contained one hundred and fifteen acres, to which he added thirty-six acres of contiguous vacancy, making in all one hundred and fifty-one acres, and for this the patent of 1772 was granted. The patent for the rest of the land is not produced before us; but we may assume that there were two several patents issued, one of which embraced this land, and, of course, it is held under the conditions imposed by the grant. It won't do to say that that part of the land embraced in this patent of one hundred and fifty-one acres is held by the title acquired in 1760, because it is held as a part of a new and entire tract, and upon different terms, and for a different rental, and therefore there is an inconsistency in his claiming to hold the land both under the patent of 1760 and that of 1772. The original entry of six hundred and eighty-one acres has disappeared entirely, and that land is now held under two different patents. Any acceptance of a new lease, providing different terms of rental, and for a different period, involves the surrender of the old lease; and so acceptance of a new grant from the lord proprietor, embracing part of that which was formerly held under the old grant, necessarily involved a surrender of the original title. The requirement that the original patentee shall formally surrender the title to be affected by the new grant has never been rescinded, as far as we are advised. In point of fact, however, the practice has fallen into disuse. It appears from Mr. Kilty's statement that the practice was simply to enter on this certificate of resurvey an order for the patent to be surrendered, but finally the practice of surrendering the old certificate or patent seems to have been abandoned entirely. Now, there were two very good reasons for that—First, it was not necessary because of the very fact that an acceptance of a new title inconsistent with the former operated as a surrender of the former; and, next, because of the doubt that seems to have been raised of the effect of the claims in the matter of priority of some other individual who might in the interim between the old and the new patent have obtained a patent covering the same land, and as between several parties holding under different patents the one who held the old title would be regarded as retaining whatever interest he acquired under it for the purpose of preserving priorities; but that is altogether a different question from the relation of the tenant and the old proprietor, and, as between them, it seems to be very plain that the acceptance of a new title or a new grant was conceded to supersede the old title, and therefore we think that the new title must stand. There has been something also presented to us to affect our judgment in that particular.

"As another item of evidence it seems that James White originally conveyed his estate to Robert Peter and Adam Stewart, as tenants in common. By an act of the assembly of Maryland the property of all British subjects was confiscated, and under that act Adam Stewart's was confiscated, and certain commissioners were appointed to take charge of the confiscated property, and dispose of it. Adam Stewart's interest in this property was sold by these commissioners. I do not remember the date of the sale, but that is quite immaterial; somewhere about 1785. Afterwards, in 1792, the chancellor made a conveyance of the property which Adam Stewart had thus forfeited to Robert Peter. The deed from the state to Robert Peter contained no reservation of the mines, and it is claimed that this last deed from the commissioners to Robert Peter of the interest of Stewart vested in Peter all interest in

whatever mines might be on the property. An inspection of that instrument will show that it purports to do nothing of the sort. The deed recites that about two hundred and fifty acres of land, which it does not locate anywhere, (the property of Adam Stewart,) were confiscated, and sold to Robert Peter, and the deed professes to convey the property of Adam Stewart, and nothing else. The property that Adam Stewart had was an undivided moiety in the land, and nothing more; and the deed from the chancellor does not on its face purport to convey anything else than exactly the property that was owned by Adam Stewart in conjunction with Robert Peter. The construction of the deed, therefore, does not bear out the claim on the part of the present holders. If it did, however, the result would have to be the same, because the deed from the state was not made until 1792, after the cession of the District to the United States; and the cession passed to the United States all the public domain within the limits of the District,—that is, that part of it that had been a part of the state of Maryland,—because it is said that all of the territory 'is hereby acknowledged to be forever ceded and relinquished to the congress and government of the United States in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon.' If this does not convey all the territory to the United States, then the United States never did acquire it, because that is the only cession by which a conveyance was made of the title to this property to the United States, and its title to it depends upon this cession, and nothing else. All this property in the District that had formerly belonged to Maryland was ceded by this act in 1791, and, that having been done, the state of Maryland could not thereafter have vested in any one the title to any part of the property. We do not find anything, however, in the circumstances referred to which affects this case.

"A point was made in argument which had not been made before, and not founded upon any new facts in reference to the character of these proceedings before the chancellor upon the application for a repatent. Robert Peter had a resurvey patent in 1803 signed by the chancellor, and founded upon a warrant of resurvey issued in 1800, about six or eight months before congress had passed its law assuming jurisdiction over the District, and we held that that could not pass title to land in the District; but it is claimed that the proceeding before the chancellor, as a judge of the land court, was in its nature a judicial proceeding, and that all such proceedings, and the result of them, are saved by the act of congress which assumed jurisdiction over this District. That is entirely a misconception, we think, of the act of congress. All that it says is this: 'That in all cases where judgments or decrees have been obtained, or hereafter shall be obtained, on suits now pending in any of the courts of the commonwealth of Virginia, or of the state of Maryland, where the defendant resides, or has property within the District of Columbia, it shall be lawful for the plaintiff in such cases, upon filing an exemplification of the record and proceedings in such suit with the clerk of the court of the county where the defendant resides or his property may be found, to sue out writs of execution thereon returnable to the said court, which shall be proceeded on in the same manner as if the judgment or decree had originally been obtained in said court.' Now, this applies only to contests between private parties in which execution may issue, and does not provide for a proceeding in which the state may be a party. The language is exclusively applicable to private parties.

"We think, therefore, upon the whole, that none of the new considerations which have been presented to us shake our former conclusion, and the motion to rescind the order is overruled. What I have said applies to the Shoemaker tract with more force than to the Truesdell tract, because that is admitted to be a new grant, or, at least, taken under the patent in 1772, and not derived from a patent in 1760 at all."

The following is the opinion of the supreme court of the District overruling the exceptions to the commissioners' report:

(February 23, 1892.)

"Mr. Justice COX. We have had under consideration the exceptions that have been filed to the confirming of the report of the commissioners appointed to appraise the land selected for Rock Creek park. The act under which these proceedings were instituted is dated September 27, 1890. It has defects in it which may embarrass its execution, and give rise to questions in the future, but we will settle the exceptions, as we are only called upon to do that now. It seems to us that our duty, as marked out in the act, is sufficiently plain and simple. The first section of the act provides that a tract of land, the limits of which are described in general terms, shall be secured as hereinafter set out, and be perpetually dedicated and set apart as a public park, pleasure ground, etc. It has a proviso as to the quantity of land, and the cost to be incurred. There are four steps to be taken in the process of securing the land, which are ordained by the body of the statute. The first one is the selection of the land by certain commissioners. The commission is composed of the chief engineer of the United States army, the engineer commissioner of the District of Columbia, and three citizens to be appointed by the president. The next step is described in the third section: 'That said commission shall cause to be made an accurate map of said Rock Creek park, showing the location, quantity, and character of each parcel of private property

to be taken for said purpose, with the names of the respective owners described thereon, which map shall be filed and recorded among the public records of the District of Columbia, and from and after the date of the filing of said map the several tracts or parcels of land embraced in said Rock Creek park shall be held to be condemned for public uses, and the title thereof vested in the United States, subject to the payment of just compensation, to be determined as hereinafter provided.' Of course this condemnation—this transfer of title—is conditional; it is conditioned upon the payment of just compensation. The next step consists in the valuation or the ascertaining of the value of the land to be selected. That is to be done in one of two ways. If it can be done by agreement with the owners, that is the process. If it cannot, then the court is directed to assess and ascertain the value in the manner that I will speak of presently. The last step is the payment of money, and it is provided that, 'when the said value or values shall be paid to the owner or owners, the United States shall be deemed to have a valid title to said land.' The act had already provided that upon the filing of the map the title should be held vested in the United States, but, as I said, that was a conditional transfer of title. Upon the payment of value, then the United States was to have a valid title to the land; in other words, then, for the first time, the condemnation is absolute and complete, and the title is transferred absolutely to the United States. As to the land about which the commission failed to agree with the owners, we are now at the third step in the process of its acquisition by the United States; and here it becomes important to ascertain exactly what the duty of the court in the premises is declared to be. The land which is embraced in the map recorded is the land which is condemned conditionally. Then it is provided that if the said commission shall be unable, by agreement with the respective owners, to purchase the land so selected and condemned within thirty days, it shall be the duty of said commission to make application to the supreme court of the District, on petition for an appraisement of the values of such land as it has been unable to purchase,—that is, such land as has been conditionally taken,—which is the land embraced in this recorded plat. The petition shall contain a particular description, etc., and the said court is authorized and required, upon said application, and without delay, to notify the owners and occupants, if known by personal service, and to ascertain and assess the value of the land so selected and condemned. Now, it will be observed that the court has no discretion in the matter at all. It is by the act directed to ascertain and assess the value of the land. The means by which the court is to do it is also provided for. The court is to ascertain and assess the value of the land so selected and condemned by appointing three competent and disinterested commissioners to appraise the value thereof. As I said, the court has no discretion. It is the duty of the court to ascertain the value of the land embraced in the recorded map which is selected and condemned. If the court should decline to discharge that duty, the commission would be entitled to a mandamus to compel it. The court has to appoint three competent and disinterested commissioners to appraise the value or values thereof. Now, it is conceded that, in the exercise of the right of eminent domain by the United States, the owner of the property is not entitled as a constitutional right to a trial by jury, because the ascertaining the value by inquest was due process of law before the constitution was adopted, and it has been recognized as such since. It cannot be said that there is any universal or well-established system of rules governing the proceedings of condemnation by inquest; but in this country it is subject to some rules. It is a universal rule that this proceeding shall in some form or other be subject to judicial supervision, so that the constitutional rights of the citizens shall not be infringed; that is, he shall have a hearing, and his property shall be fairly estimated, and not taken from him without adequate compensation being paid to him. The practice is different in different states. In some states, as, for example, Wisconsin, Montana, and, perhaps, elsewhere, after appraisers have acted, the owner has the right to appeal to the court from the appraisement made, and have the question of value regularly tried by the court and a common-law jury; and such trials are governed by the ordinary rules that are applied to other trials by jury. In some states, as in Missouri, there is a general power given to the courts to review the findings by appraisers; but everywhere it is recognized that a certain control is to be exercised over the proceedings by appraisement by the court. If, for example, it appears that the jury, in making up their estimates, have disregarded the provisions of a statute, and taken into consideration things which the statute forbade them to consider, or vice versa, the court would set aside the finding. Again, if it appears that in appraising any particular parcel the appraisers or the jury, as the case might be, have made a plain mistake of fact, or a plain misapplication of the fundamental principles of law, or a mistake in calculation, or, finally, if they have been governed by prejudice or partiality, the court would set it aside. For instance, in one case, where a railroad company was the party seeking condemnation, it appeared that the jury of inquest had valued a fraction of a tract of land at more than the whole tract was clearly worth; it was set aside as evidence of partiality and prejudice.

"Now, the court is bound to complete this assessment. If it sets aside one appraise

ment, it must go on with another, until an unobjectionable one is made, and then the assessment is complete. There are two acts bearing upon this subject, viz. the present act, and one passed in August, 1890, relating to the printing office. If the present act alone is to govern, then the rule would be that the appraisers are to appraise the property, and return the appraisement to the court, and that ends the process of assessment. The appraisement returned to the court would be a conclusive finding of value; but before this act was passed there was enacted the sundry civil appropriation act of August, 1890, which provided, among other things, for the purchase of additional land for the printing office; and that provides that the commissioners appointed to appraise, after being duly sworn for the proper performance of their duties, are to examine the premises, and also such persons in interest as might appear before them, and return their appraisement of value, and, when such report shall be confirmed by the court, then the president, if he shall deem the public interest require, shall cause payment to be made, etc. It further enacts that hereafter, in all cases of taking property in the District for public uses, whether herein or heretofore or hereafter authorized, the foregoing provisions, as respects the application of the proper officer to the supreme court of the District of Columbia, and the proceedings therein, shall be as in the foregoing provisions declared.

"It is claimed that the act of August, 1890, should be read into this act. The only effect of that is to make the confirmation of the report of the appraisers necessary; also to complete the official and judicial appraisement. It makes only this difference. If the present act alone governed, then the value of the property has been determined by the report of the appraisers, and it is conclusive as to value; but, if the act of August, 1890, is to apply, then, when the appraisement is returned, and no objection is made, or it appears that they have done their duty, it then becomes the duty of the court to confirm it. Now, then, the court has to complete this assessment by confirming it. It must confirm it as a matter of course, if the appraisers have discharged their duty, and if there is no legal ground for setting it aside. I have stated, in a general way, examples of cases in which a court will set aside an appraisement made by a board of appraisers or a jury of inquest, as the case might be. Subject to those general observations, I think the rule may be stated that the court will not review the findings of a board of appraisers simply upon evidence as to value. There is this important difference between a trial jury and a board of appraisers selected for that purpose: The jury is selected by being drawn from a box among a large number of names, and is not selected with reference to any special fitness to determine the particular case submitted to them. Then they are sworn to find a verdict according to the evidence,—not from their knowledge, but according to the evidence. The present law provides for a board of competent appraisers. They are selected with special reference to their fitness to judge and determine the values, and they are instructed to appraise,—not to find a fact according to the evidence, but to exercise their own judgment. They are directed to view the premises, and the duty imposed is more than what is generally asked of a jury.

"The observations of Judge Ira Harris, which are reported in Railroad Co. v. Lee, 13 Barb. p. 169, on this question, are very pertinent. That was an appeal from an appraisement and report of commissioners. He says: 'I think it is quite obvious that the review is not to be had upon the same principles by which the court is guarded in reviewing the proceedings of a judicial tribunal. Any technical departure from established rules in the admission or rejection of evidence cannot be allowed to affect the appraisement unless it appears that such error has injuriously affected the party appealing. The commissioners are not, like other tribunals, to be governed exclusively by evidence. They are required to view the premises, as well as to hear the proof and allegations of the parties. The one duty is not less imperative or important than the other. The commissioners are selected with a cautious regard for their fitness to judge, after qualifying themselves, in the manner prescribed, of the compensation which ought justly to be made for the land to be taken. If the court, upon appeal, are satisfied that they have not erred in the principles upon which they have made their appraisal, no other error will be sufficient to send the report back for review.' The judge then refers to the testimony of certain witnesses, and their opinion of the value of the land in dispute. He then says: 'These opinions constitute the chief part of the testimony taken. Such testimony, although admissible, is not entitled to great weight. Indeed, it is a departure from the general rule of evidence to receive it at all. "The whole history of this kind of evidence," says a distinguished judge, "shows that it is separated from incompetency by a very thin partition." In re Pearl Street, 19 Wend, 651, per Cowen, J. The opinions of witnesses, at the best, are to be received as persuasive evidence, and never controlling. The verdict of a jury is determined by the testimony submitted to their consideration. It is therefore the subject of review. It may be presented to the consideration of the court upon paper; but it is not so in relation to the proceedings of these commissioners of appraisal. The very first thing they are required to do is to view the premises. Thus their own senses are made to testify. The information thus acquired it is impossible to bring before a court of re-

view. The commissioners, too, are selected with reference to their general knowledge qualifying them to judge completely upon the matters submitted to them. Unlike a jury, they are restricted to no particular species of evidence, or any particular sources of information. They may collect information in all the ways which a prudent man usually takes to satisfy his own mind concerning matters of a like kind where his own interests are involved in the inquiry. They may seek light from other minds, that they may be the better able to arrive at just conclusions; but, at the last, they must be governed by their own judgment. That judgment is not to be controlled or outweighed by the opinions of any number of witnesses. The commissioners have no right to take such opinions, nor, indeed, any other evidence, as to the basis of their appraisal, without exercising their own judgment. They are to hear all the proofs and allegations of the parties, as well as to view the premises, as a means of enlightening their judgment; and, having done all, they are then to determine, in the free and uncontrolled exercise of the judgment, thus enlightened and thus informed, what award will best dispense equal justice to all the parties. When original jurisdiction is to be exercised in this manner, it is impossible, from the very nature of the case, that there should be anything like regular judicial review.' The same general principle is stated in Mills on Eminent Domain, (section 246:) 'An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners cannot find a greater amount of damages than is claimed by the owner. The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of the commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. The commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.'

"Now, as I have stated, the duty of the court is to see that a valid appraisement is made. An appraisement has been made and returned, and, unless some affirmative ground for setting it aside appears, it must be confirmed. The owners have, through counsel, appeared, and filed a large number of exceptions, some of which are urged, and some not. One or two of the exceptions have raised constitutional questions that have heretofore been passed upon by the court. It appears that in all the cases 13 or 15 different exceptions were filed, but a number of them have not been insisted upon at the argument. I do not think the latter require any particular notice. Two or three of them are mere variations of the same general propositions; and when we sift them down, and get at the essence, they are really only three or four in number. In some of them the question made is embraced in two or more propositions. The first one that I will notice, based on alleged misconduct on the part of the commissioners in including in the park an amount of land the value of which, as shown by the appraisers in their report, is largely in excess of the appropriation by congress. That is not an exception based upon any misconduct of the commissioners to appraise, but it is based upon the alleged excess of authority on the part of the commissioners of selection. This objection amounts simply to this: That this court has no right to appraise the land because after the appraisement is made, and, by and through it, it is ascertained that the land is more than the commission to select had a right to take. In other words, the court has no right to discharge its duty because, after the duty is discharged, certain facts are discovered which is really a contradiction. The question naturally arises, how is it to be known that those lands are worth more than the law has provided for until the appraisement is completed? The restriction as to cost is not a restriction upon the duty of the court to appraise the land, but it is a restriction upon the provision for securing the land, which is only consummated by the payment of the money. The law is that the land shall be secured, provided that the total cost shall not exceed the money in the act appropriated. But it cannot be discovered whether or not the value is in excess of the appropriation until the court has discharged its duty by officially assessing the land. We think, therefore, that the objection in question does not go to the appraisement.

"The next exception is: The commissioners have disregarded the evidence. That is expressed in three propositions,—Fourth, because the land of the respondent is of the actual value in excess of that found by the commissioners; fifth, because the report as to the value is contrary to the evidence; sixth, because the commissioners, in appraising the value of the land, disregarded the evidence, and found the value, regardless of the testimony, at less than the actual value. In other words, the objection is that the finding of the appraisers is contrary to the evidence,—not contrary to the weight of the evidence, but contrary to the evidence,—and that raises the very question which I have in part discussed, viz. whether the court can review the finding of the appraisers upon the evidence as to value. I have already stated that, as a general rule, we are satisfied that the court has no right to review an appraisement and set it aside because of error of judgment on the part of the appraisers as to value. But another difficulty arises here. Suppose the court has the right to do that;

when is a verdict or finding said to be against the evidence? Suppose that four or five witnesses testify to an actual occurrence of which they are eyewitnesses; they are not contradicted; there is no reason for disbelieving them; and yet the verdict finds the very opposite of the fact to which they testify. In that case it could be said that the verdict was against the evidence. But that was not the character of the evidence offered in this case, which consists for the most part merely of opinions by so-called 'experts.' Now, nothing can be made plainer than that even an ordinary trial jury, and, still more, selected appraisers, have a right to discount such testimony as this, and to give it just such weight as they think it deserves. The supreme court have expressed themselves upon this subject in the case of Railway Co. v. Warren, 137 U. S. 348, 11 Sup. Ct. Rep. 96: 'In respect to such value the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate. True, in large cities, where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such personal property can ordinarily be determined with accuracy; but even there, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and the circumstances affecting values are readily ascertainable, common experience discloses that witnesses, the most competent, often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained. The jury is compelled to reach its conclusions by comparison of various estimates. Much more is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character.'

"I can conceive that, even in a case of this sort, a finding may be against the evidence. Suppose that the appraisement here largely exceeded the highest claim of the owners, or, on the other hand, had fallen far below the admission of value by the government, in such case it would be against the evidence. But here the appraiser's figures fall between the two estimates,—the witnesses' on behalf of the government on the one hand, and those on behalf of the owners on the other. The owners say that it is contrary to the evidence. They mean, of course, that it is contrary to their evidence, but it is not contrary to the whole evidence. It is supported by evidence on the part of the government in a certain sense; that is to say, the evidence on each side supports the finding as against the contention on the other side. The evidence before the appraisers was conflicting, and the result is simply an estimate based upon a comparison of the opposing opinions. It cannot be said that the result was contrary to the evidence.

"I will, for a moment, refer to an affidavit that was filed by Mr. Jones, one of the parties in interest, to the effect that in conversation with Mr. Seufferle, one of the commissioners, the latter said that they did not regard the evidence, but followed their own opinions. Now, we cannot go into a collateral inquiry about that. There has also been taken the affidavit of Mr. Seufferle, which contradicts Mr. Jones, and that is an end of this matter. But apart from that, we could only understand the affidavit, allowing for the misunderstandings of a casual conversation, as amounting to no more than evidence; that the commissioners did not feel bound by the evidence of other people, but had a right to exercise their own independent judgment. That is just what they had right to do; and, giving the affidavit the weight that we think it is entitled to, it does not prove any misconduct on the part of the commissioners, or that they did anything not strictly within their power and duty.

"Another ground of exception is misconduct on the part of counsel representing the government. This is found expressed in three or four different propositions, as follows: 'Because of the misconduct of the petitioner, the United States, in proceedings in this case prejudicial to said respondent, in this: that, under the constitution of the United States, the respondent is entitled to have a just compensation for the premises proposed to be taken, and to have the testimony of impartial and unprejudiced witnesses with reference to said value, and that the said petitioner disregarded the constitutional right of these respondents to have such impartial testimony, and procured and produced before said commission the testimony of witnesses who were not impartial, as the petitioner knew. The petitioner disregarded such constitutional right of this respondent, in this, to wit: (a) By the provisions of said act of congress the commission appointed to designate the lands to be embraced in said park were required to determine the value of the lands so designated. (b) The said commissioners embraced in said park nineteen hundred and eighty acres of land, the price to be paid by them for said land being limited by the act of congress to the sum of one million two hundred thousand dollars, including the expenses of condemnation. (c) The said commissioners, having designated the said nineteen hundred and eighty acres of land, then proceeded, as required by said act, to fix values, and did fix values thereon that were grossly inadequate, and which were refused by said respondents because of such gross inadequacy. (d) That, upon hearing before said commissioners to appraise the value of said lands, under the petition in this case, the said petitioner did not proceed to procure the testimony of witnesses to impar-

tially testify touching the values of said lands, but, on the contrary, placed a list of prices so fixed by said commissioners as aforesaid in the hands of divers persons proposed to be used as witnesses to testify in respect of said values, for the purpose of affecting the judgment of said persons as to values, and to guide them in reaching the values to correspond with the values that had been thus fixed by said commissioners, and by the said commissioners furnished to them. (e) Because said petitioner, after the filing of said petition and the appointment of said commissioners to assess the values, proceeded to make purchases of divers tracts of land which had been embraced within the proposed limits of said park, and the prices at which said purchases had been made were communicated to the said proposed witnesses with the purpose and view hereinbefore averred, and, having thus communicated to the said proposed witnesses the said prices aforesaid, the said witnesses met and consulted together, and substantially agreed upon the prices that they would testify to, (and said proposed witnesses were afterwards called upon to testify,) and did testify to prices grossly inadequate, and substantially corresponding with the prices which had been fixed by said commissioners, and which they had substantially agreed upon between themselves, which testimony was received and considered by said commissioners.' In other words, it amounts to this: That the attorney representing the government had communicated with their witnesses; that the three witnesses who were called upon on the part of the government looked at the lands, went over them, compared notes, and reached a conclusion as to value before they were put upon the stand to testify. Now, this testimony was exactly of the same character as the other testimony. It was merely the opinion of these alleged experts. I do not know of any limit as to the right of an expert witness to qualify himself to testify by making notes, and comparing his views with others. After all, he simply gives his opinion. It seems to me that he has a right to enlighten his judgment by any means which conduce to the formation of a reliable opinion. Suppose that a motion were made to set aside a verdict of a trial jury; how would it sound to allege, as a ground for it, that the plaintiff's expert witnesses had put their heads together and compared notes before they went on the stand, and especially how, if that fact had been brought out on cross-examination by the adverse party, and had been fully discussed as going to the credibility of the witness? It would be a very novel idea. This is certainly not a sufficient objection to the finding of the appraisers.

"These are substantially all the grounds of objection which are set out in the exceptions. At the argument counsel went somewhat further, and maintained that to confirm the appraisement would be to enter a judgment against the United States for the entire amount of the appraisement, and in violation of the limitation as to amount stated in the act under which the proceedings were instituted. In any course of judicial decision with which we are familiar in this latitude it has never been suggested that an appraisement of land taken for a state or the United States or a municipality or a private corporation amounts to a judgment against the parties seeking to have it confirmed. On the contrary, it has been held that the parties seeking the confirmation have a right to abandon the ground which has been selected, as, for instance, by a railroad company, and seek another location. That right certainly existed in Maryland, from which state our jurisprudence is derived. In the state of New York there is a statute which gives the owner a right of an action immediately upon the condemnation; but even there it was held that the condemnation might be set aside by statute. The general rule on this subject is stated in Lewis on Eminent Domain, (section 656,) under the head of 'The Right to Abandon after the Proceedings are Complete:' 'The weight of authority, undoubtedly, is that, in the absence of statutory provisions on the question, the effect of the proceedings in condemnation is simply to fix the price at which the party condemning can take the property sought, and that, even after confirmation or judgment, the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded.' If there could be any doubt upon that point, it is removed by the provision of this statute that the condemnation shall not be complete until the president approves of the prices, and by the limitation as to cost. As to the fact of confirming this appraisement, acting as an absolute judgment against the United States, I will say that this court has no power, under any circumstances, to render a judgment against the United States.

"We have gone through, then, with all the exceptions, and do not find that they are sufficient to justify us in setting aside the report of the appraisers, and we shall therefore confirm it.

"In regard to the claim of Mrs. Carpenter, represented by Mr. Robinson, there are two alternative appraisements. We do not now decide which one of the appraisements to adopt, and that will have to be settled by further evidence."

On the motion to dismiss the petition filed by the commissioners April 19, 1892, praying for an order authorizing them to pay into court the assessed values of the various parcels of land, the opinion of the supreme court of the District was as follows:

(May 9, 1892.)

"Mr. Justice JAMES. It is conceded by the commissioners that this statute must be regarded as a finality, and that no step can be taken either by themselves or by the

court or by the president, the validity or effect of which must depend upon further legislation. If it is not practicable and lawful to secure a park on Rock creek without doing some act which is not authorized by the statute, then the requisition of a park is not authorized at all. It is insisted, on the part of the owners of some of the parcels which the commissioners now propose to take, that this legal impossibility has now been ascertained, and that their authority and that of this court to proceed further in the premises has come to an end.

"We understand the argument to be substantially as follows: It was the intent of the legislature that the land shown on the recorded map was the thing to be taken. The authority to take applied, therefore, to that land, and to neither more nor less. But the taking of that land is subject to a condition that it shall be obtainable for $1,200,000. As it has been conclusively ascertained, in pursuance of the statute, that the only taking authorized at all is now impossible, there can be no taking.

"These propositions rest upon the theory that this statute shows, not a general intent that a park should be established, but only a particular intent that a certain designated tract of land should be taken for a park, provided it could be had for a certain price; and this construction of intent is based upon the contention that the recorded map was intended by the legislature to be, in effect, its own designation of the tract to be taken, so that the statute is mandatory to the effect that precisely the quantity of land shown on the recorded map must be taken as an entirety. This we understand to be a fair statement of the method by which the conclusion is reached that, if all the land exhibited on the recorded map cannot be had for the price limited by the statute, then nothing further can be done in the matter of a park. It is observable that some of the provisions of this act are inartificially expressed, but, when all of them are considered together, as, of course, they must be, the intent of the statute is unmistakable. We are of opinion that it expresses—First, an absolute intent that there shall be a park on Rock creek; second, that this park, thus absolutely provided for, shall not exceed a certain size, nor cost more than a certain sum. We are further of opinion that the subsequent provisions of this act, notably the provisions relating to the recorded map, were intended to be in furtherance of the intent that a park should actually be secured, though within restrictions as to size and cost, and were not placed there with the intent that they should upon any contingency operate to defeat the undertaking entirely. In other words, we are of opinion that the only fair and reasonable construction of this act is that it intends that a park not exceeding two thousand acres in area, and not costing more than the sum which congress appropriated for the accomplishment of that purpose, shall actually be secured, and intends, also, that the provisions of this statute shall operate as the means of accomplishing that end. We think the processes of interpretation and construction alike support this conclusion.

"The first section of the act provides 'that a tract of land lying on both sides of Rock creek, * * * of a width not less at any point than six hundred feet, nor more than twelve hundred feet, including the bed of the creek, of which not less than two hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road, and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park and pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of "Rock Creek Park:" provided, however, that the whole tract so to be selected and condemned under the provisions of this act shall not exceed two thousand acres, nor the total cost thereof exceed the amount of money herein appropriated.' The appropriation referred to is made in the following words of the sixth section: 'To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto, the sum of one million two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated,' etc. It may be added that the title of this act is 'An act authorizing the establishing of a public park in the District of Columbia.' We suppose it would be impossible to express more distinctly an absolute intent that a park should be established. Unless the absoluteness of the authority given by the broad language of this first section is expressly limited, and is expressly or necessarily made to be wholly a contingent or conditional authority by some subsequent provision, it must be held to be the fixed and controlling intention of congress that somewhere within the limitations of area and cost a park may be secured by the commissioners.

"It is contended on the part of some of the owners that this authority to take land and to establish a park is reduced to a conditional authority by the operation of the third section, which relates to the map showing the parcels of land to be taken, and providing that on the filing of that map those parcels should be held 'condemned' to be taken. It is insisted that the designation which the commissioners were authorized to make must be regarded, when made, as if they had been originally designated in the act itself. This contention involves, we think, a confusion of principles. It is true that an act done by one to whom authority to do it has been delegated has the same

validity as if done by the party who delegates the authority, and that, on this principle, a taking of private property for public use by one who is authorized by the legislature to select and take land is as lawful as if the legislature had taken it, and that, in this sense, the taking is to be regarded as done by the legislature; but the contention in this case is to the effect that, while discretion to elect between several courses was given by the legislature, we are to hold that when the discretion has been exercised, and the election has been made, the particular choice made was one which the agent was originally commanded to make. It is only on that theory that this statute can be supposed to say to the commissioners: 'It is our intent that you shall take only the following specified tract of lands, and you are authorized to take that tract only in case you can get it for a certain price.'

"We know of no principle on which an accomplished selection which the commissioners had uncontrolled discretion to make can by this sort of relation be constructively put into the statute as an original provision to the effect that they had no discretion, but had only authority to do a particular thing; that is to say, authority in this case to obtain a tract made up of all the parcels shown on this map, and to obtain neither more nor less. It is difficult to understand how the very exercise of discretionary power should work a limitation of the original authority. Another ground of objection is that the selection shown by the recorded map constitutes, at all events, a case of exhausted power; that the commissioners have defined and 'located' once for all a park site, and now have no further power of selection or alteration of that location. If this were a correct conclusion, we should have before us a specimen of legislation without parallel. The statute authorizes considerable expenditures out of the appropriation to be made before it can be ascertained that the whole of the lands shown on the map cannot be had for the money appropriated. Many months must inevitably be—as in fact, they have been—consumed in ascertaining the values of these parcels; and yet it is contended that, if it should appear by the appraisement, after all these expenditures out of the appropriation, especially after some of the lands had been purchased and paid for, that the commissioners had placed on the recorded map more lands than the appropriation would pay for, it was the intent of the legislature that thereupon the authority of the commissioners should end, and the whole undertaking should come to naught. Is this a reasonable construction of the statute? The second section provides for 'a commission to select the land for said park, of the quantity and within the limits aforesaid;' namely, within the limits of two thousand acres, and twelve hundred thousand dollars of cost. Is it to be supposed that this general power of selection was intended to be exhausted by one selection, if it should appear that the selection first made could not be wholly carried out by purchase? Authority to select the land for a park was given in order that there might be a park, and in order that the lands selected should be suitable for that purpose. It was given in order that an important end might be achieved. Would it be reasonable to hold that authority to reach this end was exhausted by one effort to reach it? No such rule of exhausted power is applied by the courts even to a first location of a railroad line if the second location does not amount to an attempt to construct a road that has not been authorized; but, if it had been actually so applied, we should hold that this theory of exhausted power was not applicable to this statute. Rules of construction are sometimes spoken of as if there were actual rules of law by which the meaning and intent of statutes are to be ascertained, but there are no such restrictions upon construction. The intent of this statute can be gathered from its own provisions, and from its special purposes; and we find nothing in these provisions or purposes which indicates that the authority of these commissioners is limited to a single exercise of discretion. It was from the beginning in contemplation of this act that they might find when their selections came to be appraised that they could not obtain all of the selected lands for the amount of the appropriation. We hold that it was therefore in contemplation of this act that in order that they might accomplish the general intent of the statute, which it was their business to subserve, they should have authority to amend their work by abandoning such parcels as they were not authorized by the appropriation to purchase. We think the selection which they now present to us, with the approval of the president, conforms strictly to the intention of the act."

S. Shellabarger, J. M. Wilson, and T. A. Lambert, for plaintiffs in error. R. Ross Perry, C. C. Cole, and Hugh T. Taggart, for defendant in error.

*297 *Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.

It is true that, in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise and recreation, but places on which the owners of domestic animals might pasture them in

common, and they were generally laid out as a part of the original plan of the town or city.

It is said, in Johnson's Cyclopaedia, that the Central park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure ground for rest and exercise in the open air. However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.

The validity of the legislative acts erecting such parks, and providing for their cost, has been uniformly upheld. It will be sufficient to cite a few of the cases. Commissioners v. Armstrong, 45 N. Y. 234; In re Commissioners Central Park, 63 Barb. 282; Owners of Ground v. Mayor of Albany, 15 Wend. 374; Holt v. Somerville, 127 Mass. 408; Foster v. Commissioners, 131 Mass. 225, 133 Mass. 321; County Court v. Griswold, 58 Mo. 175; Cook v. Commissioners, 61 Ill. 115; Kerr v. Commissioners, 117 U. S. 379, 6 Sup. Ct. Rep. 801. In these and many other cases it was, either directly or in effect, held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use.

*298 *In the case cited from the Missouri Reports, where the legislature had authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis county, situated in the eastern portion of the county, near to and outside of the corporate limits of the city of St. Louis, it was held that this was a public use, notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the act was not unconstitutional.

The adjudicated cases likewise establish the proposition that, while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

A distinction, however, is attempted in behalf of the plaintiffs in error between the constitutional powers of a state and those of the United States, in respect to the exercise of the power of eminent domain, and this distinction is supposed to be found in a restriction of such power in the United States to purposes of political administration; that it must be limited in its exercise to such objects as fall within the delegated and expressed enumerated powers conferred by the constitution upon the United States, such as are exemplified by the case of post offices, customhouses, courthouses, forts, dockyards, etc.

We are not called upon, by the duties of this investigation, to consider whether the alleged restriction on the power of eminent domain in the general government, when exercised within the territory of a state, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia, over whose territory the United States possess not merely the political authority that belongs to them as respects the states of the Union, but likewise the power "to exercise exclusive legislation in all cases whatsoever over such District." Const. U. S. art. 1, § 8, cl. 17. It is contended that, notwithstanding this apparently unlimited grant of power over *the District, conferred in the constitution itself, there was a limitation on the legislative power of the general government contained in the so-called "act of cession" by the state of Maryland, (Act 1791, c. 45,) a proviso to which is in the words following: "Provided, that nothing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States." It is said that the acceptance by the United States of the grant constituted a contract between Maryland and the United States, whereby, in view of the foregoing language, the landowner was to be protected against any exercise by the general government of the sovereign power of eminent domain. It is sufficient to say that the history of the transaction clearly shows that the language used in the Maryland act referred to such persons as had not joined in the execution of a certain agreement by which the principal proprietors of the Maryland portion of the territory undertook to convey lands for the use of the new city, and their individual rights were thus thought to be secured. The provision had no reference to the power of eminent domain, which belonged to the United States as the grantee in the act of cession.

This position, contended for by the plaintiffs in error, was raised in the case of Chesapeake & O. Canal Co. v. Union Bank of Georgetown, in the circuit court of the United States for the District of Columbia, and Cranch, C. J., said: "The eighth objection is that, by the Maryland act of cession to the United States of this part of the District of Columbia, (Act 1791, c. 45, § 2,) congress is restrained from affecting the rights of individuals to the soil, otherwise than as the same should be transferred to the United States by such individuals; and it is contended that this prohibits the United States from taking private property in this District for public use, and that the right of sovereignty, which Maryland exercised, was not transferred. We think it is a sufficient answer to this objection to say that the United States do not, by this acquisition or by the

302 charter to the Chesapeake & Ohio Canal Company, claim any right of property in the soil. They only claim to exercise the power, which belongs to every sovereign, to appropriate, upon just compensation, private property to the making of a highway, whenever the public good requires it." 4 Cranch, C. C. 75, 80.

But this contention can scarcely have been seriously made in view of the explicit language of the Maryland act in its second section "that all that part of said territory called 'Columbia,' which lies within the limits of this state, shall be, and the same is hereby, acknowledged to be forever ceded and relinquished to the congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the constitution of government of the United States." Mattingly v. District of Columbia, 97 U. S. 687, 690; Gibbons v. District of Columbia, 116 U. S. 404, 6 Sup. Ct. Rep. 427.

Proceeding upon the conclusion that the United States possess full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia, we come to a consideration of certain objections, taken in the court below and urged here, to the validity of the statute itself, and to the proceedings under it.

There are several features that are pointed to as invalidating the act. The first is found in the provision appointing two members of the park commission, and the argument is that, while congress may create an office, it cannot appoint the officer; that the officer can only be appointed by the president, with the approval of the senate; and that the act itself defines these park commissioners to be "public officers," because it prescribes that three of them are to be civilians, to be nominated by the president and confirmed by the senate. This, it is said, is equivalent to a declaration by congress that the three so sent to the senate are "officers," because the constitution provides only for the nomination of officers to be sent to the senate for confirmation; and that it hence follows that the other two are likewise officers, whose *303 appointment should have been made by the president and confirmed by the senate. As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the president, and confirmed by the senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the president and confirmed by the senate. It cannot be doubted, and it has frequently been the case, that congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

It is true that it may be sometimes difficult to say whether a given duty, devolved by statute upon a named officer, has regard to the civil or military service of the United States. Wales v. Whitney, 114 U. S. 564, 569, 5 Sup. Ct. Rep. 1050; Smith v. Whitney, 116 U. S. 167, 179, 181, 6 Sup. Ct. Rep. 570. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

The second objection made to the validity of the act is because of certain functions to be performed by the president, which the objection characterizes as judicial, and hence beyond his legal powers, and as incompatible with his official duties. The duties prescribed to the president are the appointment of members of the park commission; the approval of the price to be given for lands where an agreement has been had between the owners and the commission; and, if an agreement is not made, and a value is put upon lands by appraisers appointed under the act, the decision whether such value is reasonable. The appointment of the commission is plainly an executive duty, and the approval of the value or price, whether fixed by agreement or appraisal, cannot be said to be a judicial act. What the president decides is not whether the value is reasonable as respects the property owner, but reasonable as regards the United States. Similar provisions were contained in the act of June, 1890, condemning land for a city post office, *303 and in the act of August 30, 1890, authorizing the acquisition of land for the use of the government printing office. The president has nothing to do with fixing the price; but, after that has been done, by agreement or by appraisers, he must decide whether the United States will take the land upon such terms, or, in other words, whether such value is reasonable.

The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or, in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by congress not to go beyond a certain aggregate expenditure cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum

beyond which expenditures shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to.

A further objection is made to the validity of the act by reason of the sixth section, which provides for the assessment of benefits resulting from "the location and improvement of said park" upon lands so especially benefited.

The cases heretofore cited to show that the erection of parks in cities is a public use, in a constitutional sense, were, most of them, cases in which it was likewise held that it is competent for the legislature, in providing for the cost of such parks, to assess a proportionate part of the cost upon property specially benefited; and we need not repeat the citations.

No special request, on the subject of the legal effect of the provision in respect to special benefits, seems to have been made to the court below, and there is no specific assignment of error as to it; nor does it appear *303 that any person having property actually assessed for special benefits is a party as plaintiff in error. We are therefore relieved from any extended consideration of this feature of the act.

Certain questions arose during the trial of the case below which are brought to our attention by bills of exception. One of these was as to the form of the oath administered to the appraisers. The defendants asked the court to administer an oath to "appraise the value of the respective interests of all persons concerned in the land within the Rock Creek park upon the whole evidence, guided by the rules of law as furnished by this court." This the court declined to do, and prescribed an oath to "faithfully, justly, and impartially appraise the value or values of said parcels of land, and of the respective interests therein, to the best of their skill and judgment."

As the statute did not prescribe any form for the oath, we do not perceive that the court exercised its discretion wrongfully in prescribing the form of oath that was used. The purpose of the defendants, in asking for the imposition of an oath in the form presented by them, would appear to have been to restrain the appraisers from being influenced by their own inspection of the lands, and to restrict them to the evidence or estimates that should be adduced before them. Whether this be so or not, the oath actually administered did not, as we understand it, leave the appraisers "at liberty at their discretion to disregard the evidence altogether, and to make their appraisement without regard to the evidence," but their duty was to view the lands, hear the evidence, and fix the values.

Complaint is made, in another exception, of instructions given and refused by the court in instructing the commission. We shall briefly consider this objection. The instruction given was as follows: "The commissioners are instructed that they shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act of congress of the 27th of September, 1890, authorizing said park; but any recent bona fide sales, made before the passage of said act, of lots similarly situated and adapted to similar uses, or recent bona fide contracts made before the passage of said act, with landowners, for other lands in the vicinity similarly situated, may be considered by the commissioners, looking at all the circumstances of these sales or contracts in the determination of the ultimate question of value."

A further instruction was given in the following terms: "The commissioners are further instructed that they shall be governed in their inquiry in making their valuations by the following considerations: What are the lands within the park limits now worth in cash, or in terms equivalent to cash, in the market, if a market now exists for such lands? What would any one needing lands for residence, agriculture, or any other purpose pay for them in cash? They are not at liberty to place a value upon these lands upon the basis of what one might be willing to buy them on time for purely speculative purposes; nor can they consider the value given them by the establishing the park; and they are to make their valuation without consideration of the fact that a specific amount of money is appropriated by the act of congress of 27th September, 1890."

The instructions asked for by the plaintiffs in error were as follows: "The commissioners shall estimate each parcel of land at its market value, and are instructed that the market value of the land includes its value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; * * * that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement, or its intrinsic character, it is peculiarly adapted to some particular use,—e. g. to the use of a public park,—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation."

The theory of appraisement asked for by the plaintiffs in error differed from the one adopted by the court chiefly in two particulars—First, it treats the case as if it were one before an ordinary jury, whose action is determined by the evidence adduced; and, *304 second, that the evidence might have reference to and include any supposed or specu-

lative value given to the property taken by reason of the act of congress creating the park project. Whereas the court regarded the functions of the appraisers as including their own judgment and inspection of the lands taken, as well as a consideration of the evidence adduced by the parties.

We approve of the instructions given by the court in both of these particulars.

The scope of action of the board of commissioners was plainly, by the terms of the act and the nature of the inquiry, not restricted to a mere consideration of the evidence and allegations of the parties, but included the exercise of those powers of judgment and observation which led to their selection as fit persons for such a position.

While the board should be allowed a wide field in which to extend their investigation, yet it has never been held that they can go outside of the immediate duty before them, viz. to appraise the tracts of land proposed to be taken, by receiving evidence of conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had. Kerr v. Commissioners, 117 U. S. 380, 6 Sup. Ct. Rep. 801.

In connection with this part of the subject, we may appropriately consider the objection made to the action of the court below in declining to review and pass upon the evidence that had been produced before the commissioners.

If, as we have said, the court below was right in refusing to restrict the commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption, or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of the lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made.

*The rule on this subject is so well settled that we shall content ourselves with repeating an apt quotation from Mills on Eminent Domain, (§ 246,) made in the opinion of the court below: "An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions."

A number of exceptions were filed to the action and conduct of the commissioners, but we think that they raised questions covered by the observations already made, and were properly disposed of by the court below.

Whether the plaintiffs in error were entitled to be allowed, in the assessment of damages, for the value of prospective gold mines in tract 39, designated on the map of the park, was a question mooted at the trial, and the action of the court in striking out the testimony offered to show such value, and in holding that, if there are any deposits of gold in this ground, they are the property of the United States, is complained of in the 7th, 8th, and 9th assignments of errors. The history of the tract in question was gone into at great length, and various patents of the province and state of Maryland were put in evidence. The court below held that, as by the grant of Charles I. to Lord Baltimore, "all veins, mines, and quarries, as well opened as hidden, already found, or that shall be found, within the regions, islands, or limits aforesaid, of gold, silver, gems, and precious stones," passed to the grantee, he yielding unto the king, his heirs and successors, "the one-fifth part of all gold and silver ore which shall happen, from time to time, to be found;" and as the confiscation of the proprietary's title in 1780 vested the same *307 in the state of *Maryland; and as also the royalty of one fifth part of the gold and silver reserved to the king had also become, by the Revolution, vested in the state,—consequently the United States succeeded to the state's title by the act of cession of 1791.

The discussion by the court below was so elaborate and careful that no useful purpose would be served by entering minutely into the subject in this opinion. It is sufficient to say that our examination of the evidence contained in the record fails to disclose any error in the ruling of the court below respecting the ownership of a supposed gold mine in tract 39, and we adopt its opinion as presenting a full and satisfactory treatment of the question.

*The twelfth and thirteenth assignments al- *308 *309 lege error in the court's action in confirming the report of the commissioners *of appraise- *310 ment as to a portion of the land embraced in the map of the proposed park, leaving other portions of that land *unacted upon. *311 We understand this objection to refer to the course of the park commissioners in securing the final action *of the president upon a portion only of the lands described in the map as originally filed; and the contention *312 is that the *map was a finality, so *hat, if it *turned out that the sum prescribed by the act of congress would not suffice to pay for

all the tracts mentioned in the map, or if, for any other reason, the commissioners should exclude from their final selection any tract originally included in the map, the whole proceeding would be vitiated, and the purpose of the act defeated. We are unable to see the force of this view. The function of the map was not to finally commit the commissioners to taking all the parts included in it, but was to facilitate their proceedings in dealing with the owners. Congress could not have meant that the validity of the whole scheme should depend upon the accuracy with which the commission should define in advance the several tracts with whose owners negotiations were to be had. It seems to us that it was a sufficient and reasonable compliance with the law if the map, as finally acted upon by the president, showed the location, quantity, and character of the parcels of land to be taken, with the names of their owners.

The fifteenth and sixteenth assignments, which complain of the course of the court in adopting and acting upon the decision of the president of the United States, approving the appraised values of part only of the land selected for the Rock Creek park, present the same contention in another form, viz. that the court and commissioners were concluded by the enumeration of tracts contained in the map when first prepared, and call for no further remarks.

The fourteenth assignment charges the court with error in refusing to allow interest on the amounts assessed as the values for lands selected for the Rock Creek park. The argument shows that the interest claimed was for the time that elapsed between the initiation of the proceedings and the payment of the money into court. The vice of this contention is in the assumption that the lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map. Interest accrues either by agreement of the debtor to allow it for the use of money, or in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course, neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained till the confirmation of the report. Then some of those entitled to the assessments accepted their money; the plaintiffs in error declined to accept, and the amounts assessed in their favor were paid into court, which must be deemed equivalent to payment.

It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority. Reed v. Railroad Co., 105 Mass. 303; Kidder v. Oxford, 116 Mass. 165; Hamersley v Mayor, 56 N. Y. 533; Norris v. Philadelphia, 70 Pa. St. 332; Chicago v. Palmer, 93 Ill. 125; Phillips v. Commissioners, 119 Ill. 626, 10 N. E. Rep. 230.

These various contentions and objections did not escape the attention of the court below, but were disposed of, as they arose in the proceedings, in opinions of great research and ability, which appear in the record. We have briefly reviewed them here, not to add to what was so well expressed in those opinions, but to show that the questions so zealously and ably pressed upon us have not been disregarded.

Our conclusion is that we find, in the legislation creating the park and in the proceedings under it, no infringement of the constitutional or legal rights of the plaintiffs in error, and the judgment of the court below is accordingly affirmed.

(147 U. S. 490)

THORINGTON v. CITY COUNCIL OF MONTGOMERY.

(February 6, 1893.)

No. 1,080.

SUPREME COURT — JURISDICTION — APPEALS FROM STATE COURTS — FEDERAL QUESTION.

In a suit in the chancery court of Alabama to enjoin a city from selling certain lots for taxes, a motion was made to compel the city to produce in court certain depositions, one of which contained complainant's testimony, or, in case this could not be legally done, that complainant be given reasonable opportunity to establish said testimony. The record failed to show that this motion was called to the court's attention, but at a subsequent term the cause was submitted. When the argument had been nearly completed, an application was made to set aside the submission, in order that the motion might be considered. The chancellor ruled that the deposition of complainant had been taken improperly, and that, in view of the fact that there had been ample time during the years the cause was pending to procure the depositions of the witnesses, and the further fact that the submission was made without any application for a continuance to get their depositions, the motion to set aside the submission should be denied. On an appeal to the supreme court of the state it was held that the refusal of the chancellor to set aside the submission was a matter within his discretion, and could not be reviewed. *Held*, that these decisions called in question no rights of plaintiff under either the fifth or fourteenth amendments to the constitution of the United States, and that no federal question was passed upon or necessarily involved, so as to give the supreme court jurisdiction of a writ of error.

In error to the supreme court of the state of Alabama.

Bill in equity in the chancery court of Montgomery county, Ala., by Sallie G. Thor

ington against the city council of Montgomery to enjoin the sale of certain lots for taxes. A decree was entered dismissing the bill, which was affirmed on appeal to the state supreme court. See 10 South. Rep. 634. Plaintiff brings error. Writ dismissed.

H. C. Semple and W. Hallett Phillips, for the motion. J. M. Chilton, opposed.

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

The opinion of the supreme court of Alabama in this case is given in the record, and reported in 10 South. Rep. 634, and refers to Winter v. City Council, 79 Ala. 481; Thorington v. City Council, 82 Ala. 591, 2 South. Rep. 513; and Id., 88 Ala. 548, 7 South. Rep. 363. It appears that a decree was rendered in favor of the city of Montgomery and against Mary E. Winter and others by the chancery court at Montgomery in August, 1884, for taxes due for previous years on six lots of land in the city, and a sale directed if the amount were not paid, which decree was affirmed December 10, 1885; that in October, 1885, certain of the lots were ordered to be sold for delinquent taxes for the year 1884; and that in November, 1885, three of the lots were sold under the decree, and bought in in the name of Mrs. Thorington, Mrs. Winter's daughter, and the taxes for 1884, interest, charges, and costs were paid. On January 25, 1886, Mrs. Thorington filed a bill in the chancery court seeking to enjoin the sale of the three lots, with the others, by the city, to satisfy the total sum of unpaid taxes ascertained by the decree. The bill was dismissed, but on appeal the decree was reversed, and, the case having been remanded, the bill was again dismissed. On a second appeal the decree was again reversed on the ground that the effect of the purchase by Mrs. Thorington under the tax sale was to cut off all prior liens for taxes for the years preceding 1884, but it was observed in the opinion that if it were shown that the money with which the lots were purchased was not, in fact or legal effect, Mrs. Thorington's, or that there was collusion or a secret trust for the taxpayer, then the doctrine of estoppel would not apply. The cause having again been heard by the chancery court, the bill was again dismissed, and on the third appeal by Mrs. Thorington the decree was affirmed by the supreme court, to which judgment this writ of error was sued out.

We cannot find that any federal question was raised in the proceedings in the chancery court. The only error assigned in the supreme court was that "the court below erred in rendering the final decree made by it dismissing appellant's bill, and in overruling objections to testimony." It is stated in the writ of error that in the cause "between Sallie G. Thorington, appellant, and the city council of Montgomery, appellee, wherein was drawn in question appellant's right, under article 5 of the amended constitution of the United States, to have the testimony of her, the said Sallie G., which had been taken under a duly-issued commission in that behalf, read in her behalf on the trial of the said cause, and the decision was against her right and claim to be so heard, a manifest error hath happened," etc.

The fifth amendment operates exclusively in restriction of federal power, and has no application to the states, but in the brief for plaintiff in error it is said that the fourteenth amendment was violated in her case in respect of the provision, "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The controversy seems to have been as to the good faith of the transaction by which the title to the property was transferred to Mrs. Thorington at the tax sale, it being contended by the city that the purchase was a mere device to evade the indebtedness for taxes, and that the property was still chargeable with such indebtedness. This was the conclusion of the chancery court, and its judgment was affirmed by the supreme court. We find from the record, the opinion of the supreme court, and the decision of the chancellor, that at the April term, 1890, of the chancery court a motion and affidavit on behalf of plaintiff were filed April 14, 1890, for an order to compel the city to produce in court certain testimony alleged to have been taken by respondent, "or, if that may not be consistently and legally done, that reasonable opportunity be given complainant to further justify her case herein by allowing complainant reasonable opportunity to establish the said testimony so taken for use in complainant's behalf in this cause." The cause was not tried at that term, nor did it appear that any action was taken on the motion, or that the attention of the court was called to it. The case was submitted to the chancellor, October 15, 1890, at the October term, and on October 16, when the argument had been nearly completed, an application was made that the submission be set aside, in order that the motion made at the last term of the court might be considered. It was stated by the chancellor that at a former time counsel had asked the court to instruct the commissioner to return a deposition he had taken to him, and the commission to the court, as having been improperly issued, and that the chancellor instructed the commissioner to take whatever action as to the deposition he might choose, but in no event to permit either party to the suit to examine it. The chancellor held that the deposition was taken improperly, and that it was the right of complainant's counsel to ask the court that it should not be subjected to the scrutiny of defendant's counsel, but that if it were then before the court it could not be used for any purpose unless in the mean time the deposi-

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tion of the witness had been subsequently taken, and the former deposition should be offered to contradict any of the statements made in the latter. The chancellor added: "It cannot be disputed that if any one desired to take action in the matter to get the deposition of either of these witnesses there has been ample time to have done so. The submission in this cause was made without any application for a continuance in order to get the deposition of these witnesses, one of whom is the complainant. The complainant has never taken any steps during the time this case has been continued from year to year to get her own or her mother's deposition in the case. Under these circumstances, the motion to set aside the submission on
*494 that ground is denied."

*As to this matter, the supreme court held that there was nothing which the court could review, that no ruling was shown to have been had or asked on the motion in April, 1890, although the cause was continued, and that the application made October 16, 1890, was addressed to the court's discretion, and could not be revised.

This decision upon a matter of practice under the state procedure did not draw in question any right complainant had under the constitution or laws of the United States. It affords no basis for the contention that her right to be heard in her own behalf was denied, and we are of opinion that not only was no federal question brought to the attention of the state courts, but that none such necessarily arose or was decided. Writ of error dismissed.

(147 U. S. 431)

UNITED LINES TEL. CO. et al. v. BOSTON SAFE-DEPOSIT & TRUST CO.

(January 30, 1893.)

No. 106.

CORPORATIONS—CONTRACTS—ULTRA VIRES—CONSOLIDATION—MORTGAGES ON AFTER-ACQUIRED PROPERTY—PRIORITY.

1. Two telegraph companies, A. and B., made a written agreement whereby B. was to build and equip certain lines, and connect them with the lines of A. A. was to issue and deliver to B. its bonds secured by a mortgage on all its property, including the lines contracted for. On the next day B. agreed with the stockholders of A. to exchange these A. bonds for A. stock in equal amounts. The bonds were issued and exchanged as agreed; B. thereby getting control of A., electing its own officers to the offices of A., and managing the two companies as one concern. The new lines were built in part by B., and connected with the A. system; B. raising the money therefor by issuing its own bonds secured by a mortgage covering after-acquired property. This mortgage was not recorded until after the recording of the A. mortgage. B. was a New York corporation. *Held*, that the agreements, and the acts done in pursuance thereof, were not ultra vires in respect to B.

2. There was nothing in these agreements contrary to law or good morals.

3. The act of connecting the new lines with the lines of A., and their use as part of the A. system, was a sufficient delivery of them by B. to A., under the contract; and the new lines then became subject to the A. mortgage, and the lien thereof took precedence of the B. mortgage.

4. A foreclosure sale of the new lines under the B. mortgage, or the sale of part thereof under a judgment, would not affect the rights of the A. mortgagees; they not having been parties to either suit.

Mr. Justice Field and Mr. Justice Brewer, dissenting.

Appeal from the circuit court of the United States for the southern district of New York.

In equity. Bill by the Boston Safe-Deposit & Trust Company, as trustee under a mortgage, against the United Lines Telegraph Company, Edward S. Stokes, and others, to obtain possession of certain telegraph lines. Decree for complainant. 36 Fed. Rep. 288. Defendants Stokes and the United Lines Telegraph Company appeal. Affirmed.

R. G. Ingersoll, for appellants. Wm. G. Wilson and Hamilton Wallis, for appellee.

Mr Justice BLATCHFORD delivered the opinion of the court.

On the 28th of August, 1883, a written agreement was made between the American Rapid Telegraph Company, (hereinafter called the Rapid Company,) a Connecticut corporation, and the Bankers' & Merchants' Telegraph Company, (hereinafter called the Bankers' Company,) a New York corporation. It recited that the Rapid Company was desirous of extending its telegraph system so as to connect Buffalo, N. Y., by a northerly route, with Chicago, Ill.; Pittsburgh, Pa., via Columbus, Ohio, Indianapolis and Terre Haute, Ind., with St. Louis, Mo.; Columbus, Ohio, with Cincinnati, Ohio, and Louisville, Ky.; and Terre Haute, Ind., with Chicago, Ill.; and that the Bankers' Company was in a position to contract for, and cause the construction or procurement, by purchase or otherwise, of portions or all of said lines. The agreement then provided as follows:

(1) The Bankers' Company agreed to construct or acquire, and to deliver to the Rapid Company, a four-wire telegraph line connecting the before-mentioned points, and to average not less than 35 poles, 30 feet long, to the mile, with two No. 6 and two No. 8 gauge galvanized extra BB wires thereon; to procure all rights of way; to fit up and furnish all offices; and to complete the whole within one year from the above date.

(2) The Rapid Company agreed to issue and deliver to the Bankers' Company, as soon as might be, $3,000,000 par value of first mortgage gold bonds, with coupons attached for 6 per cent. interest from March 1, 1884, to September 1, 1893, payable semi-annually; the bonds to be secured by a mortgage dated September 1, 1883, covering all the franchises and property, including patents, of the Rapid Company, "as now owned by it, or hereafter to be acquired by it, including the lines and property to be constructed or acquired under the provisions of this contract."

(3) The floating debt of the Rapid Company, as a confidential obligation, having preference as to lien and payment before the said $3,000,000 of bonds, was to be reduced by the appropriation of the assets of the Rapid Company thereto; and the balance then remaining unpaid, not exceeding $100,000, was assumed by the Bankers' Company. (4) Any difference regarding the interpretation or fulfillment of the agreement should be submitted to the decision and determination of Frederic H. May, whose decision should be final, and binding on both companies.

*433 On the 29th of August, 1883, a written agreement was made between the Bankers' Company and George S. Bullens, of Boston, Mass., holding for himself and others a majority in amount of the capital stock of the Rapid Company. That agreement referred to and recited the terms of the agreement of August 28, 1883, before mentioned; that the Bankers' Company was desirous of exchanging the whole or a large portion of the $3,000,000 of bonds for the capital stock of the Rapid Company; and that Bullens, acting for himself and associates, was willing to make such exchange. It then provided as follows: (1) The Bankers' Company obligated itself, as soon as it received the $3,000,000 of bonds of the Rapid Company, under the agreement of August 28, 1883, to deposit the same forthwith in the hands of Bullens, as trustee, and, under a letter of instructions to him, to hold them for exchange, dollar for dollar, with himself or others, for the stock of the Rapid Company; said stock, as soon as received by the trustee, to the extent of 51 per cent., to be handed over at once to the Bankers' Company; the balance of such stock, so received in exchange for bonds, or the balance of the bonds, if any, not exchanged, was to be held by Bullens, as trustee, until the completion of the lines of telegraph agreed to be built by the Bankers' Company under the agreement of August 28, 1883, and until the payment of the floating debt of the Rapid Company, and then handed over to the Bankers' Company; and the letter was to authorize Bullens to continue the exchange of bonds for stock up to, but not beyond, 60 days from August 29, 1883. (2) Bullens agreed to deliver to himself, as trustee, for the purpose of exchanging for the bonds, not later than 10 days from August 29, 1883, at least 51 per cent. of the total stock of the Rapid Company then outstanding.

The Rapid Company had been formed for the construction and operation of a system of telegraph lines. By the summer of 1883, it had constructed and equipped lines from Boston, Mass., to Cleveland, Ohio, and Washington city; but, although its receipts from business then exceeded its outlay for operating expenses, it found that it needed extensions to Chicago, Cincinnati, St. Louis, and Louisville, and the intermediate points. It turned its attention to the Bankers' Company, which, though having only a line from New York to Washington city, was doing a good business, and had in it men of means. It was supposed by both companies that each had something of advantage to offer to the other. Accordingly the agreement of August 28, 1883, was made, to connect Buffalo with Chicago, Pittsburgh with St. Louis, Terre Haute with Chicago, and Cincinnati with Louisville.

*434 The agreements of August 28 and 29, 1883, were forthwith acted upon. The mortgage of the Rapid Company to secure the $3,000,000 of bonds was made September 15, 1883, to the Boston Safe-Deposit & Trust Company, a Massachusetts corporation, (hereinafter called the Boston Company,) as trustee, and by its terms covered all the property of the Rapid Company, as incorporated by Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland and Ohio, or which might thereafter be acquired by those corporations, together with the lines of telegraph intended to be constructed or acquired for the Rapid Company, so as to connect Buffalo with Chicago, Pittsburgh with St. Louis, Columbus with Cincinnati, and Louisville and Terre Haute with Chicago, and all property then owned or thereafter acquired for use in connection with said lines or property, or any of them. The $3,000,000 of bonds were issued to the Bankers' Company, and it transferred them at once to Bullens. Bullens exchanged them for the stock of the Rapid Company, so far as the holders of such stock elected to make the exchange, and transferred the 51 per cent. of the stock to the Bankers' Company, retaining the remainder of the exchanged stock and all the unexchanged bonds. The Bankers' Company entered at once upon the performance of its part of the agreement of August 28, 1883, made a contract with telegraph constructors to build the new lines, and sent out men to locate those lines, under the supervision of Frederic H. May, who was the general manager of the Rapid Company.

All went on smoothly until May, 1884, when the Bankers' Company became financially embarrassed. At that date the line from Cleveland to Chicago had been substantially completed. The line between Freeport, Ohio, and Hammond, on the state line *435 between Indiana and Illinois, had been built by contract with Baldwin & Miller. The line between Cleveland and Freeport, Ohio, was built by a contractor named Farnsworth; and the line between Hammond and Chicago was built by employes of the Bankers' Company, without the intervention of any contractor. The four wires called for by the agreement of August 28, 1883, were connected through the different parts above mentioned, and the line was inspected, and found to be complete. The line ran into the city of Cleveland over the poles which

carried out of that city the line of the Rapid Company to Pittsburgh and the east, and the two lines met, and were connected by the same switchboard, in the Cleveland office. In June, 1884, returns were made to New York of the business done by the offices between Cleveland and Chicago. The four wires above mentioned were working through to New York, and so continued to do, with the exception of a brief interval in August, 1884, down to December 30, 1887, when the suit now before us was commenced.

In July, 1884, the line between Pittsburgh and Terre Haute was nearly completed, but there were gaps in it in various places, and it had not been connected with the Rapid Company's system at Pittsburgh. The work upon it, so far as it had progressed, had been done by Baldwin & Miller, before mentioned, who stopped work in July or August, 1884.

Between the date of the agreement of August 28, 1883, and the month of July, 1884, the Bankers' Company or its stockholders acquired a majority in the board of directors of the Rapid Company, and elected or appointed the officers and managers of the Bankers' Company to the corresponding positions in the Rapid Company. Thus the same men controlled the corporate machinery and property of both companies. A practical union of the two properties was expected to result from the complete performance of the agreement of August 28, 1883; and hence the Bankers' Company proceeded to string additional wires over a large part of the original lines of the Rapid Company, the receipts of the business of both *430 companies went into a common treasury, and their operating expenses were paid from the same source. A considerable sum, also, was spent in the repair and improvement of the original lines of the Rapid Company. The mortgage by the Rapid Company for $3,000,000 was recorded in Ohio between October 12, and December 22, 1883.

On November 24, 1883, the Bankers' Company, as a New York corporation, and as a New Jersey corporation, and as a Pennsylvania corporation, and as a Maryland corporation, executed a mortgage to the Farmers' Loan & Trust Company, a New York corporation, as trustee, to secure $10,000,000 of bonds of the Bankers' Company, and conveying all its property, including its "stocks of other companies," and "situate within the states of New York, New Jersey, Pennsylvania, and Maryland, the District of Columbia, and within any other state or territory of the United States," then owned, or which might be thereafter acquired.

Default was made in the payment of the interest coupons which became due September 15, 1884, on the $3,000,000 of bonds of the Rapid Company. By the terms of the Rapid Company's mortgage, however, no proceedings for foreclosure could be begun until the default had continued for six months. On March 23, 1885, the Boston Company, trustee under the $3,000,000 mortgage, filed a bill in the circuit court of the United States for the district of Connecticut for the foreclosure of that mortgage.

One Austin G. Day having recovered a judgment in the supreme court of New York against the Bankers' Company, sequestration proceedings followed; and on September 23, 1884, Richard S. Newcombe and James G. Smith were appointed by that court receivers of the Bankers' Company in New York. Those receivers were permitted to assume possession and control of the entire property of the Rapid Company, including the new line between Cleveland and Chicago, which was then in full operation as a part of the Rapid Company's system, and they were permitted to do so without any remonstrance from the officers of the Rapid Company; those officers being in fact the officers of the Bankers' Company, and wholly in its interest. Smith, one of the receivers, was assistant general manager of the Bankers' Company, and also assistant general manager of the Rapid Company.

In the foreclosure suit in Connecticut the Boston Company applied for the appointment of a receiver of the Rapid Company's property. That application was opposed by the receivers of the Bankers' Company, and by Edward S. Stokes, as the holder of receivers' certificates issued by them, and also by the Rapid Company, represented by the same officers who had suffered those receivers to take possession and control of the property of the Rapid Company. In spite of this opposition the Connecticut court appointed Edward Harlan receiver of the property of the Rapid Company, and his receivership was extended over the whole property of that company by the courts of the other jurisdictions through which that property ran. Newcombe and Smith were succeeded as receivers by one James B. Butler, and he by John G. Farnsworth, who was appointed May 1, 1885, in an action brought by the Farmers' Loan & Trust Company to foreclose the $10,000,000 mortgage made by the Bankers' Company. In the latter suit, a foreclosure sale was had July 31, 1885, and Stokes bid the sum of $500,000 for the property of the Bankers' Company. By his direction that sale was completed by a conveyance of the property to the United Lines Telegraph Company, a New York corporation; the deed of the referee being dated August 10, 1885, and acknowledged and recorded November 14–16, 1885.

The suit now before us was brought in the circuit court of the United States for the southern district of New York, December 30, 1887, by the Boston Company against the Bankers' Company, the United Lines Company, Newcombe, Smith, Butler, Farnsworth, Stokes, and the Rapid Company, as a Connecticut corporation. It is founded on the

fact that there were conflicting claims to the title to the property covered by the terms of the $3,000,000 mortgage, and is brought in aid of the original suit in Connecticut, to determine those claims, and ascertain what property was included in the mortgage. It embraces issues as to the right and title of the Rapid Company, and of the plaintiff, as trustee under the $3,000,000 mortgage, to (1) those of the original lines of the Rapid Company called "reconstructed lines," which were in some measure repaired and rebuilt after the agreement of August 28, 1883; (2) the "strung wires," being wires strung upon the lines of the Rapid Company after the date of that agreement; and (3) the "western lines," or lines described in that agreement and built thereafter, so far as they were built.

After issue was joined in the present suit, proofs were taken, and the case was heard before Judge Wallace. His opinion was delivered September 17, 1888, (36 Fed. Rep. 288,) and a final decree was entered April 4, 1889, adjudging that (1) as to the reconstructed lines, they remained the property of the Rapid Company; (2) as to the strung wires, they belonged to the Bankers' Company; and (3) as to the western lines, the plaintiff having abandoned its claim to the unfinished southerly line between Pittsburgh and Indianapolis, and insisted only that it was entitled to the northerly line between Cleveland and Chicago, (because that line was built and completed for the Rapid Company under the agreement of August 28, 1883, and was subject to the Rapid Company's mortgage,) the court so held. It is only this last point of the decision, affecting the line between Cleveland and Chicago, that is now under review, and the only appellants are the United Lines Company and Stokes.

The United Lines Company claims the property in question under its purchase on the decree of foreclosure of the $10,000,000 mortgage of the Bankers' Company, and asserts that its title is paramount to that of the plaintiff.

The answer of Stokes in the suit is a joint answer with the United Lines Company, and alleges that part of the property in controversy was sold on a judgment of the court of common pleas of Cuyahoga county, Ohio, and that Stokes became the purchaser of it at that sale. The opinion of Judge Wallace says that as it appears that that sale was set aside and vacated as void, by an appellate court having jurisdiction, and as Stokes sets up in his answer no other right or claim, the controversy is reduced to the single question of title to the property in dispute as between the plaintiff and the United Lines Company.

The circuit court said, in view of the two agreements of August, 1883, and of the testimony, that it was the understanding on the part of all concerned that the Bankers' Company was to acquire the property and control of the Rapid Company by acquiring all or a majority of the stock of the latter; that the stockholders of the Rapid Company, as an inducement to their consent, were to receive for their stock, dollar for dollar, the bonds of the Rapid Company secured by a mortgage which was to cover, not only all the property then owned by the company, but also the new lines which the Bankers' Company was to construct and deliver under the agreement; that the new line of telegraph which was built by the Bankers' Company, connecting the system of the Rapid Company at Cleveland with Chicago, was built upon rights of way secured in the name of the Bankers' Company, or of subordinate corporations of which that company was the owner, and through which it acted; that Mr. May, who represented the Rapid Company, was requested by the officers of the Bankers' Company to supervise the selection of the route, and did so; that, while the line was in process of construction, it was understood by those who represented the two companies that it was being built to form a part of the line which was to be a connected system between the Rapid Company at Buffalo, by a northerly route, and Chicago; that the portion of the new line which was to extend from Cleveland to Buffalo by a northerly route was not commenced; that the new line from Chicago to Cleveland was inspected and accepted by the Bankers' Company, and was connected with the Rapid Company's system at Cleveland,—the wires running into the office of the Rapid Company there; that as early as July, 1884, the line was used as an adjunct of the Rapid Company's system; that there was no formal transfer or delivery of that line by the Bankers' Company to the Rapid Company; that detached portions of the lines from Pittsburgh to St. Louis, by way of Indianapolis and Terre Haute, and from Cleveland to Chicago, by way of Cincinnati, Indianapolis, and Terre Haute, were built, but they were not completed prior to the appointment of a receiver of the Bankers' Company; and that the question of the lien of the $3,000,000 mortgage on those uncompleted lines was not involved.

As to the question of the validity of the $3,000,000 mortgage of the Rapid Company, the circuit court held that there was nothing immoral or dishonest in the transaction, on the part of that company or its stockholders; that there was nothing in the proof to show that those in control of the Bankers' Company were not acting in good faith towards the stockholders of the Rapid Company, their own company, or the public, or that there was any plan or purpose on their part except to promote and consummate the legitimate business scheme of merging the two companies, and building up an extensive telegraph business, by extending and consolidating the existing systems; that there was no reason to doubt that the promoters would have carried out their en-

terprise honestly, and that their expectations would have been measurably realized, if the Bankers' Company had not become financially crippled at an early stage; that the proofs do not show that the parties to the August agreements, either those who represented the one company or the other, had any fraudulent design upon the public to be carried out by means of the mortgage; that when the August agreements were made the Bankers' Company had in its treasury, or available, about $1,000,000, and was supposed by those who represented the Rapid Company to be financially able to carry out its undertaking; that the case is destitute of evidence to justify the assumption that those who represented the Rapid Company supposed that the agreement of the Bankers' Company was to be carried out at the expense of third persons, much less by defrauding third persons; that the fact that the Bankers' Company used the bonds secured by its $10,000,000 mortgage to obtain the means for building the new line was not inconsistent with the good faith of the officers of that company; that at all events the bondholders represented by the plaintiff were not shown to have been implicated in any fraudulent scheme; that the organic law of the corporations permitted them to do what was provided for by the August agreements, and there was no ground upon which to assail the $3,000,000 mortgage as ultra vires; that the Rapid Company did not assert any objection to that mortgage; that those who were stockholders of the Rapid Company, and became its bondholders, did not allege, and the Bankers' Company, after receiving the bonds and exchanging them for stock, could not be heard to allege, want of consideration, or a fraudulent consideration, or that the acts of the Bankers' Company in acquiring and transferring the bonds were without legal validity, while it retained the stock which it received as the fruits of the transaction, nor could it be permitted to assert that the August agreements were ultra vires, while retaining the fruits thereof; that it was equally clear that the bondholders of the $10,000,000 mortgage, who became creditors of the Bankers' Company after all those transactions took place, could not be heard to impeach the consideration of the plaintiff's mortgage; and that the question as to the rights of the parties to the property in controversy was merely whether it was covered by the lien of the mortgage, or equitably belonged to the plaintiff, and whether the rights of the plaintiff therein were paramount to those acquired under the $10,000,000 mortgage.

The circuit court further held that there was no satisfactory reason why the lien of the $3,000,000 mortgage should not include the "reconstructed lines;" that that mortgage was duly recorded before the $10,000,000 mortgage of the Bankers' Company was recorded, and no question arose under the registry act as to the priority of lien of the respective mortgages; that if it should be conceded that the money of the Bankers' Company exclusively was used in the improvements and reconstruction of those lines, and the improved value of the property represented nothing except what was put into it by the Bankers' Company, there was nothing to distinguish the case from the ordinary one where a mortgagor or his vendee of the mortgaged property makes repairs and improvements of a permanent character; that such improvements as become a part of the realty always inure to the security of the mortgagee; but that the "strung wires" did not come under the operation of that rule, as they did not lose their character as personalty.

The circuit court further held that the line from Cleveland to Chicago was constructed to connect Buffalo by a northerly route with Chicago, pursuant to the agreement of August 28, 1883, and was the same property described in and conveyed by the $3,000,000 mortgage, as "intended to be shortly constructed or acquired" for the Rapid Company; that the circumstance that there was no formal delivery or transfer of that property to the Rapid Company by the Bankers' Company was not material; that, as soon as it was acquired by the Bankers' Company, it became, in equity, the property of the Rapid Company; that it was competent for the latter to mortgage the lines which were not in existence at the date of the mortgage, but which, by the agreement of the Bankers' Company, were to be built or acquired thereafter, and were, by the terms of the mortgage, to inure to the security of the bondholders; that such a mortgage, although ineffectual as a conveyance in praesenti, took effect as an equitable transfer, and attached to the after-acquired property as soon as the title of the mortgagor accrued; that this case was exceptional only because it presented a question of priority between two mortgages of after-acquired property; that upon the principle that, as between equal equities, priority of time will prevail, the lien of the $3,000,000 mortgage was paramount to that of the $10,000,000 mortgage subsequently created; that much stress had been laid upon the circumstance that the line in question was paid for in bonds of the $10,000,000 mortgage, or with the proceeds of such bonds, but that such fact was of no legal significance; and that those who bought the bonds of the $10,000,000 mortgage had no higher claim for consideration than the bondholders under the $3,000,000 mortgage, who parted with their property upon the promise that this line should stand as security for the payment of their bonds.

The circuit court further held that the United Lines Company did not occupy the position of a bona fide purchaser of the property; that full notice of the equities and claims of the plaintiff was given to it before it purchased the property at the foreclosure

sale; that it acquired the rights of the bondholders under the $10,000,000 mortgage, and nothing more; that as to the suggestion that receivers' certificates were created pursuant to orders of the courts, in suits brought in state courts in New York and Ohio, in which receivers of the property of the Bankers' Company were appointed, which certificates were declared by the orders to be first liens on all the property of that company, and as to the contention that the lien of the $3,000,000 mortgage could not have precedence of those certificates, it was to be said that, as the plaintiff was not a party to those suits, the orders by which the certificates were created were nugatory as an adjudication upon the equities of the plaintiff; that no judgment in those suits could bind the plaintiff by a declaration that the certificates should outrank its equitable lien; that a purchaser of such certificates would not acquire a lien prior to the $3,000,000 mortgage upon the property included in it when it was recorded, or upon the accessorial improvements and additions; that it was not clear that a purchaser without notice, and for value, would not obtain a paramount lien upon the western lines, assuming that the certificates were authorized by a competent court having possession of the property, by its receivers, at the time; that those questions were not properly before the court, and could not be considered under the issues made by the pleadings; that the defendants did not assert in their answer that they were bona fide purchasers of such certificates, but the United Lines Company set up title under the foreclosure of the $10,000,000 mortgage, and Stokes founded his claim upon the sale by the Ohio court, which sale had been set aside; that it was no obstacle to the relief prayed by the bill that the real estate sought to be subjected to the decree was in another state; that it sufficed that the court had jurisdiction of the persons of the defendants, and could compel them to observe its decree; and that there ought to be a decree for the plaintiff, conformable to the foregoing conclusions, with reference to a master, if necessary, to ascertain what property was to be included in the description of the "reconstructed lines" in the decree.

After the delivery of the opinion, the United Lines Company and Stokes moved for a reargument on certain questions; but the motion was denied, and an order was made October 26, 1888, referring it to a special master to ascertain what property was to be included in the description of the property to be awarded to the plaintiff by the decree, and also to settle the decree. The special master, after hearing the parties, made a report on January 18, 1889, determining the property to be so included, and settling the form of the decree, and reporting to the court the evidence taken before him. The plaintiff excepted to the report, as also did the defendants the United Lines Company and Stokes, and Farnsworth, receiver. On a hearing of the exceptions the court modified the description reported by the special master, and the form of decree settled by him, confirmed his report, subject to certain specified amendments, and on April 4, 1889, entered the final decree, before mentioned, in favor of the plaintiff, from which the United Lines Company and Stokes have appealed.

It is contended for the appellants that—

(1) Under the agreements of August, 1883, no bonds of the Rapid Company were to be delivered to the Bankers' Company. The bonds were intended for the stockholders of the Rapid Company and for no one else. The delivery made was simply colorable; the persons receiving them apparently for the Bankers' Company really received them for the purpose of handing them over to Bullens, the trustee, that they might be exchanged for the stock of the Rapid Company, and the Bankers' Company never received one of those bonds.

(2) The Bankers' Company, as a matter of law, had no right to build the western lines for the Rapid Company, or any lines except for itself, and no right, in any event, to build lines for another company, by using the proceeds of its own bonds in constructing such lines, leaving the holders of its bonds without any security.

(3) If the Bankers' Company in fact tried to build the western lines for the Rapid Company with money raised by the sale of the bonds of the Bankers' Company, and intended to turn such lines over to the Rapid Company, leaving its own bondholders without any security, the transaction was fraudulent, and the Rapid Company was a party to the fraud.

(4) The evidence showed that the Rapid Company knew that the Bankers' Company had no money of its own with which to build the western lines, and that the money for such construction was being raised by the sale of the Bankers' Company's bonds, and also knew that the purchasers of those bonds had been informed by the Bankers' Company that the bonds had been secured by a deed of trust to the Farmers' Loan & Trust Company on all the lines which the Bankers' Company then had, and on all which it might thereafter build; and the Rapid Company, so knowing, and having kept secret its agreements of August, 1883, was estopped from claiming any part of said lines as its property, or as having been built for it.

(5) The western lines, as a matter of fact, never were completed by the contractors for the Bankers' Company, and never were in fact delivered to that company before the appointment of the receivers in the foreclosure suit against it; so that it was never in a position to deliver the lines to any other company, even if the contract for such delivery had been honest and valid.

(6) The lines were never delivered by the Bankers' Company, and were never received

by the Rapid Company. No settlement was had between the companies. The Bankers' Company was never in a position to deliver the lines, never having had possession of them. The lines were put in possession of the receivers appointed in suits commenced by the contractors. Afterwards they came into the possession of the receivers appointed in the foreclosure suit, and those receivers were authorized to issue $130,000 in certificates, and secure the same by a deed of trust to the Farmers' Loan & Trust Company.

(7) The Bankers' Company having failed to pay the amount due to contractors for construction and material, and receivers' certificates having been issued, the property came into the possession of the receivers of the Bankers' Company, and was never in the possession of the Rapid Company or of its receiver.

*446 (8) Afterwards, it being impossible to finish the lines, and to keep them in repair from the earnings, the deed of trust made to secure the receivers' certificates was foreclosed. The receiver of the Rapid Company, duly appointed by the circuit courts of the United States in Connecticut, New York, and Ohio, became a party to said action; and in that action a decree was entered that the property be sold for the payment of the receivers' certificates.

(9) The receiver of the Rapid Company, having been a party in the foreclosure suit in Ohio, was bound by the decision in that case. The ownership of the lines now in dispute, from Cleveland to Chicago, was settled in that suit by a court of competent jurisdiction, in a case where all the necessary parties were either plaintiffs or defendants, and such decision was final and binding upon all.

(10) The court below was misled, and supposed that the suit in Ohio had been decided upon the merits against the appellants in this case, or had been dismissed.

(11) The decree herein should be reversed, and the property restored.

But we are of opinion that the line from Cleveland to Chicago became the property of the Rapid Company, and was subject to the mortgage made by that company. That result was contemplated in the agreement of August 28, 1883, and in the mortgage of September 15, 1883. The $3,000,000 of bonds issued under that mortgage were delivered to the treasurer of the Bankers' Company on March 3, 1884. It was deliberately agreed between the two companies that the new lines in the west were to be built, were to belong to the Rapid Company, and were to be part of the security for the Rapid Company's bonds. The force of that agreement was not impaired by the fact that the Bankers' Company had made the further agreement of August 29, 1883, to exchange those bonds for stock, so far as the stockholders of the Rapid Company might elect to make such an exchange. Those who took the bonds from the Bankers' Company, under the circumstances, were authorized to expect that the company would perform its agreement, which was to give added security for the bonds, and they had a right to rely on such performance.

*447 *The line from Cleveland to Chicago was completed in compliance with the agreement, and was intended to be pro tanto a performance thereof. No further delivery of that line was practicable or requisite than that which was made by connecting it with the system of the Rapid Company, and using it as a part of that system. The same officers represented both companies, and both companies had the same general manager. His duty to his two principals, namely, the trust on the one side to deliver, and on the other to receive, the property, was sufficient to effectuate the necessary delivery from the Bankers' Company to the Rapid Company.

There is no ground for assailing the good faith of the agreement of August 28, 1883. It was entered into with perfect good faith on the part of the Rapid Company, and with every appearance of good faith on the part of the Bankers' Company. It violated no principle of law, and no rule of good morals; and, if it had been fully carried out, it is probable that both parties would have realized from it the benefits which they anticipated.

Nor is there any force in the objection that the agreement was ultra vires on the part of the Bankers' Company. The statutes of New York authorized and justified it. The general power of a corporation to hold property in states other than the one which incorporated it, in the absence of statutory prohibition in such states, is firmly established. The Bankers' Company received the benefit of the August agreement, through which alone it acquired control of the Rapid Company. It enjoyed that control, took all the receipts of the Rapid Company's business, profited by the good will which that company had acquired, and thus obtained a benefit from the August agreement which is beyond its power to restore; and the bondholders of the Bankers' Company, who are simply its creditors, and became such after the August agreement was made, are bound by the agreement made by it within the scope of its corporate powers.

It seems quite clear that the equities of the plaintiff and of the bondholders of the Rapid Company are superior to those of the bondholders of the Bankers' Company. The *448 *after-acquired property of the Rapid Company, described in its mortgage, became subject to such mortgage as fast as it was acquired. Dunham v. Railway Co., 1 Wall. 254; Railroad Co. v. Cowdrey, 11 Wall. 459.

The equities of the two appellants are no greater than those of the bondholders of the Bankers' Company. It is well settled that a sale of real estate under judicial proceed-

ings concludes no one who is not a party to those proceedings. Neither the Rapid Company nor the plaintiff was a party to the suit for the foreclosure of the mortgage of the Bankers' Company. Therefore whatever title either of them had to the property which was attempted to be sold in that foreclosure suit remained unaffected by the suit. The same fact is true of the attempted sale in the Ohio proceeding, set up in the answer. Neither the Rapid Company nor the plaintiff was a party to that proceeding, and the attempted sale under it did not bar or impair their rights. Moreover, it is quite clear on the proofs that both of the appellants had notice of the title of the Rapid Company and the plaintiff. It is therefore unimportant to give special consideration to the Ohio proceeding, or to any claim based by Stokes upon it; and the fact is immaterial whether the sale under that proceeding was set aside, or whether the order setting it aside was subsequently reversed. There was nothing in the Ohio proceeding which could divest or impair the lien of the Rapid Company's mortgage, or the rights of the plaintiff as trustee for the Rapid Company's bondholders.

For these reasons we are of opinion that the circuit court did not err in deciding that the western lines came under the mortgage of the Rapid Company, and ought to pass under the foreclosure of that mortgage.

We have considered all the points made by the appellants, and are of opinion that there is nothing substantial in them, and we have remarked upon them as fully as seems to be necessary.

Decree affirmed.

Mr. Justice FIELD and Mr. Justice BREWER dissented.

(147 U. S. 476)

BARNETT v. KINNEY, Sheriff.

(February 6, 1893.)

No. 415.

CONFLICT OF LAWS—ASSIGNMENTS IN INSOLVENCY—PREFERENCES.

The insolvency laws of Idaho, (Rev. St. Idaho T. §§ 5875–5932,) forbidding preferences in favor of any creditor, refer only to domestic insolvents, and an assignment for the benefit of creditors with preferences made in Utah, and valid there, is good in Idaho, in respect to certain personal property there situated, as against the claims of a citizen of Minnesota. 23 Pac. Rep. 922, reversed. Green v. Van Buskirk, 5 Wall. 307, 7 Wall. 139, distinguished. May v. Bank, 13 N. E. Rep. 806, 122 Ill. 551, and Frank v. Bobbitt, 29 N. E. Rep. 209, 155 Mass. 112, approved.

Appeal from the supreme court of the territory of Idaho.

At Law. Action of replevin in the district court of Alturas county, Idaho T., by Josiah Barnett, assignee in bankruptcy of M. H. Lipman, against Patrick H. Kinney, sheriff. Judgment was given for plaintiff, but this was reversed by the territorial supreme court. 23 Pac. Rep. 922. Plaintiff appeals. Reversed.

Statement by Mr. Chief Justice FULLER: *477 *This was an action of replevin commenced in the district court of Alturas county, territory of Idaho, on December 12, 1887, by Josiah Barnett against P. H. Kinney, to recover the possession of certain goods and chattels mentioned in the complaint and for damages and costs. The case was submitted to the court for trial, a jury having been expressly waived, upon an agreed statement of facts, and the court made its findings of fact as follows: That on November 23, 1887, M. H. Lipman was a citizen of the United States and of the territory of Utah, residing and doing business at Salt Lake City, and was possessed and the owner of real and personal property in Utah, and of certain personal property at Hailey, in Alturas county, Idaho, and that he was indebted to divers persons, (none of whom were then, or at the time of trial, citizens, residents, and inhabitants of Idaho,) and was insolvent, and on that day duly made, executed, and delivered to Barnett, as his assignee, a deed of assignment in writing, which was accepted by Barnett, who assumed the execution thereof; that, by the assignment, Lipman sold, transferred, assigned, and delivered to Barnett all his property, real and personal, wherever found, in trust, to take possession and convert the same into cash, and pay the necessary expenses, and then his creditors, according to certain classes named in the assignment, preferences being made thereby in favor of certain creditors, as against others, all being designated by classes; that on November 25, 1887, Barnett, as assignee, took actual possession of the personal property situated in Idaho, and on November 26th, and before the property was taken by Kinney, filed the assignment for record in the proper office in Alturas county; and that Kinney had actual knowledge and notice in the premises. It was further found that the assignment "was and is valid by the laws of the territory of Utah;" that Lipman was indebted to the St. Paul Knitting Works, a corporation organized *478 and existing under the laws of the state of Minnesota, the liability having been incurred by him as a citizen, resident, and inhabitant of Utah, and in the transaction of his business there; that on November 26, 1887, and while Barnett was in actual possession, Kinney, who was sheriff of Alturas county, under a writ of attachment in favor of that corporation and against Lipman, took possession of the property; and that thereupon this action of replevin was commenced and the possession of the property delivered to Barnett, who had sold the same and retained the proceeds subject to the final disposition of the action. It was further found that prior to the taking of the property from Barnett by Kinney under the writ of attachment, and after the assignment had been recorded, Kinney, as sheriff, had taken it from Bar-

nett's possession, under a writ of attachment issued at the suit of a firm located in Nebraska against Lipman, and it had been retaken from Kinney in an action of claim and delivery brought by Barnett against him, which action was still pending. It was also found that the goods had been shipped from Lipman's store in Utah in September, 1887, to Alturas county; and that Lipman, from September, 1887, up to the time of making the assignment, had been doing business in Idaho in the running of a branch store at Hailey, in Alturas county; and that at the time of bringing this action defendant was wrongfully detaining the property from the possession of plaintiff.

The court found as conclusions of law that the assignment, a copy of which was annexed to the finding of facts, was a good and valid instrument, and conveyed title to the property in question; and that the plaintiff, at the time of bringing the action and the trial, was entitled to the possession of the property, and to judgment therefor, and for nominal damages and costs. Judgment having been entered, an appeal was prosecuted to the supreme court of the territory, by which it was reversed, and the cause remanded to the district court, with instructions to enter judgment for the defendant. The record shows that the case had been tried in the district court before the then
479 chief justice of the territory, and that a change had taken place in that office when the hearing was had on appeal. Of the three members composing the supreme court, one was for reversal and another for affirmance, while the chief justice had been of counsel between the same parties in a case in the same district court, but "with a different attaching creditor;" and he stated that he had not participated in the discussion of the case, but, his associates having reached opposite conclusions, the disagreeable duty rested upon him "of breaking the deadlock," which he did by concurring in the opinion for reversal. The majority opinion is to be found in 23 Pac. Rep. 922, and the dissent in 24 Pac. Rep. 624. The case was brought by appeal to this court.

W. H. H. Miller and C. S. Varian, for appellant. Wm. Stone Abert and Jno. W. Warner, for appellee.

*480 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The supreme court of the territory held that a nonresident could not make an assignment, with preferences, of personal property situated in Idaho, that would be valid as against a nonresident attaching creditor, the latter being entitled to the same rights as a citizen of Idaho; that the recognition by one state of the laws of another state governing the transfer of property rested on the principle of comity, which always yielded when the policy of the state where the property was located had prescribed a different rule of transfer from that of the domicile of the owner; that this assignment was contrary to the statutes and the settled policy of Idaho, in that it provided for preferences; that the fact that the assignee had taken and was in possession of the property could not affect the result; and that the distinction between a voluntary and an involuntary assignment was entitled to no consideration.

Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicile of the owner, will be held to be valid in the courts of another country, where the property is situated, and a different local rule prevails.

We had occasion to consider this subject somewhat in Cole v. Cunningham, 133 U. S. 107, 129, 10 Sup. Ct. Rep. 269, and it was there said: "Great contrariety of state decision exists upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the states, the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicile of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual situs of the property when that is elsewhere than at the domicile of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

We have here a voluntary transfer of his property by a citizen of Utah for the payment of his debts, with preferences, which transfer was valid in Utah, where made, and was consummated by the delivery of the property in Idaho, where it was situated, and then taken on an attachment in

favor of a creditor not a resident or citizen of Idaho. Was there anything in the statutes or established policy of Idaho invalidating such transfer?

Title 12 of part 3 of the Revised Statutes of the Territory of Idaho, entitled "Of proceedings in insolvency," (Rev. St. §§ 5875–5932,) provided that "no *assignment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors;" that creditors should share pro rata, "without priority or preference whatever;" for the discharge of the insolvent debtor upon compliance with the provisions of the title, by application for such discharge by petition to the district court of the county in which he had resided for six months next preceding, with schedule and inventory annexed, giving a true statement of debts and liabilities, and a description of all the insolvent's estate, including his homestead, if any, and all property exempt by law from execution. The act applied to corporations and partnerships, and declared that, if the partners resided in different counties, that court in which the petition was first filed should retain jurisdiction over the case. Nothing is clearer from its various provisions than that the statute had reference only to domestic insolvents. As pointed out by Judge Berry in his dissenting opinion, the first section of the 58 upon this subject, in providing that "every insolvent debtor may upon compliance with the provisions of this title, be discharged from his debts and liabilities," demonstrates this. The legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho, belonging to citizens of other states or territories, could not be applied to the payment of their debts unless they acquired a six months' residence in some county of Idaho, and went through its insolvency court.

The instrument in controversy did not purport to be executed under any statute, but was an ordinary common-law assignment, with preferences, and as such was not, in itself, illegal. Jewell v. Knight, 123 U. S. 426, 434, 8 Sup. Ct. Rep. 193. And it was found as a fact that it was valid under the laws of Utah. While the statute of Idaho prescribed pro rata distribution, without preference, in assignments under the statute, it did not otherwise deal with the disposition of his property by a debtor, nor prohibit preferences between nonresident debtors and creditors through an assignment valid by the laws of the debtor's domicile. No just rule required the courts of Idaho, at the instance of a citizen of another state, to adjudge a *transfer, valid at common law and by the law of the place where it was made, to be invalid, because preferring creditors elsewhere, and therefore in contravention of the Idaho statute and the public policy therein indicated in respect of its own citizens, proceeding thereunder. The law of the situs was not incompatible with the law of the domicile.

In Halstead v. Straus, 32 Fed. Rep. 279, which was an action in New Jersey, involving an attachment there by a New York creditor as against the voluntary assignee of a New York firm, the property in dispute being an indebtedness of one Straus, a resident of New Jersey, to the firm, Mr. Justice Bradley remarked: "It is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void; but this law applies only to New Jersey assignments, and not to those made in other states, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a nonresident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by nonresident debtors. Bentley v. Whittemore, 19 N. J. Eq. 462; Moore v. Bonnell, 31 N. J. Law, 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If Deering, Milliken & Co. were a New Jersey firm, they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicile. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case would be unreasonable and uncalled for."

*In May v. Bank, 122 Ill. 551, 13 N. E. Rep. 806, the supreme court of Illinois held that the provision in the statute of that state prohibiting all preferences in assignments by debtors applied only to those made in the state, and not to those made in other states; that the statute concerned only domestic assignments and domestic creditors; and the court, in reference to the contention that, if not against the terms, the assignment was against the policy of the statute, said: "An assignment giving preferences, though made without the state, might, as against creditors residing in this state, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors; that it was the policy of the law that there should be an equal distribution in respect to them. But, as the statute has no application to assignments

made without the state, we cannot see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect to foreign creditors, and why nonresidents are not left free to execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors."

In Frank v. Bobbitt, 155 Mass. 112, 29 N. E. Rep. 209, a voluntary assignment made in North Carolina, and valid there, was held valid and enforced in Massachusetts, as against a subsequent attaching creditor of the assignors, resident in still another state, and not a party to the assignment. The supreme judicial court observed that the assignment was a voluntary, and not a statutory, one; that the attaching creditors were not resident in Massachusetts; that at common law, in that state, an assignment for the benefit of creditors which created preferences was not void for that reason; and that there was no statute which rendered invalid such an assignment when made by parties living in another state, and affecting property in Massachusetts; citing Train v. Kendall, 137 Mass. 366. *Referring to the general rule that a contract, valid by the law of the place where made, would be regarded as valid elsewhere, and stating that "it is not necessary to inquire whether this rule rests on the comity which prevails between different states and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses," the court said that the only qualification annexed to voluntary assignments made by debtors living in another state had been "that this court would not sustain them if to do so would be prejudicial to the interests of our own citizens, or opposed to public policy;" and added: "As to the claim of the plaintiffs that they should stand as well as if they were citizens of this state, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and, in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens, nor opposed to public policy, no cause appears for pronouncing it invalid." And see, among numerous cases to the same effect, Butler v. Wendell, 57 Mich. 62, 23 N. W. Rep. 460; Receiver v. First Nat. Bank, 34 N. J. Eq. 450; Egbert v. Baker, 58 Conn. 319, 20 Atl. Rep. 466; Chafee v. Bank, 71 Me. 514; Ockerman v. Cross, 54 N. Y. 29; Weider v. Maddox, 66 Tex. 372, 1 S. W. Rep. 168; Thurston v. Rosenfield, 42 Mo. 474.

*485

We do regard our decision in Green v. Van Buskirk, 5 Wall. 307, 7 Wall. 139, as to the contrary. That case was fully considered in Cole v. Cunningham, supra, and need not be re-examined. The controversy was between two creditors of the owner of personalty in Illinois, one of them having obtained judgment in a suit in which the property was attached, and the other claiming under a chattel mortgage. By the Illinois statute such a mortgage was void as against third persons, unless acknowledged and recorded as provided, or unless the property was delivered to and remained with the mortgagee; and the mortgage in that case was not so acknowledged and recorded, nor had possession been taken. All parties were citizens of New York, but that fact was not considered sufficient to overcome the distinctively politic and coercive law of Illinois.

In our judgment the Idaho statute was inapplicable, and the assignment was in contravention of no settled policy of that territory. It was valid at common law, and valid in Utah, and, the assignee having taken possession before the attachment issued, the district court was right in the conclusions of law at which it arrived.

The judgment is reversed, and the cause remanded to the supreme court of the state of Idaho for further proceedings not inconsistent with this opinion. Judgment reversed.

(147 U. S. 494)

ARNOLD, CONSTABLE & CO. v. UNITED STATES.

(February 6, 1893.)

No. 825.

CUSTOMS DUTIES—CLASSIFICATION—UNDERCLOTHING—CONSTRUCTION OF LAWS.

1. Under the tariff act of October 1, 1890, knit woolen undershirts, drawers, and hosiery are dutiable as "woolen wearing apparel," under section 1, par. 396, and not as "knit fabrics made on frames," under paragraph 392. 46 Fed. Rep. 510, affirmed.

2. The words "wearing apparel," as generally used in statutes, refer not merely to a person's outer clothing, as indicated by some dictionary definitions, but cover all articles usually worn,—dress in general,—and include underclothing.

3. As used in tariff legislation, the words "clothing and articles of wearing apparel" are more specific than "cloths and knit fabrics," since out of cloths and knit fabrics clothing and wearing apparel are made; the latter being included in the former, while the former are not included in the latter.

4. In construing the tariff act of October 1, 1890, the court will, in a proper case, as an aid to interpretation, consider the fact that the general idea of the statute is that of protection to American manufactures, and this idea suggests that an article which has been subjected to an additional process of manufacture is subject to a higher, rather than an equal or lower, rate of duty.

5. The fact that in the tariff act of March 3, 1883, a certain duty was imposed upon "clothing, ready made, wearing apparel of every description," etc., "except knit goods," and that in the act of 1890, par. 396, this exception was stricken out, is very persuasive

that congress intended that no articles of wearing apparel should be excepted from the duty prescribed in that section because they were knit goods.

6. While the expressions "knit goods" and "knit fabrics" are frequently used interchangeably, it would seem that the former more appropriately describes manufactured articles, while the latter refers more especially to manufactured material as piece goods, and this distinction is recognized in the trade.

Appeal from the circuit court of the United States for the southern district of New York. Affirmed.

Statement by Mr. Justice BREWER:

The appellants imported into the port of New York, by the steamship Alaska, several cases containing knit woolen undershirts, drawers, and hosiery. The collector assessed duty on them, under paragraph 396, § 1, of the tariff act of October 1, 1890, (26 St. p. 597,) as "woolen wearing apparel." The appellants protested, claiming that the articles were dutiable only under paragraph 392 of the same act, as "knit fabrics made on frames." On this protest, the board of general appraisers, reversing the decision of the collector, held that the merchandise should have been classified as contended by the importers, under paragraph 392, and not under paragraph 396. Thereupon the collector made application to the United States circuit court for the southern district of New York for a review of the matter. Additional testimony was taken, as authorized by the statute, and on hearing that court reversed the decision of the board of general appraisers, and sustained the ruling of the collector. 46 Fed. Rep. 510. From this decision appellants appealed to this court. Paragraphs 396 and 392 are as follows:

"396. On clothing, ready made, and articles of wearing apparel of every description, made up or manufactured, wholly or in part, not specially provided for in this act, felts not woven, and not specially provided for in this act, and plushes and other pile fabrics, all the foregoing, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, the duty per pound shall be four and one half times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto sixty per centum ad valorem."

"392. On woolen or worsted cloths, shawls, knit fabrics, and all fabrics made on knitting machines or frames, and all manufactures of every description made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, not specially provided for in this act, valued at not more than thirty cents per pound, the duty per pound shall be three times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto forty per centum ad valorem; valued at more than thirty and not more than forty cents per pound, the duty per pound shall be three and one half times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto forty per centum ad valorem; valued at above forty cents per pound, the duty per pound shall be four times the duty imposed by this act on a pound of unwashed wool of the first class, and in addition thereto fifty per centum ad valorem."

W. B. Coughtry and Stephen G. Clarke, for appellants. Asst. Atty. Gen. Maury, for the United States.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The question in this case is whether knit woolen shirts, drawers, and hosiery come within the enumeration of "clothing, ready made, and articles of wearing apparel of every description, made up or manufactured wholly or in part * * * of wool," as provided in paragraph 396, or of "knit fabrics, and all fabrics made on knitting machines or frames, and all manufactures of every description, made wholly or in part of wool." as found in paragraph 392. In the original brief filed by counsel for appellants it is conceded that either enumeration, in the absence of the other, might cover these goods, though in the reply brief it is contended that in no proper sense of the term are the appellants' importations wearing apparel; and in support thereof definitions are quoted from several dictionaries, in which the word "apparel" is defined as "external clothing," "external habiliments or array," and "a person's outer clothing." As against this, counsel for the government also refers us to dictionaries in which the term "wearing apparel" is defined as "garments worn or made for wearing; dress in general;" and the noun "wearing," as "that which one wears; clothes; garments." But it is unnecessary to search or compare the dictionaries. The term "wearing apparel" is not an uncommon one in statutes, and is used in an inclusive sense, as embracing all articles which are ordinarily worn,—dress in general. Indeed, this very statute, (paragraph 752,) in respect to articles exempt from duty, names "wearing apparel and other personal effects (not merchandise) of persons arriving in the United States." Obviously, the term is here used as covering all articles of dress, while "personal effects" refer to other matters of personal baggage not used as clothing. And it cannot be believed that a person coming into the United States is permitted to bring in his outer clothing free from duty, while his underclothing is subject to duty, and seizure for the nonpayment thereof. So in exemption statutes is frequently found the term "wearing apparel." Thus for instance, in the General Statutes of Kansas, (page 888, c. 38, § 4,) is this description of exempt property: "First, the wearing apparel of the debtor." And in the late bankruptcy act

"the wearing apparel of the bankrupt" is excepted from the operation of the assignment. Rev. St. § 5045. No one would suppose that under such statutes a man's pantaloons and shoes were exempt, while his drawers and socks were not. Not only is that the general sense in which the term is used in statutes, but also the very form of the language here used indicates an intent to compass within the enumeration every article which is ordinarily worn or recognized as an article of dress. The language is: "Clothing, ready made, and articles of wearing apparel of every description." The words "clothing, ready made," would include coats, pants, vests, and overcoats, at least; and the sweeping term added thereafter, "articles of wearing apparel of every description," was obviously meant to reach out and include everything that one wears. We think that the concession made by appellants' counsel in their principal brief is beyond question.

Each paragraph, as will be noticed, contains the words "not specially provided for in this act;" and the contention of appellants is that the enumeration in paragraph 392 is more specific, and that, therefore, it should control, referring in this connection to Solomon v. Arthur, 102 U. S. 208, 212, and Hartranft v. Meyer, 135 U. S. 237, 10 Sup. Ct. Rep. 751. But we think that the reverse is true, and that the description in 396 is more of a special enumeration than that in 392. Clothing and articles of wearing apparel are more specific than cloths and knit fabrics. Out of cloths and knit fabrics clothing and wearing apparel are made. The latter are included within the former, while the former are not included within the latter. So if the decisive matter was the more special enumeration, we think 396 would be preferred; and in this connection may be noticed the relative rate of duty, which is higher for the articles in 396 than for those in 392. The idea which runs through this statute is well known to be that of protection to our manufactures. As the duty prescribed by 396 exceeds that prescribed by 392, it suggests that the articles named in 396 have been subjected to an additional process, which is to be protected by an increase of duty; and so it is that paragraph 392 is apparently intended to provide the duty for what may be considered "piece goods," manufactured material, while that part of paragraph 396 which we have been considering, and which stands, as it were, correlated to paragraph 392, does not refer to manufactured material, but that material carried by an additional process of manufacturing into the condition of manufactured articles. It is true that we find shawls named with cloths and fabrics in paragraph 392, and they are manufactured articles, yet they closely resemble manufactured material, and are little more than piece goods cut into sizes suitable for use. It is also true that paragraph 396 names felts, plushes, etc., in addition to clothing and wearing apparel, and they are manufactured material, rather than manufactured articles. But the articles embraced within the terms "clothing" and "wearing apparel" are put in a class by themselves, and separated from the other articles named in the paragraph by the expression "not specially provided for in this act;" and it may well be that congress thought that the manufacture of felts, plushes, etc., required so much more labor than that of cloth and knit fabrics as to justify subjecting them to the higher duty of manufactured articles, like clothing and wearing apparel.

But more significant is the change made in the provisions of the tariff of 1890 from those in that of March 3, 1883. A paragraph of that tariff act (22 St. p. 509) is as follows:

"Clothing, ready made, and wearing apparel of every description, not specifically enumerated or provided for in this act, and balmoral skirts, and skirting, and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, except knit goods, forty cents per pound, and in addition thereto thirty-five per centum ad valorem."

Knit goods, it will be perceived, are excepted from the description of "clothing, ready made, and wearing apparel of every description." In Brown v. Maryland, 12 Wheat. 419, 438, Chief Justice Marshall recognized as "a rule of interpretation, to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made." Applying that rule, it follows that but for the exception the general description of "clothing, ready made, and wearing apparel" would include knit goods; and when, by the legislation of 1890, this exception was stricken out, it is very persuasive that congress understood and intended that no articles of wearing apparel should be excepted from the enumeration of paragraph 396, because they were knit goods or fabrics.

And, again, there is some significance in the substitution of the term "knit fabrics" in the act of 1890 for "knit goods" in that of 1883; for, while they are frequently interchangeable, it would seem as though "knit goods" more appropriately described manufactured articles, while "knit fabrics" referred more especially to manufactured material,—piece goods. Thus in the subsequent description, in paragraph 396, are these words, "plushes and other pile fabrics." Obviously they refer to manufactured material rather than manufactured articles. And in this connection it is well to notice that, according to the testimony, there are goods known to the trade which are piece goods, and which are fabrics made on knitting ma-

chines or frames. One witness, John D. Ashwell, manager of the Norfolk & New Brunswick Hosiery Company, a company dealing in undershirts, drawers, and hosiery, and who had been connected with that company for eighteen years, testified that he had never heard such articles called "knit fabrics," saying: "I never had a man ask me for knit fabrics in our line of business, that I know of. Had he written to me for knit fabrics, I should have told him that we did not have them, that we did not sell them, and sent him to parties who did make them." The change of the term, therefore, strengthens the conclusion deduced from other considerations.

Our conclusion, therefore, is that there was no error in the decision of the circuit court, and it is affirmed.

(147 U. S. 449)

HORNER v. UNITED STATES.

(January 30, 1893.)

No. 1,247.

LOTTERIES—WHAT ARE—POST OFFICE—MAILING LOTTERY CIRCULARS.

On February 11, 1864, the Austrian government, to raise a loan of 40,000,000 florins, issued bonds, each of which was for 100 florins and bore upon its face the number of the series to which it belonged, and its number in that series. The bonds were not payable at any day certain, but the date of payment was to be determined by drawings, whereby it was determined which series was to be redeemed, and the amount to be paid for each bond. For the first ten years there were to be five drawings a year; for the next ten years, four drawings a year; for the third ten years, three drawings a year; and thereafter, up to and including the fifty-fifth year, there were to be two drawings a year, at the end of which time all the bonds were to be paid. Under this plan the smallest amount to be paid for any bond thus selected for redemption during the first year was 135 gulden, during the second year 140 gulden, during the third year 145 gulden, and so on increasing five gulden each year until the amount reached two hundred gulden, which amount then remained stationary until all were redeemed. In addition to this there were certain bonds to be paid in each year for which large sums were to be given, ranging from 250,000 gulden to 400 gulden, and these bonds were also to be determined by chance at the drawings. *Held*, that the scheme of these bonds is an "enterprise offering prizes dependent upon lot or chance," and was in the nature of "a lottery" or so-called "gift concert," within the meaning of Rev. St. § 3894, as amended by the act of September 19, 1890, (26 St. p. 465;) and that a person who sends through the mails a circular containing an announcement of the bonds redeemed at a certain drawing, and a notification of the time of subsequent drawings, is guilty of a violation of that act. Kohn v. Koehler, 96 N. Y. 362, distinguished.

On a certificate from the United States circuit court of appeals for the second circuit.

Indictment of Edward H. Horner for sending through the mails a circular containing a list of prizes awarded at the drawing of a lottery in violation of Rev. St. § 3894, as amended by the act of September 19, 1890, (26 St. p. 465.) After his arrest upon the charge, defendant sued out a writ of habeas corpus from the circuit court of the southern district of New York, but, after a hearing, the writ was dismissed, and the prisoner remanded to the custody of the marshal. From this order an appeal was taken to the supreme court, where the judgment was affirmed. See 12 Sup. Ct. Rep. 522, 143 U. S. 570. Subsequently defendant was tried and convicted under the indictment, and from the judgment of conviction he sued out a writ of error from the circuit court of appeals, by which court the questions involved were certified to this court.

Alfred Taylor, F. S. Parker, and Herman Aaron, for plaintiff in error. Asst. Atty. Gen. Maury, for the United States.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an indictment found May 16, 1892, in the circuit court of the United States for the southern district of New York, founded on section 3894 of the Revised Statutes, as amended by Act Sept. 19, 1890, c. 908, (26 St. p. 465.) The section, as so amended, reads as follows: "No letter, postal card, or circular concerning any lottery, so-called 'gift concert,' or other similar enterprise offering * 450 prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail, or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail, or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment, for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment, and tried and punished, either in the district at which the unlawful publica-

tion was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

Section 3894, as originally enacted in 1874, was an embodiment of section 149 of the act of June 8, 1872, c. 335, (17 St. p. 302,) and reads as follows:

"Sec. 3894. No letter or circular concerning illegal lotteries, so-called 'gift concerts,' or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of *obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution." By Act July 12, 1876, c. 186, § 2, (19 St. p. 90,) section 3894 was amended by striking out the word "illegal."

The present indictment contains two counts. The first count alleges that Edward H. Horner, on December 29, 1891, did unlawfully and knowingly cause to be deposited in the post office at the city of New York, in the southern district of New York, a certain circular to be conveyed and delivered by mail, "which said circular, in the contents thereof, hereinafter set forth, concerned a lottery, and which was then and there addressed to Joseph Ehrman, 70 Dearborn street, Chicago, Illinois, and was inclosed in an envelope, with postage thereon prepaid, and carried by mail, and which said circular contained, among other things, the following, to wit," as is set forth in the margin, with the rest of said count.[1] The second count contains the same language as the first count, except that it alleges that Horner deposited the circular in the post office.

The defendant pleaded not guilty, was tried, convicted of the charges contained in the indictment, and sentenced, on May 24, 1892, to pay a fine of $100. A bill of exceptions was made, which states that it was admitted on the record, by the counsel for both parties, that the bond in question in the case represented 100 florins, and was one of a series of bonds aggregating 40,000,000 gulden state loan, and that the bonds, of which the one offered in evidence was one, all represented loans made to the empire of Austria, and were issued for the purpose of raising revenue for the government, in order to defray governmental expenses, and carry on general state affairs.

After the prosecution had rested, the counsel for the defendant moved the court to direct the jury to acquit, on the following grounds: (1) The defendant is not shown by the evidence to have committed any offense against any statute law of the United States or against the common law. (2) The circular, with causing the mailing whereof the defendant is charged in this prosecution, is not a matter prohibited under section 3894 of the Revised Statutes. (3) Said circular does not concern or relate to a lottery, so-called "gift concert," or similar enterprise offering prizes depending upon lot or chance, or concerning schemes devised for obtaining money or property under false pretenses, nor does the same concern or relate to a lottery or similar scheme, or a lottery ticket, or part thereof. (4) That the bond or bonds mentioned in said circular which have been proved herein are not a lottery, so-called "gift concert," or similar

[1] "Banking House of E. H. Horner, No. 88 Wall Street.

"New York, December 27, 1890.

"110th redemption, December 1st, 1890, at Wien. The following 26 series were called in:

Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
121	86	20,000	1369	24	24,400	2666	63	400
271	75	400		46	400		84	400
280	22	1,000	1792	19	400	2988	2	400
	65	400	1970	16	2,000		10	400
461	37	400		69	400		48	50,000
481	54	400		70	5,000		88	400
	72	10,000	3238	28	400	3195	44	5,000
487	69	400	2412	53	400		50	400
493	6	400		74	400	3238	14	5,400
684	14	400		52	400		52	400
	56	400	2483	36	400	3488	35	400
	94	400	2526	72	400	3685	39	400
815	70	400		82	400		81	400
	82	400	2531	44	400	3969	4	400
853	23	400		91	1,000		14	400
	61	400	2666	3	400		50	400
	81	400		18	2,000			400

"All other bonds contained in the above twenty-six series, not specially mentioned therein, are redeemed with fl. 200.

"Payment on and after March 1, 1891.

"The next report of redemption will be published in the second half of the month of January, 1891.

"Customers who have been notified by special letter of the redemption of their bonds, can cash the respective amounts at my office."

That the said words and figures of the said circular relate to and concern certain so-called bonds issued by the empire of Austria, and state on which of said so-called bonds payments were to be made, and the amount thereof, a translation of the face of one of such bonds, so called, being as follows, to wit:

"Series 921. 100 Florins. Number 60.

"Premium Bonds.

"One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17, 1863, (Law Journal of the Empire, No. 98,) for which the amount resulting according to the plan of redemption will be paid to the bearer by the Universal State Loan Treasury.

"Vienna, February 11, 1864.

"[Signed] Joseph Rudde,
"Imperial Royal Minister Counselor.

"[Coat of Arms.] Plener,
"Imperial Royal Minister of Justice.

"For the Board for Controlling the State Loans:

"[Signed] Collerdo Mannsfeldt.

"[Signed] Winterstein.

"For the Imperial Royal Universal State Loan Treasury:

"[Signed] Winter.

"[Signed] Schimkowsky."

Each of said so-called bonds having upon its face a series number and a number in the series, the amount of indebtedness which each of said so-

enterprise offering prizes depending upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, nor are the same a lottery or similar scheme, or lottery ticket, or part thereof. (5) That the bond or bonds mentioned in the indictment, and proved upon the trial herein, are government bonds issued by the empire of Austria, and not within the language, meaning, or purview of the statute for any violation of which the said Edward H. Horner, the defendant, has been charged herein. The counsel for the defendant also moved that the prosecution be dismissed on the same grounds severally as above enumerated. The court denied each of those motions, and the counsel for the defendant took, and was duly allowed, exceptions to such denial.

*455 *On the 14th of July, 1892, a writ of error from the United States circuit court of appeals for the second circuit, to review the judgment of the circuit court, was allowed and sued out. In the circuit court of appeals it was assigned for error (1) that the matters charged in the indictment and proved upon the trial do not constitute a crime by the common law or under any statute of the United States; (2) that the circular with mailing or causing the mailing whereof the defendant is charged herein does not concern or relate to a lottery, so-called "gift concert," or similar enterprise offering prizes depending upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, nor does the same relate to a lottery or similar scheme, or a lottery ticket, or part thereof; (3) that the bond or bonds mentioned in said circular and proved upon the trial are government bonds issued by the empire of Austria, and not within the language, meaning, or purview of the statute with a violation of which the said Edward H. Horner has been charged herein; (4) that the court erred in not directing the jury to acquit the defendant upon the trial hereof; (5) that said court erred in not dismissing the prosecution herein.

The circuit court of appeals, on the 31st of October, 1892, pursuant to section 6 of the act of March 3, 1891, c. 517, (26 St. p. 828,) certified to this court the following questions or propositions of law, concerning which it desired the instructions of this court for its proper decision: "(1) Do the bonds mentioned and described in the first and second counts of the indictment herein represent a 'lottery or similar scheme,' within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States? (2) Is the circular described and set forth in the first and second counts of the indictment herein a 'circular concerning any lottery, so-called "gift concert," or other similar enterprise offering prizes dependent upon lot or chance,' within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States? (3) Does the circular mentioned and set forth in the first and second counts of the indictment herein constitute a 'list of the drawings at any lottery or similar scheme,'* within the meaning of section *456 thirty-eight hundred and ninety-four of the Revised Statutes of the United States?"

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called bonds purports to evidence being one hundred florins, the plan of drawing set forth on the back of each of said so-called bonds, showing that up to April, 1874, there were to take place five drawings a year, on dates therein mentioned, to determine on which of the so-called bonds payments should be made, and the amounts of such payments; and that thereafter, and until the end of the nineteenth year after the date of the issue of the so-called bonds, four drawings per year were to take place at stated dates for the same purpose; and that thereafter, to and including the thirty-first year, three drawings were to take place for the same purpose at fixed dates for each year; and that thereafter, to and including the fifty-fifth year after the date of issue of such so-called bonds, two drawings per year were to take place for the same purpose, at the end of which time all of said so-called bonds were, according to the plan aforesaid, to be repaid; and according to said plan the smallest amount to be paid for any of such so-called bonds selected for payment during the first year after issue was one hundred and thirty-five gulden, during the second year one hundred and forty gulden, and during the third year one hundred and forty-five gulden, and so on, increasing in amount five gulden each year until the amount should reach two hundred gulden, which amount then remained fixed as the minimum sum to be paid for any of the so-called bonds, the payment of which should be determined by the drawings aforesaid, guldens and florins being denominations of money of the same value. Under the said plan other large amounts being provided to be paid on certain of the so-called bonds to be determined by the drawings, thus during the first year the following sums being, according to said plan, to be paid on certain so-called bonds to be determined by such drawings, to wit:

On one bond	250,000 gulden
On one bond	25,000 gulden
On one bond	15,000 gulden
On one bond	10,000 gulden
On 2 bonds, each at 5,000 gulden	10,000 gulden
On 3 bonds, each at 2,000 gulden	6,000 gulden
On 6 bonds, each at 1,000 gulden	6,000 gulden
On 15 bonds, each at 500 gulden	7,500 gulden
On 30 bonds, each at 400 gulden	12,000 gulden

And during subsequent periods other provision being made for such large amounts, all of said so-called bonds being in the same form as said copy translation, and having the same drawing and redemption plan indorsed upon them, and being identical in all respects, except that the series numbers and the number thereof vary as to each so-called bond, all of the drawings heretofore referred to by which, first, are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, are determined the particular bonds in the series whose holders shall be entitled to the larger sums aforesaid, the numbers of which are drawn from the wheel, being conducted in such a way as that the determination of the numbers, both for redemption and for amounts, is wholly by lot or chance, the holder of each so-called bond having an equal chance with the holder of every other so-called bond, first, in securing an early payment of his so-called bond, and, second, in securing as a so-called payment for his so-called bond the very large prizes to which reference has been hereinabove made; the result in each case, as before alleged, being dependent wholly on lot or chance.

It is contended on behalf of Horner that it is not a proper test to apply to the government bonds in question whether or not they have an element of chance in them; that the test ought to be whether they are a "lottery or similar scheme;" that they are not a "lottery or similar scheme;" and that all the questions certified should be answered in the negative.

It is urged that all the bonds are to be redeemed within 55 years from the date of their issue; that during the first year the Austrian government agrees to pay, as the minimum amount for any bond redeemed, 135 gulden; during the second year, 140 gulden; during the third year, 145 gulden; and so on, increasing 5 gulden in amount each year, until the minimum amount to be paid by the government on each bond redeemed is 200 gulden; that the primal object is only to raise money to carry on the government; that the money received by the government upon the bonds is not used as a fund out of which to pay prizes or to repay the loan; that the money for such purposes is raised by taxation and the usual means of raising revenue; that the bonds were issued in 1864, many years prior to the enactment of the original statute of the United States, which was passed in 1872; and that, as the government loan in question has for its primary object a loan, it is not transformed into a lottery because it has attached, as a subsidiary feature, an element which is like that of a lottery, in the distribution by lot or chance of certain larger premiums or awards.

But we are of opinion that the scheme in question falls within the inhibition of section 3894, as amended. The denunciation of that section is no longer against sending by mail a circular concerning an "illegal" lottery, but is against mailing a "circular concerning any lottery, so-called 'gift-concert,' or other similar enterprise offering prizes dependent upon lot or chance."

Each "premium bond" states that the 100 florins is a "share of the loan of forty million florins," for which will be paid to the bearer *457 "the amount resulting according to the plan of redemption." This plan of redemption is set forth on the back of each bond, and by it each bond belongs to a distinct series, the number of which is on the face of the bond, together with the number of the bond in that series. Thus, the bond set out in the first count is No. 60 of series 921. The bonds do not purport to be payable on a certain day, but in order to determine what bonds are to be paid, and at what time, and what amount is to be paid on each of them respectively, it is stated on the back of the bonds (which are dated February 11, 1864) that until April, 1874, there are to be five drawings a year, on certain dates, to determine on which of the bonds payments are to be made, and the amounts of such payments; that thereafter, and until the end of the nineteenth year from the date of the issue of the bonds, four drawings a year are to take place at stated dates, for the same purpose; that thereafter, to and including the thirty-first year, three drawings a year are to take place at certain dates; and that thereafter, to and including the fifty-fifth year after the date of the issue, two drawings a year are to take place for the same purpose, at the end of which time all of the bonds are to be paid. According to such plan, the smallest amount to be paid for any bond selected for payment during the first year after issue is 135 gulden; during the second year, 140 gulden; during the third year, 145 gulden; and so on, increasing in amount five gulden each year, until the amount reaches 200 gulden, which amount then remains fixed as the minimum sum to be paid for any bond the payment of which shall be determined by such drawings.

Under the plan, other and larger amounts are provided to be paid on certain of the bonds, to be determined by the drawings, namely, during the first year, on one bond, 250,000 gulden; on one, 25,000 gulden; on one, 15,000 gulden; on one, 10,000 gulden; on each of two bonds, 5,000 gulden; on each of three, 2,000 gulden; on each of six, 1,000 gulden; on each of fifteen, 500 gulden; and on each of thirty, 400 gulden.

The first count further alleges that during subsequent periods other provision is made for such larger amounts; that all of the bonds are in the same form, have the same drawing and redemption plan indorsed upon them, and are identical in all respects, except that the series number and the number thereof vary as to each bond; and that all of the drawings, by which are determined, first, the series of the bonds to be paid or redeemed in each year, and, second, the particular bonds in the series whose holders shall be entitled to the larger sums, "the numbers of which are drawn from the wheel," are conducted in such a way that the determination of the numbers, both for redemption and for the larger amounts, "is wholly by lot or chance," the holder of each bond having an equal chance with the holder of every other bond, in securing, first, an early payment of his bond, and, second, as a payment for his bond the very large prizes to which reference is above made, the result in each case "being dependent wholly on lot or chance." The circular set forth in the indictment contains a list of the drawings of the scheme.

In the Century Dictionary, under the word "lottery," is the following definition: "A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for the distribution of prizes by chance among persons purchasing tickets, the correspondingly numbered slips, or lots, representing prizes or blanks, being drawn from a wheel on a day previously announced in connection with the scheme of intended prizes. In law the term 'lottery'

embraces all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc., and includes various forms of gambling. Most of the governments of the continent of Europe have at different periods raised money for public purposes by means of lotteries, and a small sum was raised in America during the Revolution by a lottery authorized by the continental congress. Both state and private lotteries have been forbidden by law in Great Britain and in nearly all of the United States,—Louisiana and Kentucky being the two notable exceptions." Under that definition, the circular in question had reference to a lottery.

In Webster's Dictionary "lottery" is defined as "a distribution of prizes by lot or chance."

*In Worcester's Dictionary it is defined as "a distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles;" and it is there said that during the eighteenth century the English government constantly availed itself of this means to raise money for various public works.

In the Imperial Dictionary the word is defined thus: "Allotment or distribution of anything by fate or chance; a procedure or scheme for the distribution of prizes by lot; the drawing of lots. In general, lotteries consist of a certain number of tickets drawn at the same time, some of which entitle the holders to prizes, while the rest are blanks. This species of gaming has been resorted to at different periods by most of the European governments, as a means of raising money for public purposes."

Although the transaction in question was an attempt by Austria to obtain a loan of money to be put into her treasury, it is quite evident that she undertook to assist her credit by an appeal to the cupidity of those who had money. So she offered to every holder of a 100-florin bond, if it was redeemed during the first year, 135 florins; if during the second year, 140 florins; and so on, with an increase of 5 florins each year, until the sum should reach 200 florins; and she also offered to the holder, as part of the bond, a chance of drawing a prize varying in amount from 400 florins to 250,000 florins. Every holder of a bond has an equal chance with the holder of every other bond of drawing one of such prizes. Whoever purchases one of the bonds purchases a chance in a lottery, or, within the language of the statute, an "enterprise offering prizes dependent upon lot or chance." The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter. What is called in the statute a "so-called 'gift concert'" has in it an element of certainty and also an element of chance, and the transaction embodied in the bond in question is a "similar enterprise" to lotteries and gift concerts.

In U. S. v. Zeisler, 30 Fed. Rep. 499, the circuit court of the United States for the northern district of Illinois, held by Judge Blodgett, referring to certain bonds issued by the city of Vienna, in Austria, under a scheme in substance like that embodied in the bonds now before us, decided that circulars concerning the drawings thereunder were within the inhibition of section 3894. Judge Blodgett, in his opinion in the case, said, (pages 500, 501:) "If these drawings determined only the time when these bonds would be paid, I should say that the mere determining of that time by lot or drawing would not give them the characteristics of a lottery; but when a city or a government, in order to make an inducement for people to buy their bonds, holds out large prizes to be drawn by chance or determined by lot in the manner in which prizes are usually determined in even an honestly conducted lottery, it seems to me it comes clearly and distinctly within the inhibiting clause of the statute under which this indictment is found. The mere reading of one of these bonds, and the drawing plan annexed to it, which is put in evidence, shows that it was the intention to stimulate the sale of the bonds by these large prizes, which were to be determined at every drawing, and which every holder of a bond had the chance of obtaining; and hence it seems to me that the purpose of the scheme was not only to determine by lot when the bonds should be paid, but also to determine certain extraordinary chances to the holders of the fortunate numbers drawn. The mere fact that these bonds are authorized by the law of a foreign country, and sanctioned by the policy of such country, does not, as it seems to me, in the least degree affect the question in this case. In Governors of the Almshouse, etc., v. American Art Union, 7 N. Y. 228, a 'lottery' was defined to be 'a scheme for the distribution of prizes by chance;' and the same definition is given in Thomas v. People, 59 Ill. 160, and Dunn v. People, 40 Ill. 465. The bonds in question certainly involved a lottery, within the meaning of the cases I have cited, and many more to the same effect might also be quoted. The circular sent through the mail was intended to induce persons to purchase and deal in these bonds with the hope of becoming the lucky winners of some of the high prizes to be distributed at each drawing; and the fact that the purchasers of the bonds were, by the drawing plan, to get back their principal, and, in the aggregate, what is equivalent to a very small rate of interest upon that principal, does not, as it seems to me, change the character of the transaction, or relieve it from the characteristic features of a lottery; that is, that high prizes, out of all due proportion to the amount of money paid for a bond,

were to be drawn for, and distributed by chance among the holders of these bonds, in the same manner as the prizes are determined in an ordinary lottery."

In Ballock v. State, 73 Md. 1, 20 Atl. Rep. 184, the court of appeals of Maryland held that the selling of the Austrian bonds in question was a violation of the antilottery law of that state. The Maryland Code (article 27, § 172) provided against the drawing of any lottery, or the selling of any lottery ticket, in the state; section 173 provided that all devices and contrivances designed to evade the provisions of section 172 should be deemed offenses against it; section 174 provided a punishment for offending against any of the provisions of section 172 and section 173; section 183 provided that the preceding sections should apply to all lotteries, whether authorized by any other state, district, or territory, or by any foreign country, and that the prohibition of sale of any lottery ticket or other device in the nature thereof should apply to lotteries drawn out of Maryland as well as those drawn within it; and section 184 provided that the courts should construe the foregoing provisions relating to lotteries liberally, and should adjudge all tickets, parts of tickets, certificates, or any other device whatsoever, by which money or any other thing was to be paid or delivered on the happening of any event or contingency in the nature of a lottery, to be lottery tickets. Ballock was indicted and convicted for violating those provisions by selling Austrian government bonds substantially like the bonds in question here. The court of appeals said, (page 8, 73 Md., and page 186, 20 Atl. Rep.:) "It is true that Austrian government bonds are vendible, and ought to be treated as other articles of commerce, as a rule; but when those bonds are coupled with conditions and stipulations which change their character* from simple government bonds for the payment of a certain sum of money to a species of lottery ticket which falls under the condemnation of our statutes, it must be classed as its conditions characterize it, and then it is not vendible under our law, and it does not violate constitutional provision or treaty stipulation to so hold." The court further remarked that it had been vigorously argued that, because the money ventured must all come back, with interest, so that there could be no final loss, it could not be a lottery, and added: "At some uncertain period, determined by the revolution of a wheel of fortune, the purchaser of a bond does get his money repaid; but we do not think this deprives the thing of its evil tendency, or robs it of its lottery semblance and features. The inducement for investing in such bonds is offered of getting some 'bonus,' large and small, in the future, soon or late, according to the chances of the wheel's disclosures. The investment may run one year or it may run thirty years, according to the decision of the wheel. It cannot be said this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit, and a love of making gain through the chance of dice, cards, wheel, or other method of settling a contingency. It certainly cannot be said that it is not in 'the nature of a lottery,' and that it has no tendency to create desire for other and more pernicious modes of gaming. Our statute does not justify a court, expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery simply because there can be no loss, when there may be very large contingent gains, or because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies, which the state is seeking to prevent."

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In Long v. State, 74 Md. 565, 572, 22 Atl. Rep. 4, it was said to be a valid exercise of power in a state to protect the morals and advance the welfare of the people by prohibiting every scheme and device bearing any semblance to lottery or gambling.

In Cohens v. Virginia, 6 Wheat. 264, 441, it was held that, where an act of congress empowered the corporation of the city of Washington to authorize the drawing of lotteries for certain purposes, it could not force the sale of the tickets in Virginia, where such sale was prohibited by law. That case is a strong authority in favor of the view that, although lottery tickets are authorized by one government, such validity cannot authorize their sale within the territory of another government, which forbids such sale. That is the case now before us.

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As to what have been held to be lottery tickets by the courts of the several states, reference may be made to Com. v. Chubb, in the general court of Virginia, 5 Rand. (Va.) 715; Dunn v. People, 40 Ill. 465, where it was held that the character of the transaction would not be changed by assuming that the ticket represented an article of merchandise intrinsically worth the amount which the holder would be obliged to pay, and that, if every ticket in any ordinary lottery represented a prize of some value, yet, if those prizes were of unequal values, the scheme of distribution would still remain a lottery; Thomas v. People, 59 Ill. 160, where a ticket was a receipt for money in payment for the delivery of a copy of an engraving, and for admission to certain concerts and lectures, for which it was sold, and money was to be distributed in presents amounting to a certain number to the purchasers of engravings, and it was held that that was a scheme for the distribution of prizes by chance, and constituted a lottery, it being apparent that some of the purchasers would fail to receive a prize, and that, even if the ticket to the concerts and lectures and the engraving were intrinsically worth the price paid, the scheme

would still be a lottery; Chavannah v. State, 49 Ala. 396, where it was held that the venturing of a small sum of money for the chance of obtaining a greater sum was a lottery; Com. v. Sheriff, 10 Phila. 203, where it was said that whatever amounted to the distribution of prizes by chance was a lottery, no matter how ingeniously the object of it might be concealed; Holoman v. State, 2 Tex. App. 610, where it was held that selling boxes of candy at 50 cents each, each box being represented to contain a prize of money or jewelry, the purchaser selecting his box
*464 in ignorance of its contents, was a *device in the nature of a lottery; State v. Lumsden, 89 N. C. 572, where a like device was held to be a lottery; and Com. v. Wright, 137 Mass. 250.

Cases in England are to the same effect. In Reg. v. Harris, 10 Cox, Crim. Cas. 352, it was held that a lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what purported to be of the value of a shilling, and also to the chance of a greater value than a shilling, was an illegal lottery, within the statute. In Sykes v. Beadon, 11 Ch. Div. 170, 190, there were holders of certificates, who subscribed money to be invested in funds which were to be divided among them by lot, and divided unequally,—that is, those who got the benefit of the drawings got a bond bearing interest and a bonus, which gave them different advantages from the persons whose certificates were not drawn; and it depended upon chance who got the greater or the lesser advantage. The scheme was held to be a subscription by a number of persons to a fund for the purpose of dividing that fund among them by chance, and unequally; and Sir George Jessel, master of the rolls, characterized the scheme as a lottery. In Taylor v. Smetten, 11 Q. B. Div. 207, packets were sold, each containing a pound of tea, at so much a packet. In each packet was a coupon entitling the purchaser to a prize, and that fact was stated publicly by the seller before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good, and worth the money paid for it. It was held that the transaction constituted a lottery, within the meaning of the statute.

The only case of importance to the contrary is that of Kohn v. Koehler, 96 N. Y. 362. That was an action brought in the supreme court of New York by Kohn against Koehler, under section 32 of part 1, c. 20, tit. 8, art. 4, of the Revised Statutes of New York, which provided that "any person who shall purchase any share, interest, ticket, certificate of any share or interest, or part of a ticket, or any paper or instrument pur-
*465 porting to be a ticket or share or interest in any ticket, or purporting to be a certificate of any share or interest in any *ticket, or in any portion of any illegal lottery, may sue for and recover double the sum of money and double the value of any goods or things in action which he may have paid or delivered in consideration of such purchase, with double costs of suit." Kohn sued to recover double the amount paid by him to Koehler for a bond issued by the authority of the government of Austria, like the bonds now in question before us, and which the court of appeals stated "purported on its face to be a share or interest in and to a certain illegal lottery."

The constitution of New York of 1846, in article 1, § 10, provided as follows: "Nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed, within this state." By section 22 of part 1, c. 20, tit. 8, art. 4, of the Revised Statutes of New York, a penalty was provided against a person who should set up or propose any money to be distributed by lot or chance to any person who should have paid or contracted to pay any valuable consideration for the chance of obtaining such money; by section 24 all contracts made or executed for the payment of any money in consideration of a chance in a distribution of money should be void; and by section 26 "every lottery, game, or device of chance, in the nature of a lottery, by whatever name it may be called, other than such as have been authorized by law, shall be deemed unlawful, and a common and public nuisance."

At the special term of the supreme court the defendant had a judgment in his favor, which was reversed by an order of the general term. 21 Hun, 466. The court of appeals reversed the order of the general term and affirmed the judgment of the special term. In its opinion, the court of appeals said that the purpose of the Austrian government in issuing the bonds was to obtain money for its own use; that the provision by which, upon a certain contingency, the holder of the bond might receive an additional sum, was no doubt an inducement held out for the purpose of obtaining money on the same, but it did not constitute the main feature and the substance of the transaction between the government and the purchaser of the bond; and that it could not be held, upon any sound theory, that the privilege of
*466 obtaining by lot or *chance a larger sum than the principal, interest, and premium, which the holder was sure to get in any event, imparted to the loan the character, object, and accompaniments of a mere lottery scheme, in violation of the constitution and laws of the state of New York. Judge Finch dissented.

It is to be noted that the New York statute under which the action referred to was brought was aimed against a share or interest in an "illegal" lottery. The act of congress of June 8, 1872, now section 3894 of the Revised Statutes, as originally enacted, condemning only "illegal" lotteries, was

amended by the act of September 19, 1890, so as to cover "any lottery, so-called 'gift concert,' or other similar enterprise offering prizes dependent upon lot or chance." As the New York statute contained the word "illegal," it may be that the court of appeals gave force to the view that the Austrian loan was a legal lottery, from the fact that it dwelt so largely on the idea that the bonds were issued by the Austrian government, in accordance with its laws, for the purpose of obtaining a loan of money, in connection with the further facts stated by it that like bonds had been issued by several governments of other countries, and that the bond in question was an evidence of debt, and a public security of a foreign government, exposed for sale in the same manner as other securities upon which money is loaned. It by no means follows that the court of appeals would have made a like decision on a statute with language in it like that of section 3894.

The case of Ex parte Shobert, 70 Cal. 632, 11 Pac. Rep. 786, merely followed the ruling in Kohn v. Koehler, supra.

The question whether the transaction covered by this indictment was an offense against section 3894 was sought to be raised in the case of Horner v. U. S., No. 2, 143 U. S. 570, 12 Sup. Ct. Rep. 522, which was before us prior to the finding of this indictment, on an appeal from an order of the circuit court dismissing a writ of habeas corpus sued out on the commitment of Horner by a commissioner of the court, to await the action of the grand jury. The point was raised here, on the appeal, that the Austrian bond scheme was not a lottery; but this court said (page 577, 143 U. S., and page 524, 12 Sup. Ct. Rep.) that that question was properly triable by the circuit court, if an indictment should be found, and that it was not proper for this court on the appeal, or for the circuit court on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery. We have now considered that question, and are clearly of opinion that section 3894 applies to the transaction.

The three questions certified must each of them be answered in the affirmative, and it is so ordered.

(147 U. S. 500)

SCHUNK v. MOLINE, MILBURN & STODDARD CO.

(February 6, 1893.)

No. 1,153.

SUPREME COURT—JURISDICTION — CIRCUIT COURT — JURISDICTIONAL AMOUNT — SUIT ON CLAIMS NOT DUE.

1. Under the judiciary act of March 3, 1891, (26 St. p. 826,) in a suit where the jurisdiction of the circuit court depends on diverse citizenship, the only question that can be considered by the supreme court on writ of error to the circuit court is whether or not the circuit court had jurisdiction. McLish v. Roff, 12 Sup. Ct. Rep. 118, 141 U. S. 661, followed.

2. A federal circuit court has jurisdiction of a suit on certain notes aggregating over $2,000, brought in good faith by a plaintiff, relying on a state statute which allows a creditor to bring an action on claims not due when the debtor intends fraud, (Cobbey, Consol. St. Neb. 1891, p. 1003,) although the amount of the notes already due is less than $2,000. Bowman v. Railway Co., 6 Sup. Ct. Rep. 192, 115 U. S. 611, distinguished. Gaines v. Fuentes, 92 U. S. 10, and Upton v. McLaughlin, 105 U. S. 640, followed.

3. The fact that there is a good defense apparent on the face of the plaintiff's pleadings to a part of the amount in controversy, and that the rest is less than $2,000, does not oust a federal circuit court of jurisdiction.

4. Cobbey, Consol. St. Neb. 1891, p. 1003, § 237, gives a creditor the right of attachment against the property of a debtor for a claim before it is due when the debtor intends fraud *Held*, that a federal circuit court, under Rev St. § 915, has jurisdiction to determine whether a plaintiff is entitled to an attachment on such a claim.

5. Where there is error in the decision of the circuit court in such a case, a writ of error should issue, not from the supreme court, but from the circuit court of appeals, under Act March 3, 1891, (26 St. p. 826.)

Mr. Justice Field, dissenting.

In error to the circuit court of the United States for the district of Nebraska. Affirmed.

Statement by Mr. Justice BREWER:

On the 14th of November, 1891, defendant in error commenced a suit against B. A. Schunk, in the circuit court of the United States for the district of Nebraska, on several notes, some of which, amounting to $530.09, were past due, while the others, amounting to $1,664.04, were not then due. The prayer of the petition was in these words:

"Wherefore the plaintiff prays judgment against the said defendant for the said sum of $530.09, with interest thereon from the respective dates of the notes which are now past due, together with the further sum of $1,664.04, which will become due and payable the 1st and 8th days of December, 1891, with interest thereon from the respective dates of said promissory notes, and the plaintiff prays that it recover a judgment for all of its costs paid out and expended in this action; and plaintiff further prays for a judgment against said defendant for all reasonable costs of collection of the above-mentioned indebtedness, and for a judgment, including plaintiff's attorneys' fees, in the sum of $250.

Under the provisions of the state statutes, an attachment was issued against the property of the defendant. The section authorizing this is in these words:

"Sec. 237. A creditor may bring an action on a claim before it is due, and have an attachment against the property of the debtor, in the following cases: First. Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts. Second. Where he is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent. Third. Where

he is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts." Cobbey, Consol. St. 1891, p. 1003.

Subsequent sections prescribe the proceedings to be pursued, the regularity of which in this case is not challenged. A demurrer to the petition, on the ground, among others, that no cause of action was stated, was overruled, a motion to discharge the attachment denied, and judgment rendered on May 21, 1892, for the sum of $2,347.50, together with $100 as an attorney's fee. To reverse this judgment the defendant below, as plaintiff in error, has sued out a writ of error from this court.

W. J. Lamb and Ricketts & Wilson, for plaintiff in error. John L. Webster, for defendant in error.

*Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

In this case the only question that can be considered is, under section 5 of the court of appeals act of March 3, 1891, (26 St. p. 826,) that of the jurisdiction of the circuit court. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118.

The errors assigned are—First, in overruling the demurrer; second, in holding that the court had jurisdiction to seize and sequester the property to secure the payment of a debt not yet due; third, in holding that it had jurisdiction to issue an attachment upon a demand not yet due; and, fourth, in allowing an attorney's fee. Of course, the latter matter presents no question of jurisdiction.

With respect to the other assignments, the plaintiff was a corporation created by and a citizen of the state of Ohio, and the defendant a citizen of Nebraska. The jurisdiction of the circuit court was, therefore, invoked on the ground of diverse citizenship. By the act of March 3, 1887, (24 St. p. 552,) as corrected by the act of August 13, 1888, (25 St. p. 433,) jurisdiction is given to the circuit courts over controversies "between citizens of different states, in which the matter in dispute exceeds" the sum or value of $2,000. The claim of the plaintiff was to recover $2,194.13 and interest. The right to recover this, or any part thereof, was challenged by the demurrer.

In Gaines v. Fuentes, 92 U. S. 10, this court said: "A controversy was involved, in the sense of the statute, whenever any property or claim of the parties capable of pecuniary estimation was the subject of litigation, and was presented by the pleadings for judicial determination." Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. Rep. 424.

Within the letter of the statute there was, therefore, a controversy between citizens of different states, in which the matter in dispute was over the sum or value of $2,000.

It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2,500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the $2,500; and, whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court? We do not mean that a claim, evidently fictitious, and alleged simply to create a jurisdictional amount, is sufficient to give jurisdiction. In Bowman v. Railway Co., 115 U. S. 611, 6 Sup. Ct. Rep. 192, the damages as originally stated in the declaration were $1,200. By amendment they were raised to $10,000; but it being evident that the increase was simply to give this court jurisdiction on error, and not because there was really a claim for any such damages, the case was dismissed for want of jurisdiction. The authorities on this question are collected in the opinion of Chief Justice Waite; and it may be laid down as a general proposition that no mere pretense as to the amount in dispute will avail to create jurisdiction. But here there was no pretense. The plaintiff in evident good faith, and relying upon the express language of a statute, asserted a right to recover for $2,000; and that its claim was not merely specious is shown by the fact that after a contest it did recover a judgment for the full amount that it claimed. A case much in point is that of Upton v. McLaughlin, 105 U. S. 640, 644. That was a suit brought by an assignee in bankruptcy more than two years after the cause of action accrued, and it was claimed that the trial court had no jurisdiction, because of a provision of section 5057 of the Revised Statutes of the United States, that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy

and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." But it was held that the court did have jurisdiction, and this, notwithstanding sections 55 and 57 of the Code of Civil Procedure of Wyoming, the territory in which that litigation took place, *506 authorized a defendant to demur to the petition when it appeared upon its face either that the court had no jurisdiction, or that the petition did not state facts sufficient to constitute a cause of action, and also provided that these objections were not waived by not taking them by either demurrer or answer. Speaking for the court, Mr. Justice Blatchford said: "It is contended that a petition which shows upon its face that the cause of action is barred by a statute of limitation is a petition which does not state facts sufficient to constitute a cause of action; and that that objection, though not taken by demurrer or answer, may be taken at any time. But we are of opinion that the statutory provisions referred to cannot properly be construed as allowing the defense of a bar by a statute of limitation to be raised for the first time in an appellate court, even though the petition might have been demurred to as showing on its face that the cause of action is so barred, and thus as not stating facts sufficient to constitute a cause of action." In other words, it was held that although there was a perfect defense apparent upon the face of the petition, yet the court had jurisdiction, i. e. the right to hear and determine; and further, in that case, that the defense was not available when suggested for the first time in the appellate court. So here the circuit court had jurisdiction, because the amount claimed was over $2,000; and although it appeared upon the face of the petition that a part of the claim was not yet due, still the court had jurisdiction,—the right to hear and determine whether this matter constituted a good defense to any part of the amount claimed.

But it is said that the plaintiff, in a federal court, cannot avail himself of the right given by a state statute to attach for a claim not yet due; that state statutes can confer no jurisdiction on the federal courts; and that, therefore, the circuit court had no jurisdiction to issue the attachment in this case. Even if it were conceded that such contention were well founded, (and we express no opinion in that matter,) the result would not be, as claimed, that the circuit court was *507 ousted of all jurisdiction. It would be simply an instance in which a court having jurisdiction gave to a party greater relief than he was entitled to. Surely, the court, the matter in dispute being over $2,000, and therefore a controversy within its jurisdiction, has a right to hear and determine, in the exercise of jurisdiction, whether the plaintiff was entitled to this extraordinary relief. If it be conceded that it erred in granting such relief, it would be simply a matter of error, and not one of jurisdiction.

But was it error? Section 915, Rev. St., provides that, "in common-law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

It is sufficient to say that this section of the statute makes it clear that a question was presented worthy at least of the consideration of the circuit court, and whose determination, even though erroneous, was not sufficient to oust the court of jurisdiction.

Unquestionably, the circuit court had jurisdiction; and if the defendant sought to have any matter of error considered, it should have taken the case to the circuit court of appeals. Judgment affirmed.

Mr. Justice FIELD dissents.

(147 U. S. 508)

STANLEY et al. v. SCHWALBY et al.

(February 6, 1893.)

(No. 1,092.)

LIMITATION OF ACTIONS — THE UNITED STATES AND THEIR AGENTS — SUPREME COURT — JURISDICTION.

1. The statute of limitations, although it cannot be pleaded against the sovereign except by consent, may be pleaded for the benefit of the sovereign. Mr. Justice Field, dissenting. 19 S. W. Rep. 264, reversed. Baxter v. State, 10 Wis. 454, approved.

2. When a suit against the sovereign is not permitted, a protest or a proper application for redress will prevent the running of the statute of limitations in its favor, as a suit would in the case of an individual.

3. Although the United States are not bound by the laws of a state, the word "person" in a state statute of limitations includes them as a body politic and corporate, and they may take advantage of such statute.

4. Possession for the statutory period by army officers of land acquired by the United States for a military reservation, although it is in fact for the United States, is adverse as to other claimants, and a complete defense to an action of trespass to try title brought against such officers. Mr. Justice Field, dissenting. 19 S. W. Rep. 264, reversed.

5. The supreme court has jurisdiction to review on writ of error the decision of the highest state court having jurisdiction, when its final judgment or decree is adverse to the validity of an authority alleged to be exercised under the United States.

In error to the supreme court of the state of Texas. Reversed.

Statement by Mr. Chief Justice FULLER:

This was an action of trespass to try title, brought February 23, 1889, in the district court of Bexar county, Tex., against David S. Stanley and three other defendants, by Mary U. Schwalby, whose husband, J. A. Schwalby, was afterwards made a party plaintiff, to recover a certain parcel or lot of land in the city of San Antonio. Mrs. Schwalby claimed title to one third of the lot as one of the three heirs of her father, Duncan B. McMillan, deceased, and subsequently one Joseph Spence, Jr., intervened, and asserted title to one third of the lot through a conveyance made to him by Duncan W. McMillan, another of said heirs. Judgment of possession of the whole lot was prayed, upon an averment that defendants entered without right or title.

*508 *The land in question was part of a military reservation of the United States, and was used and occupied as a military post, and David S. Stanley and his codefendants were officers of the army of the United States, holding and occupying the land under authority of the United States. They pleaded not guilty, and specially that they held lawful possession of the property as officers and agents of the United States, which had had title and right of possession, under conveyance duly recorded, since the year 1875, as innocent purchasers for value without notice; and also the 3-year, the 5-year, and the 10-year statutes of limitation of Texas, and a claim for allowance for permanent and valuable improvements.

The United States district attorney appeared for the United States, acting, as he alleged, "by and through instructions from the attorney general of the United States," and joined on behalf of the United States in the pleas of the other defendants.

The district court being of opinion that the United States could not set up the statute of limitations, whether for 3, 5, or 10 years, or otherwise, the pleas of the United States to that effect were ordered to be stricken out.

On the trial evidence was adduced on both sides bearing upon the title and the purchase of the property by the United States and the value of the improvements. It appeared that one Dignowity was the common source of title, and had executed a statutory warranty deed of the lot in controversy to Duncan B. McMillan, dated and acknowledged May 9, 1860, but not recorded until September 30, 1889; that McMillan, then a widower, died February 5, 1865, leaving three children him surviving, of whom plaintiff Mary U. was born September 11, 1848, and married J. H. Schwalby January 18, 1871; and Duncan W. was born November 1, 1850, and conveyed to Joseph Spence, Jr., the intervener, March 26, 1889, by deed acknowledged that day and filed for record March 29, 1889.

Dignowity died in April, 1875, testate, and by the terms of his will, which was duly probated that month, his property passed to his widow, who, on May 1, 1875, in her own right, and as independent executrix of her husband's will, released and *quitclaimed to *510 the city of San Antonio all her right, title, and interest in the lot in question, "known as the 'McMillan Lot,'" with covenant of warranty against any person claiming by, under, or through Dignowity or his estate. The city of San Antonio conveyed this and three other lots by warranty deed, dated June 16, 1875, and recorded October 21, 1875, to the United States for military purposes.

Gen. Stanley testified that he was a brigadier general of the United States army, that his codefendants were officers of the same, and that they took and held possession as such officers.

It was contended that the evidence tended to show that the city and the United States took with notice of a previous sale to McMillan; that McMillan had never paid the purchase price in full; that the unrecorded deed was never delivered to McMillan, but held in escrow; and that Dignowity paid the taxes on the lot from 1860 to 1875.

The district court gave judgment in favor of the plaintiffs Schwalby and Spence, that each had title to one third of the lot, and for the possession of the whole, and also in favor of the United States for $1,521 for the improvements; that being the difference between the value thereof and the amount found due from the United States for the use and occupation of the premises. Both parties excepted to the judgment, and perfected an appeal therefrom. The supreme court of Texas reversed the judgment, and rendered judgment dismissing the action as to the United States, that plaintiffs recover from the defendants, Stanley and others, possession of the lot in question, and the sum of $200, being the value of the use and occupation of said land, together with costs; to review which judgment this writ of error was sued out. The opinion is reported, in advance of the official series, in 19 S. W. Rep. 264.

Asst. Atty. Gen. Maury, for plaintiffs in error. A. H. Garland, for defendants in error.

*512 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

In The Siren, 7 Wall. 152, Mr. Justice Field, who spoke for the court, in adverting to the familiar rule of the common law that the sovereign cannot be sued in his own courts without his consent, and the ground upon which the rule rested, said: "This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring

his case within the authority of some act of congress. Such is the language of this court in U. S. v. Clarke, 8 Pet. 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property."

If, then, this suit had been directly against the United States, or the property of the United States, it could not have been maintained; and it is only upon the proposition that it was brought, not against the United States, but against the officers of the United States as individuals, although holding possession of the property under their authority, and as belonging to them, that it proceeded to judgment. The district attorney of the United States, acting, as he alleged, "by and through instructions from the attorney general of the United States," filed certain pleas on behalf of the United States, among others, of limitation and for allowance for valuable improvements. No question seems to have arisen in the state district court as to the authority of the district attorney to do this. The court ruled that the United States could not plead the statutes of limitation, and therefore struck those pleas out, but sustained the plea claiming an allowance for improvements, and rendered judgment in favor of the United States for the value thereof. The supreme court of Texas held that, as the instructions of the attorney general were not found in the record, and no act of congress empowering him to make the United States a party, either plaintiff or defendant, to an *513 action in a state court was referred to, the United States could not be regarded as a party, and therefore reversed the judgment below, and rendered judgment dismissing the United States from the case. The error assigned to this action of the supreme court has not been pressed by counsel for the government, and we are not called upon to express any opinion upon it. We should remark, however, that from a very early period it has been held that even where the United States is not made technically a party under the authority of an act of congress, yet, where the property of the government is concerned, it is proper for the attorney for the United States to intervene by way of suggestion, and in such case, if the suit be not stayed altogether, the court will adjust its judgment according to the rights disclosed on the part of the government thus intervening. Such was the leading case of The Exchange, 7 Cranch, 116, 147, where the public armed vessel of a foreign sovereign having been libeled in a court of admiralty by citizens of the United States to whom she had belonged, and from whom she had been forcibly taken in a foreign port by his order, the district attorney filed a suggestion stating the facts, and, the circuit court having entered a decree for libelants disregarding the suggestion, this court, upon an appeal taken by the attorney of the United States, reversed the decree and dismissed the libel, and Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

Probably the instructions here were that the district attorney should make defense for Gen. Stanley and his fellow officers, and, in addition, he thought it wise to bring the rights of the United States to the attention of the court by application in their name.

The argument for the plaintiffs in error is confined to the disposition of the pleas setting up the statutes of limitation, in respect of which the decision did not turn upon the question whether on the facts the bar was or was not complete, but upon the view that, although, as between individuals, a perfect defense might have been made out, it could not be availed of by or under the United States.

*514 By the Texas statute relied on it was provided that every suit to recover real estate "as against any person in peaceable and adverse possession thereof under title or color of title shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." "Title" was defined to mean a regular chain of transfer from or under the sovereignty of the soil, and "color of title" to mean a consecutive chain of such transfer down to the person in possession, without being regular; as if one or more of the muniments were not registered, or not duly registered. "Peaceable possession" was described as "such as is continuous, and not interrupted by adverse suit to recover the estate," and "adverse possession" was defined as "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." The statute also provided that five years' peaceable and adverse possession of real estate, "cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered," should be a bar; and that ten years' like peaceable and adverse possession, with cultivation, use, or enjoyment, should have a like result; and also that, whenever in any case the action of a person for the recovery of real estate was barred, the person having such peaceable and adverse possession should "be held to have full title, precluding all claims." 2 Sayles' Civil St. (Tex.) p. 109, tit. 62, c. 1.

The supreme court of Texas was of opinion that the bar of the statute could not be interposed by or under the United States, because the United States are not bound by such

statutes, as well as because no action could be brought against the United States.

The rule that the United States are not bound, and the reason for it, are thus given in U. S. v. Nashville Ry. Co., 118 U. S. 120, 125, 6 Sup. Ct. Rep. 1006: "It is settled beyond doubt or controversy, upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided, that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless congress has clearly manifested its intention that they should be so bound." And this doctrine was declared by the court in U. S. v. Insley, 130 U. S. 263, 266, 9 Sup. Ct. Rep. 495, to be "applicable with equal force, not only to the question of the statute of limitations in a suit of law, but also to the question of laches in a suit in equity."

To the same effect, Mr. Justice Story, in U. S. v. Hoar, 2 Mason, 311, said: "The true reason, indeed, why the law has determined that there can be no negligence or laches imputed to the crown, and therefore no delay should bar its right, (though sometimes asserted to be because the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects,—1 Bl. Comm. 247,) is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers. And though this is sometimes called a 'prerogative right,' it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments. * * * But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear, from the nature of the mischiefs to be redressed or the language used, that the government itself was in contemplation of the legislature, before a court of law will be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself."

But, as observed by Mr. Justice Strong, delivering the opinion of the court in Savings Bank v. U. S., 19 Wall. 227, 239, while the king is not bound by any act of parliament unless he be named therein by special and particular words, he may take the benefit of any particular act though not named; and he adds that the rule thus settled as to the British crown is equally applicable to this government, and that so much of the royal prerogative as belonged to the king in his capacity of parens patriae, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.

The general rule is stated in Chitty on the Law of the Prerogatives of the Crown, 382, clearly to be "that, though the king may avail himself of the provisions of any acts of parliament, he is not bound by such as do not particularly and expressly mention him; for it is agreed in all our books that the king shall take benefit of any act, although he be not named." Case of a Fine, 7 Coke, 32a; Magdalen College Case, 11 Coke, 68b; Queen & Buckberd's Case, 1 Leon. 150; 1 Bl. Comm. 262.

We think there is nothing to the contrary in Rustomjee v. Queen, 1 Q. B. Div. 487, where, by a treaty between the queen of England and the emperor of China, the emperor had paid to the British government a sum of money on account of debts due to British subjects from certain Chinese merchants, who had become insolvent, and it was held that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants, and that the statute of limitations did not apply to a petition of right. The political trust with which her majesty was charged in respect of her own subjects afforded no basis for the prosecution in a court of a claim as against a debtor or trustee, and, of course, limitation had no application. Indeed, the form of proceeding by petition of right, even as simplified and regulated by 23 & 24 Vict. c. 34, is so far variant from proceedings between subject and subject as to give adjudications thereunder but slight, if any, bearing upon the question under discussion. Tobin v. Queen, 14 C. B. (N. S.) 505.

It was in view of the ancient rule and its derivation that the supreme court of Wisconsin, in Baxter v. State, 10 Wis. 454, held that while the statute cannot be set up as a defense to an action by the government, this rule, being founded upon the public good and the protection and preservation of the public interest, instead of furnishing any support for the position that as a defendant the state could not have the benefit of the statute, would fully sustain the opposite conclusion.

And so in People v. Gilbert, 18 Johns. 227, it was pointed out by way of illustration that the same rule of construction applied to the statute concerning costs which the state may recover, though not obliged to pay them, because not included in the general terms of the statute.

It is obvious that the ground of the exemption of governments from statutory bars or the consequences of laches has no existence in the instance of individuals, and we think the proposition cannot be maintained that be-

cause a government is not bound by statutes of limitation, therefore the citizen cannot be bound as between himself and the government.

Of course, the United States were not bound by the laws of the state, yet the word "person" in the statute would include them as a body politic and corporate. Sayles' Civil St. art. 3140; Martin v. State, 24 Tex. 68.

This brings us to consider the objection that the United States cannot obtain or be protected in title through adverse possession, unless an action would lie against them for the recovery of the property. It by no means follows that because an action could not be brought in a court of justice, therefore possession might not be regarded as adverse, so as to ripen into title. In the case of a government, protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of the right to possession, or of the abandonment of his claim by another, when an action cannot be brought, as the action itself when it can.

In Comegys v. Vasse, 1 Pet. 193, 216, quoted from and applied by Mr. Justice Lamar in Williams v. Heard, 140 U. S. 529, 543, 11 Sup. Ct. Rep. 885, it was remarked by Mr. Justice Story: "It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. *518 Neither the king of Great Britain nor the government of the United States is suable in the ordinary courts of justice for debts due by either. Yet who will doubt that such debts are rights?" However, the very institution of this suit shows, as the fact is, that these claimants could have brought such an action as this at any time between the date when the United States took possession and the filing of this petition.

As stated by Mr. Justice Miller in Cunningham v. Railroad Co., 109 U. S. 446, 451, 3 Sup. Ct. Rep. 292, 609, it may be accepted as unquestioned that neither the United States nor a state can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in this court by virtue of the original jurisdiction conferred by the constitution. Accordingly, whenever it can be clearly seen that a state is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defense is that he has acted under the orders of the government.

In these cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class is included U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. Rep. 240, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense. *519 In such a case the validity of an authority exercised under the United States is drawn in question, and, where the final judgment or decree in the highest court of a state in which a decision could be had is against its validity, jurisdiction exists in this court to review that decision on writ of error.

The case before us is an action of trespass to try title, brought against officers of the United States, exercising an authority under the United States in holding possession of the property in controversy. Laying out of view the intervention by the district attorney of the United States in the direction of making the United States a party, and considering the case in its relation to the defenses interposed by Gen. Stanley and his fellow officers, we are unable to perceive why the statutory bar, if complete, could not be availed of. Although not bound by statutes of limitation, the United States, as we have seen, were entitled to take the benefit of them, and, inasmuch as an action could have been brought at any time after adverse possession was taken, against the agents of the government through whom that was done, and by whom it was retained, the objection cannot be raised against them that the statute could not run because of inability to sue. The alleged trespass was committed by the defendants as the servants of the United States, and by their command; yet, if they showed the requisite possession in themselves as individuals, though in fact for the United States, under whose authority they were acting, the defense was made out. Agents when treated as principals may rely upon the protection of the statute. Ware v. Galveston City Co., 111 U. S. 170, 4 Sup. Ct. Rep. 337.

In any view, they were not mere trespassers, and, if subject to suit during the statutory period of peaceable and adverse possession, they could not, after its expiration, be found guilty of an unlawful withholding from the original owner. The tort, which must be the gist of the action in order

to render it maintainable against the officers of the United States as individuals, could not be predicated of them under such circumstances.

We refrain from any consideration of the *520 case upon its merits, but, for the reasons indicated, reverse the judgment, and remand the cause for further proceedings not inconsistent with this opinion.

Mr. Justice FIELD, dissenting.

I am unable to agree with the majority of the court in the judgment rendered in this case, or in the reasons upon which it is founded. The action is styled one of trespass to try title. It is, in fact, the form adopted in Texas to determine the title to real property in controversy, and the principles governing ejectments govern their disposition. It was commenced in a district court of the state of Texas, in the county of Bexar.

The petition, the first pleading in the action, alleges that Mary U. Schwalby, who is herein joined by her husband, was, on the 1st of February, 1889, lawfully seised of certain described premises in the county of Bexar, holding the same in fee simple, and entitled to the possession thereof; that afterwards, on the 2d of February, the defendants unlawfully entered upon the premises, and dispossessed her therefrom, and withhold them from her, setting out a description of the premises in full. The petition concludes with a prayer that the plaintiff may have judgment for the recovery and possession of the premises and for costs.

The premises were a part of a military reservation of the United States in Texas, and were occupied as a military post. The defendant David S. Stanley and his codefendants were officers of the army of the United States, and as such were in possession of and held the land, and, answering for himself and them, he says that as individuals they do not claim, and have no title to, the land in controversy, but claim that they are lawfully in possession thereof as officers and agents of the United States, and that the United States "holds in herself" complete title to the property in controversy, and that the defendant, as an officer of the United States in possession, enters a plea of not guilty to the trespasses and allegations charged in the petition.

*521 The designation thus given to the United States as "herself" in a pleading drawn by one of their attorneys is open to criticism, as in the constitution, both before and since the Civil War, the United States have always been designated in the plural; thus, article 3, § 3, declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort;" and article 13, adopted since the Civil War, declares that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."

In the amended answer filed by the defendants they pleaded not guilty, and alleged that they had lawful possession of the property as officers and agents of the United States, which had title and right of possession since 1875 under conveyance duly recorded, and that they were innocent purchasers for a valuable consideration, without notice of any outstanding title. They also pleaded specially the 3-years, the 5-years, and the 10-years statutes of limitations, and set up a claim for allowance for permanent and valuable improvements.

I fully agree with the court that, if this action had been brought directly against the United States, it could not be sustained, for it is among the axioms of the law that the government, state or national, is not amenable to civil process at the suit of a private citizen, except upon its consent to submit to such jurisdiction. Any judgment rendered in proceedings not voluntarily assented to would necessarily be void, whether the judgment be rendered for money or specific property. It may be doubted whether the appearance in this case of the United States by a district attorney, without further evidence of their assent to the process, is sufficient. The answer of the United States that they appear by the district attorney, under instructions of the attorney general of the United States, the supreme court of Texas held to be insufficient, as the instructions of that officer did not appear in the record, and there was no act of congress authorizing him to make the United States a party to the action in the state court. That court, therefore, reversed the judgment of the lower court, and dismissed the action so far as *522 it was against the United States. It also held that the United States could not plead the statute of limitations. In this decision I think that court was clearly right, and, although this court does not expressly approve that doctrine, it would seem from its language that it might be implied that the United States could plead the statute. From any such implication I emphatically dissent. The whole theory upon which statutes of limitation are founded, whether for the repose of litigation, or upon presumption of performance, from lapse of time, of the obligations alleged, or from other causes, is that during the period prescribed by the statute the party has had full right, without legal hindrance, to prosecute his demand against the party invoking the bar of the statute, and has failed to do so. As justly observed by the court below, "it would be contrary to reason to hold that it was the intention of the lawmaking power that a right should be barred by failure to bring an action within a prescribed time, when, at the same time, the right to bring the action was denied."

Now, no such bar can be pleaded by the United States, for the reason that no action can be instituted against them without their express consent. They can have no occasion to plead such a statute, because they can always insist upon their immunity from judicial process. If they assent to the action, they, of course, do not wish the benefit of such a statute.

The cases where the government, state or national, without being named, may invoke the benefit of a law passed for private parties, applies to a very different class of cases from the one before us. A specified time for presenting claims against the government may be prescribed by statute, but we may look in vain for cases like the one before us, in which the government, not being suable during the time prescribed by statute, may interpose the lapse of time as a bar to an action whenever it is subsequently permitted.

But it is admitted that in cases where officers of the army, or agents of the government, state or national, are in possession of real property, holding it for either of them, they cannot, in an action for its recovery, rely upon their agency or official character under the government as a justification of their possession, without showing a title in the government. They must show in that way their right to the possession under that title. The case of U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. Rep. 240, is sufficient authority on this point. Referring to that case, in Re Ayers, 123 U. S. 453, 501, 8 Sup. Ct. Rep. 164, this court said: "In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants, claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and, as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals for the individual wrong and trespass." See, also, Cunningham v. Railroad Co., 109 U. S. 446, 452, 3 Sup. Ct. Rep. 292, 609. Establishing the title of the government, and thus showing their own possession under the government to be rightful, the action will be defeated. But the officers or agents cannot plead the statute of limitations in their own behalf if they hold under the United States, and in maintaining a different doctrine there is, in my opinion, a plain error in the decision of the court. The action of ejectment or of trespass to try title necessarily implies the wrongful possession of the defendant. He can only defeat that position by showing title or ownership in the party under whom he holds or in himself. But how can he show title or ownership in himself? If he has a title by deed, which he can trace back beyond the claim of the plaintiff, he can do so; but, if he relies upon the statute, he must show adverse possession of the property in himself for the period prescribed. To render his possession adverse it must be accompanied by a claim of title or ownership in himself as against the whole world. It must be exclusive and continuous, and not referable to any other claimant. If the defendant admits that any other person, or that the government, has the title or owns the property at any time within the period of prescription, his adverse possession, on which alone he can rely, fails, and his claim of right to the property is defeated. This doctrine is sustained by the whole current of authorities in the English and American courts, as will be seen by reference to the treatise on the statute of limitations by Angell, and also to the one by Buswell, under the chapters on "Adverse Possession," where the adjudged cases are cited. See, also, Sedg. & W. Tr. Tit. Land, §§ 729–740; and Doswell v. De La Lanza, 20 How. 29; Melvin v. Proprietors, 5 Metc. (Mass.) 15; Ward v. Bartholomew, 6 Pick. 409; and Adams v. Burke, 3 Sawy. 420.

The statute of Texas prescribing the limitations of actions for the recovery of real property is not materially different, except in the periods designated, from the statutes of limitations of other states. It provides that every suit to recover real estate, "as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." "Peaceable possession" is described as "such as is continuous, and not interrupted by adverse suit to recover the estate." "Adverse possession" is defined as being "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

If the defendants cannot show title in the party under whom they hold, or in themselves, they are trespassers against the real owner, whether they claim under the government or a private party; and the doctrine that if they hold under the government, the title to which is not established, they can be allowed to set up adverse possession in themselves, or, in other words, to plead the statute of limitations, when they expressly disavow any claim or title to the property, upon the assertion of which alone such adverse possession can be maintained or the statute made available, is, in my judgment, in conflict with well-settled principles, and the whole course of judicial decisions in England and in every state of the Union. The defendants, by their own admissions, are not in a position to set up any such defense.

(147 U. S. 669)

UNITED STATES v. PITMAN.

(March 6, 1893.)

No. 699.

CLERKS OF COURT—FEES FOR ATTENDANCE.

Under Rev. St. § 828, allowing the clerk of the federal courts "five dollars a day for his attendance on the court while actually in session," the clerk is entitled to the fee, not only when the judge is present in person, but when in obedience to his written order, under Rev. St. §§ 583, 672, the court is adjourned by the marshal or clerk, the journal being first opened, and the other officers being present. 45 Fed. Rep. 159, affirmed.

Appeal from the district court of the United States for the district of Rhode Island. Affirmed.

Statement by Mr. Justice BROWN:

This was a petition for per diem fees as clerk of the circuit and district courts of the United States for the district of Rhode Island. Petitioner claimed for 108 days' attendance, under Rev. St. §§ 672, 583, and averred that, notwithstanding the rendition of the services claimed, and the approval of his account by the court, and notwithstanding that the marshal, the crier, and one of the bailiffs had received pay for attendance upon a portion of the days enumerated in his petition, to which fact the attention of the first comptroller was called, the accounting officer of the treasury declined to allow the same. With respect to certain of the days the court found that they "were days on which sessions of the said circuit court were appointed to be holden by the presiding judge thereof, and that the said Pitman attended on said days at the time and place of holding said court, accordingly, and that no judge was present to preside at said court on said days, and that said court on said days was adjourned by and pursuant to a written order signed by one of the judges of said court, and directed alternatively to the marshal, and, in his absence, to the clerk, to a day and time fixed and limited in said order;" and that certain other days "were days on which sessions, terms, and sittings of the said district court were appointed to be holden by the presiding judge thereof;" and that otherwise the facts were the same as in the former case. Upon this state of facts the court entered a judgment for the petitioner in the sum of $495, (45 Fed. Rep. 159,) and the United States appealed.

*670 *Sol. Gen. Aldrich, for appellant. Henry Pitman, in pro. per.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case depends upon the construction to be given to Rev. St. § 828, wherein there is allowed to the clerk "five dollars a day for his attendance on the court while actually in session," taken in connection with section 583, which provides that, "if the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct;" and with section 672, which contains a similar provision with regard to the absence of the judges of a circuit court. The practice in the district of Rhode Island is stated in the opinion of the court below to be "that the courts shall meet at the time fixed by law, and transact such business as may then appear, and thereafter shall hold by successive adjournments and appointments at short intervals a substantially continuous session until the next succeeding day for the commencement of a regular term. During the continuance of these sessions the judges have attended in court here whenever their engagements did not take them elsewhere, and on the occasion of their absence, or expected absence, for a time which might be definitely fixed, or which was indeterminate by reason of the doubtful exigencies of business elsewhere, they have sometimes, as in this case, made provision for adjournments according to the terms of sections 583 and 672."

Whether this practice be conducive to the convenient dispatch of business or not is a question for the judge to determine. After the term of a court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be opened for incidental business after the regular business of the term *671 has been concluded, is a matter which rests in the discretion of the presiding judge. It is presumed that he will act in this particular in what he conceives to be the interest of the public, and that he will put the government to no unnecessary expense. It is clearly the duty of the officers of the court to be present at the adjourned day, and to obey the written order of the judge with respect to any further adjournment; and there is no reason why they should not receive their per diems therefor as if the judge were actually present. It was held by this court in the case of McMullen v. U. S., 146 U.S. 360, 13 Sup. Ct. Rep. 127, that when the court is open, by its order, for the transaction of business, it is in session, within the meaning of this section, "but that, if the court, by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or during those days, although the current term has not expired."

We think the court should be deemed "actually in session," within the meaning of the law, not only when the judge is present in person, but when, in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by

further direction of the judge. That this was the construction placed upon these sections by congress is evident by the civil appropriation act of March 3, 1887, (24 St. pp. 509, 541,) which provided as follows: "Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is open by the judge for business, or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts."

Attendance upon the days when the court *672 is opened under the provisions of these numbered sections is put by congress upon the same footing as if the judge were actually present and business were actually transacted. The restriction of per diems to days when the court is actually in session was probably intended to be construed and explained in connection with section 831, which provides that no per diem or other allowance shall be made for attendance at rule days.

There was no obligation on the part of plaintiff to prove that the district court was not in session on the days allowed for attendance at the place of holding the circuit court; or that the circuit court was not in session on the days allowed for attendance at the place of holding the district court. The findings of fact, however, show that the plaintiff is entitled to but 98 days' attendance, instead of 99, and the judgment should therefore be reduced $5.

This deduction being made, the judgment of the court below is affirmed

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(148 U. S. 21)

MOELLE v. SHERWOOD.

(March 6, 1893.)

No. 103.

EQUITY — REHEARINGS—ESTOPPEL—DEEDS—DESCRIPTION—BONA FIDE PURCHASERS.

1. As a general thing the jurisdiction of a court over its decrees terminates with the close of the term at which they are rendered, but by Equity Rule 88 an exception is made where no appeal lies to the supreme court of the United States.

2. Where a motion is made in the federal courts for leave to file a petition for a rehearing, and the allegations of the insufficiency of the amount involved to allow an appeal are conceded as true by the opposite party, the motion is properly granted, and such party cannot be allowed to show afterwards that the amount involved was sufficient to allow an appeal.

3. A change in the description contained in a deed, after it is delivered and recorded, does not convey the newly-described property. This can only be accomplished by a new conveyance.

4. A grantee in a quitclaim deed is not precluded from showing himself a bona fide purchaser. 36 Fed. Rep. 478, affirmed.

Appeal from the circuit court of the United States from the district of Nebraska.

In Equity. Suit by James K. O. Sherwood against Theodore J. Moelle to quiet title to certain real estate. Upon the original hearing the bill was dismissed, but at the following term of court a rehearing was granted, and thereafter a decree was rendered in favor of complainant, quieting his title. 36 Fed. Rep. 478. Defendant appeals. Affirmed.

Statement by Mr. Justice FIELD:

This is a suit in equity, commenced in June, 1885, in the circuit court of the United States for the District of Nebraska, to quiet the title of the complainant to certain real property described in the bill as the S. E. ¼ of section No. 31, township No. 3 N., of range 8 E., of the sixth P. M., in Nuckolls county, state of Nebraska, to which the defendant, a citizen of that state, claims some adverse interest and title. The bill alleges that the complainant is a citizen of New York, and that at the commencement of the suit, and for a long time prior thereto, he was the owner in fee simple, and entitled to the possession, of the described premises. His chain of title is as follows:

(1) A patent of the land in controversy, and of other land, from the United States, dated November 1, 1871, issued to George L. Bittinger, and recorded in Nuckolls county, December 31, 1883.

(2) A deed bearing date on the 22d of August, 1882, executed by Bittinger and his wife to L. P. Dosh, of Scott county, Iowa, reciting a consideration of $100, by which they sold, conveyed, and quitclaimed all their "right, title, and interest in and to" the premises in controversy. This deed was recorded September 19, 1882.

(3) A warranty deed, dated October 27, 1882, of the premises, by L. P. Dosh and his wife to J. R. Dosh, of Guthrie county, Iowa, reciting a consideration of $1,513. This deed was recorded November 20, 1882.

(4) A warranty deed of the premises, dated June 30, 1883, by J. R. Dosh and his wife to the complainant, James K. O. Sherwood, reciting a consideration of $1,800. This deed was recorded April 24, 1885.

The bill alleges that the complainant purchased the premises in question,—that is, the southeast quarter of section 31 of the township named,—at their full value, in the regular course of business, but that the defendant claims that, by some secret and unrecorded deed from Bittinger, he has acquired a superior title to the premises, which claim so affects the title of the complainant as to render its sale or disposition impossible, and disturbs him in his right of possession, but of the nature of the claim, except as above stated, he is ignorant. He therefore prays that the defendant may disclose the nature of his estate, interest, and claim in the *673 premises, that the title of the complainant therein may be quieted, and that the defendant may be decreed to have no estate or interest therein, and be enjoined from asserting any.

The defendant, in his answer, denies that the complainant has any estate in or title to

the premises, and sets up that on the 23d day of June, 1870, George L. Bittinger, the patentee of the United States, and his wife, by a warranty deed, conveyed the premises for a valuable consideration to one Guthrie Probyne; that such deed was recorded August 20, 1883; that on the 24th day of August, 1883, Probyne and wife, for a valuable consideration, by a warranty deed, conveyed the premises to the defendant; and that the same was recorded August 28, 1883.

The defendant also, by leave of the court, filed a cross bill in which he alleges that at the commencement of the suit, and a long time prior thereto, he was the owner in fee simple and in possession of the premises in controversy, and that his ownership of the estate rests upon the following muniments of title, namely, the patent mentioned from the United States of the described premises to Bittinger, dated November 1, 1871; the warranty deed of the premises by Bittinger and wife to Guthrie Probyne, dated June 23, 1870, and the warranty deed of Probyne and wife to the defendant, Theodore J. Moelle. The cross bill also refers to an alleged tax deed of the premises by the treasurer of Nuckolls county, Neb., to one Ferdinand Faust, and a quitclaim from him to L. P. Dosh; but no notice is taken of the tax deed, as it is conceded to be invalid. The prayer in the cross bill is that the title of the complainant, the defendant in the original bill, may be adjudged perfect and valid.

The answer to the cross bill sets up the various conveyances under which the complainant in the original suit claimed title to the premises, and, while admitting that the alleged deed to Probyne from Bittinger and wife, dated June 23, 1870, of the land in controversy, was placed on record August 20, 1883, it charges that no such deed of the premises was ever signed, acknowledged, or delivered by the grantors named, but avers
*424 that the deed signed, acknowledged, and delivered by them to *him on the day designated conveyed different property from the premises embraced in the deed, recorded August 20, 1883, being part of a different quarter section of the township, viz. the southwest quarter of section 32, and not the southeast quarter of section 31, and was recorded June 3, 1871, with this different description. It alleges that subsequent to the record the deed was changed so as to read, "the southeast quarter of section thirty-one," instead of the southwest quarter of section 32, and in such changed condition was recorded August 20, 1883.

The depositions taken in the case established the alteration made in the deed to Probyne as set forth in the answer to the cross bill. It is to be observed, also, that the date of the execution of the alleged deed to him by the patentee is more than a year prior to the issue of the patent. The testimony of the complainant, Sherwood, was taken in the case, and was to the effect that, before purchasing the property, he examined an abstract of title to it, and found a regular chain of conveyances from the United States to J. R. Dosh; that he also found, from the records of certain tax sales, a regular chain of conveyances from the grantee of the tax deed to the same party; that no other instrument affecting the title appeared of record; and that he was satisfied that the title was perfect. He then had the land examined, and it was reported to him to be a fair quantity of wild prairie, lying vacant and unoccupied, and never had been occupied, and he paid $1,800 cash for the property. In answer to a question, he stated that, at the time, he believed he was getting a good title, and had no idea that any such controversy as now exists would arise. The land was unoccupied, the price of the land a reasonable one, and he believed that he was getting a valuable piece of property, with a perfect title, for a fair consideration.

The case was heard at the January term of the circuit court, 1888, and on the 9th of March, which was in the same term, a decree was rendered, dismissing the bill. At the following term of the court, on the 18th of May, the complainant made a motion for leave to file a petition for a rehearing, representing to the court that at the hearing of the cause, and *when the decree was rendered, it was *425 believed by him that the property in controversy was of sufficient value to give jurisdiction to the supreme court of the United States, and that an appeal would lie from the decree, but that since then he had become assured that no appeal would lie, by reason of the fact that the premises in dispute were in value less than $5,000. The petition was accompanied by the affidavit of one of the solicitors of the complainant that the allegations were made after careful investigation, and believed to be true. On the 29th of October, which was during the May term, the cause was submitted with the petition for a rehearing, and both were decided on the same day, and a decree rendered in favor of the complainant, quieting his title as prayed. 36 Fed. Rep. 478. From that decree the present appeal is taken.

N. S. Harwood and J. H. Ames for appellant. C. S. Montgomery, for appellee.

*Mr. Justice FIELD, after stating the facts *426 in the foregoing language, delivered the opinion of the court.

The appellant asks for a reversal of the decree below on two grounds—First, that the petition for a rehearing was allowed, and a rehearing had, after the adjournment of the court for the term in which the original decree was rendered; and, second, that the decree, as finally rendered, was against the settled law, as to the effect of the quitclaim deed through which the complainant claims.

As a general thing, the jurisdiction of a court over its decrees terminates with the

close of the term at which they were rendered. An exception to this doctrine is allowed by the 88th rule in equity, in cases where no appeal lies from the decree to the supreme court of the United States. It was on that ground that the motion was made for leave to file the petition for a rehearing in this case, and the allegations of the insufficiency of the amount involved, as the reason that no appeal from the decree would lie, does not appear to have been controverted by the defendant, but to have been conceded as true. The petition was therefore properly allowed; and, the case being submitted with such petition, there was no error in the court considering its merits on the legal propositions presented. Although the appellant has, by affidavits since filed, shown that the amount involved exceeds the sum of $5,000, it is too late for him, on that account, to object to the rehearing granted. His concession, upon which the petition was heard, cannot now be recalled. He should have shown that the land in controversy was sufficient at the time the motion was argued, instead of conceding its insufficiency, as alleged.

*227 Of the merits of the decree rendered in favor of the complainant, and sustaining his title, we have no doubt. His title is traced directly from the patentee of the United States, by various intermediate conveyances. The quitclaim by him to Dosh, bearing date on the 22d of August, 1882, was executed while the title still remained in him. The deed to Probyne, bearing date, as it would seem, prior to the issue of the patent, and on which the defendant relies, does not cover the premises in controversy, but only property situated in a different section of the township. Even if it be conceded that the parties intended that the conveyance should embrace the premises in controversy, they did not carry out their intention, and in its original condition the deed was placed on record, and there allowed to remain, giving notice to all parties interested in section 31 of township No. 3 that the conveyance to Probyne of June 23, 1870, did not affect them. The change in the description of the property, made after the delivery of the deed to the grantee, and its record in the register's office of the county, did not give operation and force to the deed, with the changed description, as a conveyance of the premises in controversy. An alteration in the description of property embraced in a deed, so as to make the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, certainly does not give it validity as a conveyance of the property of which the new description is inserted. The old execution and acknowledgment are not continued in existence as to the new property. To give effect to the deed as one of the newly-described property, it should have been re-executed, reacknowledged, and redelivered. In other words, a new conveyance should have been made.

But if the deed as altered in its description of the property conveyed be deemed valid as between the parties from the time of the alteration, though not re-executed, it could not take effect and be in force, as to subsequent purchasers, without notice, whose deeds were already recorded but as to them, by the statute of Nebraska, it was void. The statute of that state upon the subject is as follows:

"All deeds, mortgages, and other instruments of writing which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded: Provided, that such deeds, mortgages, or instruments shall be valid between the parties." Section 16, c. 73. Comp. St. Neb. 1891, p. 647.

The form of the quitclaim to Dosh on the 22d of August, 1882, did not, therefore, prevent the passing of the title of Bittinger to the grantee. Until then the title was in him. The deed previously executed to Probyne, if effectual for any purpose when it was altered without re-execution, was inoperative, as against the grantee in the quitclaim, by force of the above statute.

The doctrine expressed in many cases, that the grantee in a quitclaim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument,—that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time,—indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property; and therefore it is said that the grantee, in accepting a conveyance of that kind, cannot be a bona fide purchaser, and entitled to protection as such, and that he is in fact thus notified by his grantor that there may be some defect in his title, and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title, or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind, even when the title is known to be perfect. He may hold the property only as a trustee,

or in a corporate or official character, and be unwilling, for that reason, to assume any personal responsibility as to its title or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than one of quitclaim, or of a simple transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a bona fide purchaser, however free, in fact, his conduct in the purchase may have been from any imputation of the want of good faith. In many parts of the country a quitclaim, or a simple conveyance of the grantor's interest, is the common form in which the transfer of real estate is made. A deed in that form is in such cases as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference, in their efficacy and operative force, between conveyances in the form of release and quitclaim, and those in the form of grant, bargain, and sale. If the grantor, in either case, at the time of the execution of his deed, possesses any claim to or interest in the property, it passes to the grantee. In the one case,—that of bargain and sale,—he impliedly asserts the possession of a claim to or interest in the property; for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess, without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a bona fide purchaser. But in either case, if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title, and against incumbrances or liens, does not raise a presumption of the want of bona fides on the part of the purchaser in the transaction. Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guaranties against future contingencies. The character of bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance, or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property, or a clear title, must depend upon the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of ascertaining this fact, and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the bona fide nature of the transaction on his part.

In the present case, every available means of ascertaining the character of the title acquired, both at the time of his own purchase and at the time the purchase of his predecesssors in interest were made, were pursued by the complainant. When he looked at the records of the county where the property was situated, he saw that the only deed executed by the patentee, the original source of title, was for property other than the premises in controversy. No mere speculative investment in the chance of obtaining a good title could, therefore, properly be imputed to him.

Decree affirmed.

(147 U. S. 538)

FLEITAS v. RICHARDSON.

(March 6, 1893.)

No. 29.

APPEAL—FINAL JUDGMENT—FORECLOSURE—STATE PRACTICE—EQUITY JURISDICTION.

1. Under Code Pr. La. arts. 63, 98, 732–734, an act of mortgage passed before a notary public in the presence of two witnesses, with an acknowledgment and identification of the debt thereby secured, imports a confession of judgment, upon which the creditor is entitled to executory process, and to obtain, without previous citation to the debtor, an order for the seizure and sale of the mortgaged property for the payment of the debt. By article 735 the clerk is required to give the debtor notice of this order a specified time before the sale, and the debtor is entitled to have the sale suspended for certain causes enumerated in articles 738, 739. *Held*, that this order of seizure and sale is not a final judgment or decree, and hence no appeal will lie to the supreme court of the United States from such an order made by the circuit court, although, under Code Pr. arts. 565, 566, such an order in the state courts is subject to appeal. Levy v. Fitzpatrick, 15 Pet. 167, followed. Marin v. Lalley, 17 Wall. 14, distinguished.

2. A proceeding under these statutes, though in summary form, is in the nature of a bill in equity, and belongs on the equity side of the court.

Appeal from the circuit court of the United States for the eastern district of Louisiana. Dismissed.

Statement by Mr. Justice GRAY:

This was a bill in equity, filed June 29,

1888, in the circuit court of the United States for the eastern district of Louisiana, by Gilbert M. Richardson, a citizen of New York, against Francis B. Fleitas, a citizen of Louisiana, and residing in that district, for a seizure and sale of mortgaged lands in the parish of St. Bernard, in that district, under executory process, in accordance with the provisions of the Louisiana Code of Practice, the material parts of which are copied in the margin.[1]

*539 *The bill alleged that the defendant, on January 28, 1884, executed and delivered to the plaintiff five promissory notes, for $12,600 each, payable to the plaintiff's order on January 1st, in 1885, 1886, 1887, 1888, and 1889, respectively, with interest *at the yearly rate *540 of 8 per cent., and on the same day, by authentic act of mortgage, passed before a notary public in the presence of two witnesses, (a copy of which was annexed to the bill,) mortgaged the lands in question to secure the payment of these notes, which were duly paraphed by the notary, ne varietur, to identify them with the act of mortgage, and that the last two notes, (copies of which, with the paraph of the notary thereon, were also annexed to the bill,) and interest since July 1, 1887, had not been paid; that Shattuck & Hoffman, a commercial firm named in the mortgage, had no interest in these notes, and the plaintiff believed they had no interest in the act of mortgage; and that, under these notes and the mortgage, there was past due, and owing to the plaintiff, the sums of $27,216, with interest since January 1, 1888, on $25,200 thereof, at the rate of 8 per cent., and on $2,016 thereof, at the rate of 5 per cent.

The copy of the act of mortgage, annexed to the bill, showed that it was made to secure the payment of the notes to the plaintiff, and also to secure the payment to Shattuck & Hoffman of advances made by them to the defendant under a written agreement between them and him of the same date, not exceeding the amount of his debt to the plaintiff, and authorized the mortgages, in case any of the debts thereby secured should not be paid at maturity, to cause the mortgaged property "to be seized and sold under executory process, without appraisement, to the highest bidder, for cash, hereby confessing judgment in favor of said mortgagees, and of such person or persons as may be the holder or holders of said promissory notes, and all assigns of said Shattuck & Hoffman, for the full amount thereof, capital and interest, together with all costs, charges, and expenses whatsoever," and further provided that, in the event of a foreclosure of the mortgage and sale of the premises, "then out of the proceeds of said sale the said indebtedness to said Gilbert M. Richardson, whether held by

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[1] Article 63. When the hypothecated property is in the hand of the debtor, and when the creditor, besides his hypothecary right, has against his debtor a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized immediately, and sold, for the payment of his debt, including the capital, the interest, and the costs, pursuant to the rules provided hereafter for executory proceedings.

Article 98. The proceedings are ordinary when citation takes place, and all the delays and forms of law are observed. They are executory when seizure is obtained against the property of the debtor, without previous citation, in virtue of an act or title importing confession of judgment, or in other cases provided by law.

Article 732. Executory process can only be resorted to in the following cases:

(1) When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor.

(2) When the creditor demands the execution of a judgment which has been rendered by a tribunal of this state, different from that within whose jurisdiction the execution is sought.

The proceeding by provisional seizure (attachment) or in rem resembles in some sort the executory process, but should not be confounded with it, as they are subject to different rules.

Article 733. An act is said to import a confession of judgment, in matters of privilege and mortgage, which it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage.

Article 734. When the creditor is in possession of such an act, he may proceed against the debtor or his heirs by causing the property subject to the privilege or mortgage to be seized and sold on a simple petition, and without a previous citation of the debtor.

Article 735. In obtaining this order of seizure, it shall suffice to give three days' notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles between the place of his residence and the residence of the judge to whom the petition has been presented.

Article 738. The debtor against whom this order of seizure shall have been rendered may obtain an injunction to suspend the sale, if, before the time of sale, he files in the court issuing the order his opposition, in writing, alleging some of the reasons contained in the following article, and of which he shall swear to the truth.

Article 739. The debtor can only arrest the sale of the thing thus seized, by alleging some of the following reasons, to wit:

(1) That he has paid the debt for which he is sued;

(2) That he has been remitted by the creditor;

(3) That it has been extinguished by transaction, novation, or some other legal manner;

(4) That time has been granted to him for paying the debt, although this circumstance be not mentioned in the contract;

(5) That the act containing the privilege or mortgage is forged;

(6) That it was obtained by fraud, violence, fear, or some other unlawful means;

(7) That he has a liquidated account to plead in compensation to the debt claimed;

(8) And, finally, that the action for the recovery of the debt is barred by prescription.

Article 740. When the judge grants an injunction, on the allegation under oath of any of the reasons mentioned in the preceding article, he shall require no surety from the defendant, but he shall pronounce summarily on the merits of his opposition, if the plaintiff requires it.

said G. M. Richardson or his assigns, shall be paid by priority over said indebtedness due, or to become due, to said Shattuck & Hoffman, or their successors and assigns."

*541 Upon the filing of the bill, on June 29, 1888, the court made the following order: "Let a writ of seizure and sale issue herein, as prayed for, and according to law, to satisfy complainant's demands, as set forth in the foregoing bill and petition. Let the marshal seize and take into his possession, according to law, the property described in the foregoing petition, and then let the sale of this property be stayed till the further orders of this court."

On June 30, 1888, the clerk of the court issued to the defendant, and the marshal served upon him, a notice, in these terms: "Take notice that payment is demanded of you, within three days from the service hereof, of the amount specified in the writ of seizure and sale granted on the bill of complaint herein, a copy of which accompanies this notice, with interest and costs; and in default of payment within that delay the property referred to in said bill of complaint will be seized and sold, according to law, subject to the order on said bill. A further delay of one day for every twenty miles distance from your domicile to this city, at which place this court is held, is allowed you by law."

On the same day the defendant, appearing for that purpose only, prayed for, and was refused, an appeal or writ of error from that order to this court.

At the next term of the circuit court, on November 19, 1888, the defendant, appearing for the purpose of the motion only, moved that all the orders and proceedings in the case be quashed and set aside for want of jurisdiction, and also because, if the circuit court had authority, under any circumstances, to issue executory process, no case was made in the bill for issuing it, for want of authentic evidence, inasmuch as the mortgage appeared upon its face to have been made to include a private agreement between the defendant and Shattuck & Hoffman, (a copy of which, verified by his oath, was annexed to the motion,) and also "making known unto the court that he will make no other and further appearance or pleading herein, at all times believing the proceeding void in law, and this court without jurisdiction over the same," and praying that, if the court should refuse to quash the proceedings, he might be allowed an appeal to this court from the order of seizure and sale.

*542 *On November 22d a writ was issued to the marshal, commanding him to seize and take into his possession, according to law, the property described in the mortgage, and to sell it to satisfy the plaintiff's demands as set forth in the bill, and repeated in the writ; "said sale to be for cash, without appraisement, and said sale to be stayed until the further orders of the court, under its order dated June 29, 1888, on the bill herein," and to make return of his proceedings to the court.

On November 24th the plaintiff moved to strike the defendant's motion from the files, as not being allowed by the rules of the court or by the laws of Louisiana; and the court denied the motion to quash, as well as the motion to strike from the files, but granted the appeal, upon the defendant giving bond in an amount to be fixed by the court, and referred the case to a master to report the facts, to enable the court to determine that amount.

On the return of the master's report, the court, on December 7, 1888, made the following order: "This cause came on to be heard, and was argued by counsel, whereupon the court, on consideration thereof, and further reconsidering the whole matter with reference to the order or decree awarding executory process herein, and the defendant's applications for appeal therefrom, doth now order that so much of the order of June 29, 1888, awarding executory process herein, as directs the marshal to stay the sale of the property directed to be seized till the further orders of the court, be stricken out, and that all orders made subsequently to the date of the defendant's application for an appeal, on June 30, 1888, except the order of reference to the master to report the facts upon which the amount of bond could be determined and fixed, be revoked, and that an appeal, to operate as a supersedeas, be allowed to said defendant nunc pro tunc as of said 30th day of June, 1888, according to his petition then presented, on his giving bond as required by law, with good and solvent surety, in the sum of one thousand dollars. And it is further ordered that the marshal, on the filing of such bond, release from seizure the property he has seized herein, and that the exceptions to the order of reference be overruled."

*On the same day the defendant gave bond *543 accordingly to prosecute his appeal to this court "from the decree rendered on June 29, 1888."

J. R. Beckwith, for appellant. Thos. J. Semmes, for appellee.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

At October term, 1888, this court denied a motion to dismiss or affirm, submitted on briefs under rule 6. But on fuller consideration of the case, and in the light of the oral arguments of counsel, we are constrained, although the question is not free from difficulty, to hold that this court has no jurisdiction, because the order appealed from is not a final judgment or decree.

By the Louisiana Code of Practice, an act of mortgage, passed before a notary public in the presence of two witnesses, with an acknowledgment and identification of the debt thereby secured, imports a confession of

judgment, upon which the creditor is entitled to executory process, and to obtain, without previous citation to the debtor, an order for the seizure and sale of the mortgaged property for the payment of the debt. Articles 63, 98, 732–734. But the clerk of the court is required to give notice of this order to the debtor 3 days before the sale, adding a day for every 20 miles between the place of his residence and the place where the court is held. Article 735. If such notice is not given to the debtor, the proceeding is erroneous. Saillard v. White, 14 La. 84; Hart v. Pike, 29 La. Ann. 262. The debtor may obtain an injunction to suspend the sale, if before the time of sale he files in the court his opposition, in writing, under oath, alleging that the debt has been paid or remitted or extinguished, or that the time of payment has been extended, or that the act of mortgage *544 is forged, or obtained by fraud, violence, or other unlawful means, or that he has a liquidated account to plead in compensation, or that the action for the debt is barred by prescription. Articles 738, 739.

The provisions of that Code, making the acknowledgment of the debt and mortgage, in solemn form, before a notary public, conclusive evidence, upon which, without previous notice to the debtor, the creditor may obtain an order for the seizure and sale of the mortgaged lands to satisfy his debt, bear some analogy to proceedings (never denied to be due process of law) which were well known where the common law prevailed, before the adoption of the constitution of the United States, such as the recognizances called "statute merchant" and "statute staple," in England, and similar recognizances in Massachusetts, taken before a court or magistrate, and upon which, when recorded, execution might issue without previous notice to the debtor, and be levied upon his lands or goods. 2 Bl. Comm. 160, 341, 342; Bac. Abr. "Execution," B; The King v. Giles, 8 Price, 293, 316, 351; St. Mass. 1782, c. 21; Albee v. Ward, 8 Mass. 79, 84; Rev. St. c. 118; Gen. St. c. 152; Pub. St. c. 193.

In Louisiana, however, the act before the notary, as well as the order for seizure and sale, includes no lands but those described in the mortgage; and, although the creditor may obtain that order without previous notice to the debtor, the sale cannot take place until the debtor has had notice and opportunity to interpose objections.

This proceeding, therefore, is a civil suit inter partes, which, where the parties are citizens of different states, is within the jurisdiction conferred by congress on the circuit court of the United States. Act Sept. 24, 1789, c. 20, § 11, (1 St. p. 79; Rev. St. § 739;) Act March 3, 1875, c. 137, § 1, (18 St. p. 470;) Act March 3, 1887, c. 373, § 1, (24 St. p. 552;) Act Aug. 13, 1888, c. 866, (25 St. p. 434;) Toland v. Sprague, 12 Pet. 300; Levy v. Fitzpatrick, 15 Pet. 167; Chaffee v. Hayward, 20 How. 208, 215; Marin v. Lalley, 17 Wall. 14. And the proceeding, though in summary form, is in the nature of a bill in equity for the foreclosure of a mortgage, and clearly belongs on the equity side of that court. Brewster v. Wakefield, 22 How. 118, 128; Walker v. Dreville, 12 Wall. 440; *545 *Marin v. Lalley, 17 Wall. 14; Improvement Co. v. Bradbury, 132 U. S. 509, 515, 10 Sup. Ct. Rep. 177.

The debtor being entitled to notice and hearing before an actual sale of the property, it would seem, upon principle, that the order for a sale must be considered as interlocutory, only, and not the final decree in the case,—at least when the debtor does, within the time allowed by the Code, come in, and contest the validity of the proceedings. McGourkey v. Railway Co., 146 U. S. 536, 545, 547, 549, 13 Sup. Ct. Rep. 170, and cases there cited.

By the decisions of the supreme court of Louisiana, indeed, such an order, "exhausting the power of the court quoad the application," although its execution may be stayed on the opposition of the debtor, is subject to appeal, under the practice in that state. Code Pr. La. arts. 565, 566; Harrod v. Voorhies, 16 La. 254; Mitchell v. Logan, 34 La. Ann. 998, 1003; Ralston v. Mortgage Co., 37 La. Ann. 193. But the practice of the decisions of the state in this respect cannot control the appellate jurisdiction of this court from the circuit court of the United States, as defined by act of congress. Rev. St. § 691; Luxton v. Bridge Co., 147 U. S. 337, 341, 13 Sup. Ct. Rep. 356.

Upon the question whether the order of seizure and sale was a final judgment, the case of Levy v. Fitzpatrick, above cited, is much in point, and was fully discussed in the opinion delivered by Mr. Justice McKinley, who was peculiarly familiar with the law of Louisiana. In that case, a writ of error to reverse the order of seizure and sale, made without previous notice to the debtors, was dismissed for want of jurisdiction; and Mr. Justice McKinley, speaking for the whole court, said:

"Had this proceeding taken place before a judge of competent authority in Louisiana, the debtors might have appealed from the order of the judge to the supreme court of that state; and that court might, according to the laws of Louisiana, having examined and decided upon the errors which have been assigned here. But there is a marked and *546 radical difference between the jurisdiction of the courts of Louisiana and those of the United States. By the former, no regard is paid to the citizenship of the parties; and in such a case as this no process is necessary to bring the debtors before the court. They, having signed and acknowledged the authentic act, according to the forms of the law of Louisiana, are, for all the purposes of obtaining executory process, presumed to be before the judge. Code Pr. La. arts. 733, 734. An appeal will lie to the supreme court

of Louisiana from any interlocutory or incidental order, made in the progress of the cause, which might produce irreparable injury. State v. Lewis, 9 Mart. La. 301, 302; Broussard v. Trahan, 4 Mart. La. 489; Gurlie v. Coquet, 3 Mart. (N. S.) 498; Seghers v. Antheman, 1 Mart. (N. S.) 73; State v. Pitot, 12 Mart. La. 485."

But, as the judge went on to say, "the jurisdiction of the courts of the United States is limited by law, and can only be exercised in specified cases." He then observed that by the judiciary act of 1789, c. 20, § 11, giving the circuit court of the United States original jurisdiction of suits at common law or in equity between citizens of different states, no judgment could be rendered by a circuit court against any defendant not served with process, unless he waived the necessity of service by entering his appearance in the suit, and that, by section 22 of the same act, only final judgments of the circuit court could be reviewed by this court on writ of error, and added: "It is obvious that the debtors were not before the judge in this case, by the service of process or by voluntary appearance, when he granted the executory process. In that aspect of the case, then, the order could not be regarded as a final judgment, within the meaning of the twenty-second section of the statute. But was the order a final judgment, according to the laws of Louisiana? The fact of its being subject to appeal does not prove that it was, as has already been shown. Nor could it per se give to the execution of the process, ordered by the judge, the dignity of a judicial sale. Unless at least three days' previous notice were given to the debtors, the sale would be utterly void. Grant v. Walden, 6 La. 623, 631. This proves that some other act was necessary on the part of the plaintiffs to entitle them to the fruits of their judgment by confession; and in that act is involved the merits of the whole case, because, upon that notice, the debtors had a right to come into court and file their petition, which is technically called an 'opposition,' and set up as matter of defense everything that could be assigned for error here, and pray for an injunction to stay the executory process till the matter of the petition could be heard and determined. And, upon an answer to the petition coming in, the whole merits of the case between the parties, including the necessary questions of jurisdiction, might have been tried, and final judgment rendered. Code Pr., arts. 738, 739. From this view of the case, we think the order granting executory process cannot be regarded as anything more than a judgment nisi. To such a judgment a writ of error would not lie. The writ of error in this case must therefore be dismissed." 15 Pet. 170–172.

The single ground of that decision, as appears by these extracts from the opinion, was that there had been no final judgment in the circuit court. The point that the case, though coming from the state of Louisiana, where the distinction between common law and equity is not preserved, yet, being essentially a suit in equity in the circuit court of the United States, should have been brought to this court by appeal, and not by writ of error, was not considered or noticed, and had not then been decided, although it is now well settled. McCollum v. Eager, 2 How. 61; Walker v. Dreville, 12 Wall. 440; Marin v. Lalley, 17 Wall. 14.

In Marin v. Lalley, above cited, the order of seizure and sale was made by the circuit court on March 28, 1872. The defendants afterwards came in, filed various objections, oppositions, and answers, and prayed that the proceedings might be quashed. The court on June 3d ordered that "the objections and answers of the defendants to the order of seizure and sale be overruled;" and the defendants on June 13th appealed, as appears on referring to the record, from "the order for executory process, entered herein on the 28th day of March, 1872, and made final on the 3d day of June, 1872, by judgment of this honorable court." The appeal taken by the defendants in that case, and which this court refused to dismiss on motion, was not an appeal from the original order of March 28th, but from that order as made final by the judgment of June 3d, and was therefore an appeal from that judgment. It was of this final order, made after notice to, and opposition by, the defendants, that Chief Justice Chase, in delivering judgment, said: "It is, in substance, a decree of foreclosure and sale, which has repeatedly been held to be a final decree." "If there were any doubt as to the finality of the original order, there can be none that it became final when the answer and objections were overruled. That order seems to have been made contradictorily with the debtors. Their opposition was overruled, and their property decreed to be seized and sold to pay their debts." And he distinguished Levy v. Fitzpatrick, above cited, on the ground that the order there held not to be a final judgment was "the original order, without the three-days' notice, and without any act on the part of the debtors." 17 Wall. 17, 18.

The present case appears to us to be governed by Levy v. Fitzpatrick, and to be likewise distinguishable from Marin v. Lalley.

The original order of the circuit court for a seizure and sale was made June 29, 1888, and directed the marshal to seize the property, but to stay the sale until the further orders of the court. On June 30th a notice, together with a copy of the bill and order, was issued by the clerk, and served on the defendant; and the defendant, appearing specially for the purpose, prayed for an appeal from that order, which was denied. These were all the proceedings which took place at the first term.

At the next term the defendant, on Novem-

ber 19th, again appearing specially, moved to quash the proceedings, and, if that should be refused, renewed his prayer for an appeal from the order of June 29th. The writ of seizure and sale was not issued to the marshal until November 22d, and directed that the sale should be stayed until the further *549 orders of the court, under its former order. On November 24th the court denied the motion to quash, and granted the appeal, upon the defendant giving bond in an amount to be determined. On December 7th the court, reconsidering the whole matter with reference to the order of June 29th, and to the defendant's application of June 30th for an appeal from that order, ordered that so much of that order as directed the marshal to stay the sale until the further orders of the court be stricken out, and that an appeal, to operate as a supersedeas, be allowed to the defendant nuc pro tunc as of June 30, 1888, on his giving bond in the sum of $1,000. The defendant gave bond accordingly to prosecute his appeal "from the decree rendered on June 29, 1888."

It thus clearly appears that the only appeal claimed by the defendant was from the original order of seizure and sale, of June 29, 1888, made before notice to the defendant, and was allowed, as of June 30th, upon the application which he had then made, as soon as he had notice of that order, and that no appeal was, in terms or by implication, claimed, applied for, allowed, or taken, from the order of December 7th, which was the final order of the circuit court in this case.

It necessarily follows that the order appealed from was not a final decree, and that the appeal must be dismissed for want of jurisdiction.

We are the more ready to accept this conclusion because we have no doubt that if, upon this record, the appeal could be treated as having been taken from the final decree of December 7th, no reason is shown for reversing the judgment of the circuit court. The only objections taken below to the order and proceedings, as appears by the motion to quash, were that the circuit court had no jurisdiction, and that there was no authentic evidence of the debt to Shattuck & Hoffman, secured by the same mortgage as the notes to the plaintiff. But that the circuit court, sitting in equity, had jurisdiction of the case, has been already shown; and, there being authentic evidence of the plaintiff's debt, the want of like evidence of the separate and distinct debt to Shattuck & Hoffman, which by the express terms of the mortgage, was subordinate to the debt to the plaintiff, is immaterial. Chambliss v. Atchison, 2 La. Ann. 488, 491; Renshaw v. Richards, 30 La. Ann. 398; Dejean v. Hebert, 31 La. Ann. 729; Soniat v. Miles, 32 La. Ann. 164.

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Appeal dismissed for want of jurisdiction.

Mr. Justice SHIRAS, not having been a member of the court when this case was argued, took no part in its decision.

(147 U. S. 664)

UNITED STATES v. FLETCHER.

(March 6, 1893.)

No. 783.

UNITED STATES MARSHALS—FEES.

1. Under Rev. St. § 790, which allows a United States marshal to execute all such writs as may be in his hands at the time of the expiration of his term, the fees for executing such writs properly belong to him; but if, for the convenience of making up accounts, he relinquishes them to his successor, the latter may charge them up in his accounts.

2. The marshal of the district in which a criminal is arrested may deputize the marshal of the district where the crime was committed to execute the warrant of removal, and may relinquish to him the fees therefor; and, in that event, the latter is entitled to have the same allowed. 45 Fed. Rep. 213, affirmed.

3. Where a claim for fees as marshal is presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken or is deferred for an unreasonable time. City of New Orleans v. Paine, 13 Sup. Ct. Rep. 303, 147 U. S. 261, followed.

4. Under Rev. St. § 829, allowing the marshals six cents a mile for traveling to serve process, with a proviso that, "where more than two writs of any kind required to be served in behalf of the same party or the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs," such marshal is entitled to mileage for each writ he serves when on different persons, although he only makes one trip. U. S. v. Harmon, 13 Sup. Ct. Rep. 327, 147 U. S. 268, approved. 45 Fed. Rep. 213, affirmed.

5. Act Feb. 22, 1875, prohibiting an allowance for mileage or travel not actually or necessarily performed, only refers to cases where process is sent by mail to a deputy to be served at a place remote from the office whence the process issues.

Appeal from the circuit court of the United States for the eastern district of Arkansas. Reversed.

This was an action to recover certain fees alleged to be due the plaintiff as marshal of the United States for the eastern district of Arkansas. The court below directed judgment to be entered in his favor for $3,069.16, (45 Fed. Rep. 213,) and the United States appealed.

Sol. Gen. Aldrich, for the United States. Wm. W. Dudley, L. T. Michener, and R. R. McMahon, for appellee.

Mr. Justice BROWN delivered the opinion of the court.

*A part only of the items in controversy are included in the assignments of error. Those to which objection was made in this court are as follows:

1. Expenses incurred by a deputy of the plaintiff's predecessor while endeavoring to arrest persons for offenses against the United States, $16.

This item was disallowed by the comptroller upon the ground that the same was due to the former marshal, and that the plaintiff was

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not authorized to pay expenses incurred by his predecessor. As a general rule, this is entirely true, but it appears in this case that the writs were issued before the plaintiff qualified for office, but were not returned until after he had qualified, and that, by an arrangement between the outgoing and incoming marshal, the latter was to have the fees earned upon all writs in the hands of the deputies of the former at the date the office changed hands. It further appeared that the outgoing marshal made no claim to these fees. Properly speaking, the outgoing marshal was entitled to these fees, under Rev. St. § 790, which allows him to execute all such precepts as may be in his hands at the time of his removal or the expiration of his term. But if, for the convenience of making up accounts, the outgoing marshal is content to relinquish his right to these fees, we see nothing but a technical objection in the way of the incoming marshal charging them up in his accounts. Did the outgoing marshal claim these fees as a debt justly due him, a different question would arise, but, in view of his relinquishment of them, we think they should have been allowed to his successor, the plaintiff.

2. An item of $1,804.73, for travel and other fees in pursuing into other judicial districts, and there arresting, persons charged with crime in the eastern district of Arkansas, and bringing the persons so arrested into the latter district, was disallowed by the comptroller upon the ground that the marshal had no authority to arrest a prisoner in any district but his own.

It appears, however, that where arrests were so made the marshals of the foreign districts deputized the plaintiff or his deputy to execute the orders of removal to the eastern district of Arkansas, and relinquished in favor of the plaintiff all claim against the United States for the mileage or fees so accrued. It appears to have been the custom for the marshals of this district to pursue fugitives from justice into other districts, to procure a deputation from the marshals of such other districts, and in such cases it was the practice of the treasury department up to 1875 to allow the mileage and other fees to the pursuing marshal, when the marshals of the foreign districts relinquished their claims for the same in his favor. When a person is arrested in one district for an offense alleged to have been committed in another, Rev. St. § 1014, requires the judge of the district within which he is arrested to execute a warrant to the marshal for his removal to the district where the trial is to be had. No good reason is perceived why the marshal of that district may not deputize the marshal of the district within which the crime was committed, or his deputy, to execute such warrant of removal, and relinquish to him his legal fees therefor.

Under such circumstances, we think the latter may properly charge these fees in his own account to the government, and that they should be allowed to him.

3. Expenses incurred to the amount of $130.50 in endeavoring to arrest in his own district persons charged with crime therein. The sum did not exceed the rate of $2 per day, the maximum amount allowed by law, and was not disallowed by the accounting officers in the settlement of his accounts, but was merely suspended for an itemized statement of the expenses.

Objection was made to this item upon the ground that the account was still in process of settlement in the department, and had not been finally passed upon or disallowed. Rev. St. § 829, allows to a marshal "for expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day." The finding of the court was that the services had been performed, and that the expenses equaled the amount charged, and sometimes exceeded the two dollars a day allowed by law. The comptroller, however, had a right to require items of these expenses to be furnished. The smallness of the amount allowable under the statute does not affect the principle, unless at least a showing be made that it is impossible to furnish the particulars.

With regard to the power of the court to allow these items pending the settlement of the marshal's account by the officers of the treasury department, Rev. St. § 951, provides that, "in suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the treasury for their examination, and to have been by them disallowed, in whole or in part," etc. This was, prior to the establishment of the court of claims, the only method provided by law for obtaining a judicial allowance of claims against the government. It is true that it was held by this court, under the court of claims act, in Clyde v. U. S., 13 Wall. 38, that a rule of that court, requiring parties to present their claims to an executive department before suing, was unauthorized and void, the court holding that this was a jurisdictional requirement, which congress alone had the power to establish, and, inferentially at least, that no action of the executive department was required before suit could be begun in that court under the act establishing it. This was also the ruling in U. S. v. Knox, 128 U. S. 230, 234, 9 Sup. Ct. Rep. 63, which was a suit in the court of claims by a commissioner of the circuit court for fees. In delivering the opinion of the court, Mr. Justice Miller remarked: "We understand the court to have decided, [in Clyde v. U. S.,] in substance, that the action of the auditing department, either in allowing or rejecting such a claim, was not an essential prerequisite to the jurisdiction of the court of claims to

hear it." But if such claims are presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. So long as the claim is pending and awaiting final determination in the department, courts should not be called upon to interfere; at least unless it ignores such *668 claim, or fails to pass upon it within a reasonable time. This was the rule applied by this court with respect to a pending survey of lands in City of New Orleans v. Paine, 147 U. S. 261, 13 Sup. Ct. Rep. 303.

4. The last assignment of error relates to a claim of $1,565.16, for more than one mileage on the service of two or more writs against different persons for different causes, when the service was made in the course of one trip; and also for mileage on more than one writ where more than one writ was served at the same time and place upon different persons. Rev. St. § 829, allows six cents a mile for traveling in the service of process, with a proviso that, "when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs." There is here a clear implication that there is no restriction upon the right of the marshal to charge mileage upon as many writs as he may have in his hands where the writs are against different persons.

The proviso in the act of February 22, 1875, § 7, (18 St. p. 334,) that no person shall be entitled to an "allowance for mileage or travel not actually and necessarily performed," evidently refers to cases where process is sent by mail to a deputy to be served at a place remote from the office whence the process has issued. The reasons for this allowance, however, are fully stated in U. S. v. Harmon, 147 U. S. 268, 13 Sup. Ct. Rep. 327, and this item is allowed upon the authority of that case.

This disposes of all the questions raised by the assignments of error, and the judgment of the court below is therefore reversed, and the case remanded, with instructions to enter a new judgment in conformity with this opinion.

(147 U. S. 661)

UNITED STATES v. TANNER.

(March 6, 1893.)

No. 335.

UNITED STATES MARSHALS —FEES—TAKING CRIMINAL TO PENITENTIARY—CONSTRUCTION OF STATUTES.

1. When a marshal takes a criminal to a penitentiary, the only mileage he can charge is that prescribed in Rev. St. § 829, "for transporting criminals, ten cents a mile for himself, and for each prisoner and necessary guard," and he cannot also charge six cents per mile as for "going to serve" the warrant of commitment.

2. A departmental construction of a statute will not be followed by the courts, when it is clearly erroneous.

Appeal from the court of claims.

Action by John R. Tanner, United States marshal, against the United States, to recover mileage fees. From a judgment for plaintiff, the United States appeals. Reversed.

Statement by Mr. Justice BROWN:

This was a petition to recover for services, as marshal of the United States for the southern district of Illinois, in executing certain warrants of commitment of prisoners to the penitentiary at Chester, Ill. The claims were for travel fees in the service of the warrants, and were disallowed by the comptroller upon the ground that a claim for mileage had *already been allowed for, as "transportation" for the deputies who executed the writs. The fifth finding of fact was that "prior to or about the 1st of October, 1885, it had been the usual practice of United States marshals to charge mileage in their accounts for going to serve writs of commitment within their respective districts, six cents a mile, in addition to ten cents a mile, each, for transportation of themselves or deputies, prisoners, and guards; and such charge, when made, had been allowed by the accounting officers of the treasury until the date named, when the practice was changed, and such mileage was thereafter not allowed."

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Upon this state of facts the court found, as a conclusion of law, that petitioner was entitled to recover the sum of $128.16. 25 Ct. Cl. 68. The United States appealed.

Sol. Gen. Aldrich, for the United States.

Geo. A. King, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This is a claim by a marshal for travel fees in serving warrants of commitment to a penitentiary. The claim is made under that clause of Rev. St. § 829, which allows "for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others." An allowance had already been made to petitioner under another clause of section 829, "for transporting criminals, ten cents a mile for himself, and for each prisoner and necessary guard." The effect of the allowance would be to give the marshal 16 cents per mile for his own travel for going from the place where the court is held to the penitentiary.

*The delivery of a warrant of commitment to a warden of a penitentiary is in no sense a service of a process, warrant, attachment, or other writ, within the meaning of the clause first above cited. The word "process," as used in that clause, evidently refers to process for bringing persons or property within the jurisdiction of the court, and not to warrants of commitment, by virtue of which criminals are transported from the court to the place of commitment. This is evident, not only from the inclusion of "writs of subpoena in criminal or civil cases," but from the provision that, "where more than one person is served therewith," travel is allowed "to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others." If a warrant of commitment can be said to be served at all upon any person, it is upon the criminal himself, who is transported by authority of such process, rather than upon the jailer, with whom it is simply deposited, and the fees of the marshal therefor are manifestly covered by the allowance for the travel of himself, his prisoners, and guards. Not only does the transportation of a prisoner imply a travel in company with him, but section 829 expressly allows a fee of fifty cents for "every commitment * * * of a prisoner," which implies the deposit of a warrant of commitment with the jailer. In some jurisdictions the prisoner is committed and held under a certified copy of the sentence, and no commitment at all is used.

This question was not involved in the decision of this court, or of the court below, in the case of U. S. v. Harmon, 147 U. S. 268, 13 Sup. Ct. Rep. 327, 43 Fed. Rep. 560.

If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. U. S. v. Graham, 110 U. S. 219, 3 Sup. Ct. Rep. 582; Swift Co. v. U. S., 105 U. S. 691. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.

The judgment of the court below must, therefore, be reversed, with directions to dismiss the petition.

(147 U. S. 672)

UNITED STATES v. JONES.

(March 6, 1893.)

No. 312.

CLERKS OF COURT—FEES.

1. The clerk of the federal district court is entitled to fees for entering orders approving marshals' accounts, and such fees are not "additional pay," within the meaning of Rev. St. § 1765, but are distinctly allowed by section 828, as folio fees. U. S. v. Van Duzee, 11 Sup. Ct. Rep. 758, 140 U. S. 169.

2. He is also entitled to fees for certifying copies of such orders to be forwarded to the department, with the accounts, but not for affixing seals thereto, unless the department requires the copy to be so authenticated.

3. The clerk is entitled to fees for copies of orders for marshals to pay supervisors of election, as such orders are clearly within the act of February 22, 1875, making an order necessary before any account in favor of court officers is paid; and, even though such orders are not within the statute, if the court assumed to make them, and the clerk enters them, he is entitled to his fees therefor.

4. The clerk is entitled to fees for filing marshals' accounts current, but not for filing vouchers to such accounts, as under the act of 1875 the vouchers are deemed a part of the account.

5. The said clerk is entitled to fees for making final records in criminal cases. These records include the indictment and other pleadings, the processes, journal entries, and the order of commitment.

6. A judgment against the United States for fees alleged to be due a clerk of court cannot be reversed on the ground that the record fails to show that the amount of the judgment, together with the amount already paid the clerk, would not increase his emoluments beyond the maximum allowed by law. This is a matter to be determined by the department when the whole account is stated and settled. U. S. v. Harmon, 13 Sup. Ct. Rep. 327, 147 U. S. 268, followed.

Appeal from the district court for the southern district of Alabama. Reversed.

*This was an action for fees alleged to be due the petitioner, Jones, for services rendered by him as clerk of the district court for the southern district of Alabama, the items of which were set out in a bill of particulars annexed to his petition. Judgment having been rendered in favor of the petitioner for $292.35, (39 Fed. Rep. 410,) the United States appealed to this court.

Sol. Gen. Aldrich and Felix Brannegan, for the United States. Wm. W. Dudley, L. T. Michener, and Richard R. McMahon, for appellee.

Mr. Justice BROWN delivered the opinion of the court.

The government assigns as error in this case the allowance of certain items—

(1) For entering orders of the court approving marshals' accounts, making copies thereof, and attaching certificates under seal to such copies.

(2) For copies of orders for marshals to pay supervisors of election.

(3) For filing marshals' accounts current, with vouchers thereto attached.

(4) For making final records, recording bonds and commitments.

1. Charges for entering orders approving marshals' accounts were allowed in the case of U. S. v. Van Duzee, 140 U. S. 169, 171, 11 Sup. Ct. Rep. 758, and we have seen no reason to change the opinion there expressed. The labor of preparing one's own accounts for services or fees is a mere incident to the rendition of the service, and is universally assumed by the creditor as his own burden; but the approval of the account of another stands upon a different

footing, and, if performed at the request of the government, or under a statute requiring it to be performed for the protection of the government, there is no reason why the clerk should not receive such fees therefor as he receives for analogous services in other matters.

We are referred to Rev. St. § 1765, as expressly inhibiting compensation for such services. This section provides that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever * * * for any other service or duty whatever, unless the same is authorized by law," etc. It is sufficient to observe of this that the service charged by the clerk in entering these orders is strictly in the line of his duty as clerk; that his per folio fees for such orders are expressly allowed by section 828, and are not "additional pay, extra allowance, or compensation in any form whatever."

The clerk is also entitled to charge for certifying copies of such orders, to be forwarded to the department, with the accounts, but not for seals affixed to such copies, unless, as was held in Van Duzee's Case, (page 174, 140 U. S., and page 760, 11 Sup. Ct. Rep.,) the treasury department required the copy of such order to be authenticated, not only by the signature of the clerk, but under seal. The charge for seals does not seem to have been allowed.

2. The charge for copies of orders for marshals to pay supervisors of election is objected to on the ground that there is no law authorizing courts to issue orders to the marshal to pay supervisors of election or special deputies. The act of February 22, 1875, (18 St. p. 333,) does require, however, that "before * * * any account payable out of the money of the United States shall be allowed * * * in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same * * * to a United States circuit or district court, * * * and the court shall thereupon cause to be entered of record an order approving or disapproving the account," etc. The account in question is *675 clearly within this section. Supposing it, however, to be a question of doubt,* if the court assumed jurisdiction to make such order, and the clerk obeyed it by entering it upon the journal, he is entitled to his fee therefor, irrespective of the necessity for such order being made. In fact, he would be guilty of contempt in refusing to make such entry. The government cannot, in this collateral proceeding, attack the power of the court to make this order.

3. The charges for filing marshals' accounts current, with vouchers attached thereto, were objected to upon the ground that the filing of each voucher separately was not only unnecessary but improper, since vouchers belong to and are part of the account to which they pertain. The act of 1875, above cited, requires the accounts and vouchers of marshals and other judicial officers to be made in duplicate, one copy of which must be forwarded by the clerk to the accounting officers of the treasury, and the other is to be retained in his office. Of course he is entitled to his fee for filing this account, but not for filing the vouchers, which are usually attached to the account, or, if not physically attached to it, are deemed to be a part of it, and as constituting, with the account, one paper. The clerk would be as much entitled to a separate fee for recording each coupon attached to a bond as for recording each voucher to an account as a separate paper.

4. The items for making final records, recording bonds and commitments. The court below held it to be the duty of the clerk to record, after the determination of any prosecution, all the proceedings of the court relating thereto. This record includes the indictment and other pleadings, the processes, journal entries, and we think it also includes the order of commitment, which, as held by the court below, is an important part of the proceedings in a criminal case, and should be made a matter of record, where, by the rules or practice of the court, a record of criminal cases is made up. As the court held the remainder of the charges included in these items, for the recording of bail bonds and justification of sureties, to be no part of the proceedings of the court, and their entry upon the record as unauthorized and unnecessary,* and as no appeal was taken by the petitioner, we are not called upon to express an opinion with regard to them.

5. The judgment is further claimed to be erroneous upon the ground that it does not appear that the amount of the judgment, together with the compensation already paid to petitioner as clerk of the court, would not increase his emoluments beyond the limits prescribed by law for his office. This objection, however, does not apply to any particular item, but is a matter to be considered by the officers of the department when the whole account is stated and settled. If the maximum compensation has already been allowed and paid, perhaps it might be matter of defense to be pleaded and proven by the government; but we are clearly of the opinion that it cannot be raised in this manner, and so held in the case of U. S. v. Harmon, 147 U. S. 268, 13 Sup. Ct. Rep. 327, decided at the present term.

The judgment of the court below is therefore reversed, and the case remanded, with directions to reduce the judgment in conformity with this opinion.

(147 U. S. 676)

UNITED STATES v. KING.

(March 6, 1893.)

No. 628.

CLERKS OF COURT—FEES—EXTRA WORK.

1. Rev. St. § 1765, precludes a clerk of the United States court from claiming any compensation for extra work germane to his office imposed on him by law, and he is not entitled to any fee or compensation for services as clerk in selecting juries in connection with the jury commissioners. U. S. v. Saunders, 7 Sup. Ct. Rep. 467, 120 U. S. 126, applied.

2. Under Rev. St. §§ 624, 626, 839, 796, the clerk is entitled to charge a per diem fee for attendance upon court by one of his deputies; and, where simultaneous sessions are held in separate divisions of the district, he is entitled to fees for personal attendance at one and attendance by deputy at the other. Section 831, declaring that only one fee shall be charged when the circuit and district court sit at the same time, should be construed to mean when they sit at the same time and place.

3. Proceedings for the removal of a prisoner from one district to another for trial are not "a cause," within the meaning of Rev. St. § 828, and the clerk is not entitled to fees for docketing and indexing the same.

4. The clerk of a federal court is entitled under Rev. St. § 828, to fees for entering orders approving the accounts of marshals and other officers. U. S. v. Jones, 13 Sup. Ct. Rep. 437 followed.

5. The practice which obtains in the southern district of Georgia of making separate reports to the court of the amount of fees due from the United States to witnesses and jurors, and obtaining separate orders for the payment of each claim, is unnecessary, burdensome, and oppressive, and the clerk is not entitled to fees for making such reports, or for filing the orders made thereon.

6. The clerk of a federal court is not entitled to fees for drawing more than one recognizance in a criminal case, unless it appears that the witnesses could not conveniently have recognized together.

7. The proceedings before the committing magistrate properly constitute no part of the final record in a criminal case, and hence the clerk of a federal court is not entitled to any fee for copying therein the papers sent up by the commissioner.

Appeal from the district court of the United States for the southern district of Georgia. Reversed.

This was a petition by H. H. King, whose Christian name is not given, to recover certain fees as clerk of the circuit court of the United States for the southern district of Georgia. To his petition was annexed a schedule of 23 items, running through four years of service, which had been disallowed by the accounting officers of the treasury, amounting in the aggregate to $595.65. The case was tried upon an agreed statement of facts, and a judgment rendered against the United States for $586.15 and costs. See Erwin v. U. S., 37 Fed. Rep. 470. The United States appealed.

Sol. Gen. Aldrich, for the United States.
C. C. Lancaster, for appellee.

*676 *Mr. Justice BROWN delivered the opinion of the court.

The agreed statement of facts shows that petitioner was appointed clerk on March 17, 1881, and has continued to hold that office until the present time; that his accounts were duly presented and approved by the court; that the accounting officers disallowed some of the items charged; that the claimant made up an account for these disallowances from the date of his appointment, including therein similar items for services rendered, which had not been included in his accounts, because of adverse rulings upon the legality of the charges. This account was presented and sworn to in open court for the purpose of bringing this suit. The several items, the allowance of which is assigned by the government as error, will be considered in their order.

*678

1. Per diem charges of five dollars for services as clerk in selecting juries in connection with the jury commissioner are objected to, upon the ground that no compensation is provided by law for such services.

Prior to 1879, juries to serve in the courts of the United States were, under Rev. St. § 800, designated by ballot, lot, or otherwise, according to the mode of forming such juries practiced in the several states, and the courts were authorized to adopt rules conforming the method of designating and impaneling juries to the laws and usages of the state. By the act of June 30, 1879, however, (21 St. p. 43,) a new system was inaugurated, and it was provided, in substance, that the names of not less than 300 persons should be placed in the jury box by the clerk of the court, and a commissioner to be appointed by the judge, who should be of opposite politics to the clerk, and that the clerk and commissioner should each place one name in the box alternately, without reference to party affiliations. The clerk was not by this statute made a jury commissioner, but a new duty was imposed upon him as clerk, and no provision was made for his compensation. That congress has the right to impose additional duties upon a public officer without additional compensation is not denied, but it is insisted that under the sundry civil appropriation bill of March 3, 1885, (23 St. pp. 478, 511,) and under subsequent appropriation bills, a provision for "compensation for jury commissioners, five dollars per day, not exceeding three days for any one term of court," should be equitably held to include the clerk, who performs the same duties as a jury commissioner. As the clerk is not a jury commissioner eo nomine, it is difficult to see how he could be paid out of an appropriation for jury commissioners, or how these appropriation bills enlarge his rights, and, unless he is entitled to extra compensation as clerk for these duties, there would seem to be no appropriation from which he could be paid. While the duties of the clerk are similar to those of the commissioner, there is nothing in the language to indicate that the clerk did not act as clerk in performing such duties, or that he became ex officio a jury commissioner.

*679

The question of compensation for extra services has been the subject of considerable discussion in this court, and of some legislation by congress. The ordinary rule, in the absence of legislation, is that, if the statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation; but if he is employed to render services in an independent employment, not incidental to his official duties, he may recover for such services. Mechem, Pub. Off. § 862, 863. Acting upon this principle, it was held by this court in 1833 that, in an action brought by the United States against a public officer, the court might allow, by way of offset, an equitable claim for the disbursement of public moneys and other services rendered to the government under orders of the head of a department, though there were no act of congress providing for the case. U. S. v. McDaniel, 7 Pet. 1; U. S. v. Ripley, Id. 18; U. S. v. Fillebrown, Id. 28. See, also, Gratiot v. U. S., 15 Pet. 336, 4 How. 80.

Apparently, in consequence of these decisions, congress, on March 3, 1839, passed an act (5 St. p. 349) which, as amended August 23, 1842, (5 St. pp. 508, 510,) provided "that no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation." This provision was subsequently carried into the Revised Statutes, (section 1765.) Of this statute it was said by this court in Hoyt v. U. S., 10 How. 109, 141: "It cuts up by the roots these claims by public officers for extra compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of congress. The prohibition is general, and applies to all public officers, or quasi public officers, who have a fixed compensation." This language was somewhat limited by Chief Justice Taney in Converse v. U. S., 21 How. 463, 471, wherein he says of these provisions: "They can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law." An allowance was made by the court in this case (three of its members dissenting) to a collector of customs as commission for the purchase of supplies for the lighthouse service throughout the United States, so far as such purchases were made for lighthouses outside of his district, and beyond the limits to which his duties extended. See, also, U. S. v. Brindle, 110 U. S. 688, 4 Sup. Ct. Rep. 180.

Further construing this statute, it was held in U. S. v. Shoemaker, 7 Wall. 338, that a collector of customs was not entitled to offset, in a suit against him by the United States, compensation for disbursements made for building a customhouse and marine hospital at the port where he was collector. See, also, Hall v. U. S., 91 U. S. 559, wherein items for set-off for extra services and expenses were excluded; and Badeau v. U. S., 130 U. S. 439, 9 Sup. Ct. Rep. 579, in which a retired army officer accepting pay under an appointment in the consular service was held to be precluded from receiving salary as an officer in the army.

In U. S. v. Saunders, 120 U. S. 126, 7 Sup. Ct. Rep. 467, it was held that this act had no application to two distinct places, offices, or employments, each with its own duties and compensation, but both held by one person at the same time. In delivering the opinion of the court in this case, Mr. Justice Miller observed that "the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of congress or by order of the head of his department, or, in any other mode, added to or connected with the regular duties of the place which he holds."

We think that the construction given to this section in these cases is conclusive against the claim of the clerk for per diem services in the drawing of juries, or for such services as are not taxable, as orders, certificates, or the like, under section 828, fixing the compensation of clerks. These services are not rendered in a distinct capacity as jury commissioner, but are incidental and germane to his regular duties as clerk.

2. An item for attendance on the circuit court at Macon by deputy for several days was disallowed by the comptroller, upon the ground that the clerk had been allowed a per diem for his personal attendance upon the court at Savannah upon the same day, the comptroller holding that the clerk was entitled to but one per diem for any one day, although the court might be in session at two or more places, and the clerk be represented at one of those places by a deputy. By Rev. St. § 624, the circuit court is authorized to appoint deputies of the clerk upon his application, and provision is made by sections 626 and 839 for compensation to such deputies to be paid by the clerk, and allowed in the same manner as other expenses of his office are paid and allowed. By section 796 the legal responsibility of the clerk for the acts of his deputy is recognized. Under such circum-

stances, when the law provides expressly for the appointment of a deputy, and authorizes the clerk to pay his compensation as a part of his office expenses, there can be no question that his acts as such deputy should be recognized as the acts of the clerk himself, and that the clerk is entitled to like fees for the performance of such acts. It would not be claimed that the clerk would not be entitled to his fee for clerical services in entering orders, etc., performed by his deputy. No valid distinction can be made in this particular between such charges and the ordinary per diem charges for attendance.

*653 *Among the fees provided for the clerk by section 828 are five dollars a day for his attendance upon the court "while actually in session," with a qualification contained in section 831 that, "when the circuit and district courts sit at the same time, no greater per diem or other allowance shall be made to any such officer than for an attendance on one court." As the circuit and district courts are ordinarily held together at the same time and place by the district judge, sitting both as judge of the district and of the circuit court, and cases in both courts are disposed of indifferently, and without reference to the court in which they are pending, the obvious purpose of this proviso was to limit the officials to a single per diem for attendance upon both courts. Where, however, the two courts are held in different places, or, as in this case, in different divisions of the same judicial district, upon the same day, or where a court is held by the regular district judge at one place, and a different branch or division of the same court is held at another place by the circuit judge or a district judge designated under the statute for that purpose, the reason of the rule does not apply. In such a case a separate staff of officers is necessary for each place, and equitably each is entitled to fees for attendance. We think the last clause of section 831 should be limited to cases where the court sits not only at the same time, but at the same place. It is unnecessary to decide whether, when the district consists of two divisions, and courts are held in both divisions by the same judge and officers, they are one court or two. It is sufficient for the purpose of this case to hold that the sessions are separate, and that the clerk is entitled to charge for his own attendance at one place, and for that of his deputy at another.

3. The eighth item relates to the case of one Clayton, who was removed under Rev. St. § 1014, by order of the judge to the northern district of Georgia for trial. No objection is made to the particulars of this item, except to the charge for docketing and indexing, which cannot be allowed, as the proceeding is not a "cause," within the meaning of section 828, providing for docket fees.

*654 The application to the judge is a summary one, and accompanied by a copy of the indictment, information, or commitment of the commissioner before whom he has been examined, and ordinarily no evidence is required except as to the identity of the accused, when the judge issues a warrant for his removal, and no papers are required to be filed with the clerk.

4. Items 10 and 11, for entering orders approving the accounts of marshals and other officers, are allowed upon the authority of U. S. v. Jones, 13 Sup. Ct. Rep. 437, (just decided.)

5. Item 13 is for making reports of the amount of fees due by the United States to jurors and witnesses for traveling and attendance, and for filing orders of the court to pay the same. The practice in the southern district of Georgia with regard to the payment of fees due by the United States to witnesses and jurors is stated by the court below to be as follows. (Erwin v. U. S., 37 Fed. Rep. 470, 483:) "When a case has been disposed of, and the witnesses are discharged by the district attorney from further attendance, they report to the clerk's office. The clerk then ascertains the exact amount due them for attendance and mileage, by examination of their subpoenas, questioning them as to the place from which they have traveled, and comparing their statements with a table of distances kept in his office for that purpose, and the witness is sworn on a jurat drawn on his subpoena ticket to the correctness of his claim. If any doubtful question arises, it is referred to the presiding judge for his decision. The days attended, mileage, and amounts due the respective witnesses are then entered on a report, which is signed by the clerk, and submitted to the court for its approval." If the court adjudge the report correct, he indorses upon it an order for the payment of the witnesses and jurors. The only criticism to be made upon this practice is in requiring separate orders to be made in each case.

The practice in most districts allows the witness or juror to appear before the clerk, make oath to his mileage and attendance, and receive a ticket or memorandum of the amount due him, which he presents to the marshal, who takes his receipt upon a large roll opened for the signature of all such jurors and witnesses as are paid off during the term. One order is then made to pay all persons whose names are on the roll, and the expense of a separate order in each case is thereby avoided. In the southern district of Georgia the practice seems to have been for each witness or juror, as he was discharged, to appear separately or in small numbers before the clerk, who administered the oath, for which he charged 10 cents; drew a report, for which he charged 30 cents; entered an order on the minutes, 30 cents; filed copy of the same, 10 cents; made a copy of the same to accompany the marshal's accounts, 20 cents; and annexed his

certificate thereto, 15 cents. The clerk's charges thus aggregated $1.15 for the payment of a witness, whose fees may not have exceeded $1.50, or of a single juror, whose fees may not have exceeded $2. Any practice which puts the government to such an expense is burdensome, vexatious, and oppressive. In the present case a separate report seems to have been made, and a separate order issued, whenever a juror or witness was discharged, or a small number were discharged together; and the item contains charges for drawing 332 reports, at 30 cents each, and filing 358 orders, at 10 cents each; the comptroller allowing the items for entering the orders, and making copies of the same for the marshal. In view of the petty character of these claims, if the clerk be competent, it would seem that the practice usually pursued would sufficiently protect the government, and would render unnecessary a scheme which seems to have been skillfully devised for the multiplication of fees. This charge must be disallowed.

6. Item 18 is for drawing three recognizances in a single criminal case, and was disallowed by the comptroller, upon the ground that one recognizance for all the witnesses would have been sufficient. We agree with this conclusion, and the item will therefore be disallowed, unless it be made to appear that the witnesses could not conveniently have recognized together.

7. Item 17 is for entering upon the final record the proceedings before the committing magistrate, namely, affidavit; warrant of arrest; marshal's return; and finding of the commissioner of probable cause of defendant's guilt, upon which the information is founded; commitment to jail in default of bond; recognizance, where given, and justification of surety; and waiver of homestead exemption, where it is waived; petition and order for subpoenas on part of defendant at the expense of the government; commitment under sentence; and marshal's return,—$60.75.

*685

While we held in the case of U. S. v. Van Duzee, 140 U. S. 169, 170, par. 1, 11 Sup. Ct. Rep. 758, that the clerk was entitled to a fee for filing papers sent up by the commissioner, they evidently form no part of the record in the circuit court, and the clerk is not entitled to a fee for entering them. The record proper begins with the indictment or information, and ends with the sentence and commitment. The proceedings before a commissioner are principally for the information of the district attorney. In U. S. v. Van Duzee, 140 U. S. 169, 176, par. 9, 11 Sup. Ct. Rep. 758, the clerk was allowed to recover for so much of the record as included the order of the commissioner binding the party to appear before the grand jury, on account of a rule of the court in that case requiring this order to appear in the final record.

This disposes of all the questions raised in the brief of the attorney general, and the judgment of the court below will therefore be reversed, and the case remanded, with directions to reduce the judgment in conformity with this opinion.

(147 U. S. 687)

UNITED STATES v. PAYNE.

(March 6, 1893.)

No. 673.

CLERKS OF COURT—FEES.

1. A clerk of a federal court claimed a fee of three dollars for making docket entries under Rev. St. § 828, which allows that sum for making such entry "on the trial or argument of a cause where issue is joined and testimony given." The record showed that issue was joined and testimony given. *Held*, that he was entitled to the fee, although the record failed to show that the testimony was given on the "trial or argument."

2. While a writ of alias fi. fa. is ordinarily issued upon a simple praecipe, it is competent for the district attorney to apply to the court for an order therefor, and, if such order is made, the clerk is bound to enter it, and is entitled to a fee therefor, whether or not such order was necessary.

3. The clerk of a federal court is entitled to a fee for entering a recognizance taken in open court; but where the recognizance is taken out of court, by a separate instrument, he is only entitled to a fee for drawing and filing the same, and not for entering it on the record.

4. A scire facias upon a recognizance is an original action, and is therefore "a cause," within the meaning of Rev. St. § 828, allowing fees for docket entries and indexes upon the trial of a cause; but an indictment which has been ignored by the grand jury is not a cause, and such fees cannot be allowed thereon.

5. The clerk of a federal court is entitled to fees for entering orders approving the accounts of officers of the court, and for filing duplicate accounts, but not for filing vouchers. U. S. v. Jones, 13 Sup. Ct. Rep. 437, followed.

6. The clerk of a federal court is not entitled to fees for attendance on a district court with the jury commissioner in drawing jurors. U. S. v. King, 13 Sup. Ct. Rep. 439, followed.

Appeal from the court of claims. Reversed.

This was a petition for fees by the clerk of the district and circuit courts of the United States for the western district of North Carolina. The petition averred that the accounts had been duly presented to the accounting officers of the treasury, and payment thereof refused, although such accounts had been duly presented and approved by the court in accordance with law. The court found the facts in favor of the petitioner, and directed judgment in his behalf for $538.50, and the United States appealed. As the court found a large number of items in favor of the petitioner, the allowance of which is not now disputed, it is unnecessary to set forth the finding in full.

Sol. Gen. Aldrich, for the United States.
C. C. Lancaster, for appellee.

*688 *Mr. Justice BROWN delivered the opinion of the court.

The assignments of error in this case relate to several petty items claimed to have been illegally allowed by the court below.

1. For making dockets and indexes, taxing costs, etc., in various suits, upon manufacturers' bonds under the internal revenue law, where issue was joined and testimony given, for which petitioner claimed *689 three dollars in each case. Rev. St.* § 828, allows a fee of three dollars "for making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given;" and two dollars for similar services "in a cause where issue is joined, but no testimony is given;" and one dollar "in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue." Objection is made to the taxation of three dollars in this case upon the ground that it does not appear that the testimony was given "on the trial or argument" of the cause. If the allowance depended upon the first clause alone, it might be claimed with reason that it would be no hardship upon a public officer, who is entirely familiar with the statute, to bring himself within its terms, and to make it clearly appear that the services were rendered on the trial or argument of the cause; but, as the second clause is limited to cases where issue has been joined, but no testimony is given, and as, in this case, the issue was joined and testimony was given, we think it a reasonable inference that it was the intention of congress to allow three dollars in such case, or that it may be assumed that the testimony was given upon the trial or argument of the case, as required by the first clause. This item should therefore be allowed.

2. For entering orders of court for alias fi. fa., and for venditioni exponas, one folio each. While a writ of alias fi fa. is ordinarily issued upon a simple praecipe, it is perfectly competent for the district attorney to apply to the court for an order for that purpose, and, if such an order be made, the clerk is clearly bound to enter it, and is entitled to his fee therefor, whether such order be necessary or not, or, indeed, whether the court had any right to enter it or not. The propriety of such an order cannot be tested upon the application of the clerk for his fee for entering it.

3. For making record entries of recognizances of defendants, and entering and filing said recognizances. Recognizances may be taken either in open court, in which case a record entry of the fact is made upon the journal, or by a separate instrument, signed and acknowledged before a proper officer. In the one case the clerk is entitled to a fee* for making the entry, and in the other for drawing and filing the recognizance, (U. S. v. Barber, 140 U. S. 164, 166, par. 3, 11 Sup. Ct. Rep. 749,) but not for both. A deduction should therefore be made from this item.

4. For making docket entries and indexes in cases of sci. fa. and other proceedings, where issue was joined, but no testimony given. This item was disallowed upon the ground that docket fees were only taxable in "causes," and that a scire facias is not "a cause" within the meaning of the section.

While a scire facias to revive a judgment is merely a continuation of the original suit, (Frierson v. Harris, 94 Amer. Dec. 223, notes,) a scire facias upon a recognizance, or to annul a patent, or for other similar purposes, is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annul a patent. Winder v. Caldwell, 14 How. 434, 443; U. S. v. Stone, 2 Wall. 525, 535.

5. Items 8 and 9 are for entering orders approving the accounts of officers of the court, filing duplicate accounts and vouchers. All of these are allowable, under U. S. v. Jones, 13 Sup. Ct. Rep. 437, (just decided,) except the fees for filing vouchers, which should be disallowed.

6. Per diem fee for attendance on the district court with the jury commissioner in drawing jurors is disallowed upon the authority of U. S. v. King, 13 Sup. Ct. Rep. 439, (just decided.)

7. For entering separate orders of court excusing jurors, entering orders of court to issue subpoenas, entering order for alias capias. As these orders appear to have been made by the court, and the fees for entering them allowed by the court, the charges must be sustained.

8. Item 15, for making dockets and indexing, where no indictment is found, but the same is ignored by the grand jury, should be disallowed. "A cause" in a criminal case is begun by filing an indictment which has been found, but not by one which has been ignored.

9. Item 20, for drawing recognizances of defendants, is allowed upon the authority of U. S. v. Barber, 140 U. S. 164, 166, par. 3, 11 Sup. Ct. Rep. 749.

*690 *This disposes of all the items involved upon this appeal, and the judgment of the court below is therefore reversed, and the case remanded, with instructions to reduce the judgment in conformity with this opinion.

(147 U. S. 685)

UNITED STATES v. ERWIN.

(March 6, 1893.)

No. 1,194.

DISTRICT ATTORNEYS—FEES—PER DIEM.

A United States district attorney is entitled to charge a per diem for services before a United States commissioner upon the same day that he is allowed a per diem for attendance upon the court.

Appeal from court of claims. Affirmed.

*686 This was a petition by the district attorney of the United States for the southern district of Georgia for services rendered in conducting examinations of persons charged with crime before United States commissioners upon the same days that attendance upon the circuit or district courts was charged. The court found as a conclusion of law that the plaintiff was entitled to recover, and awarded judgment in his favor for $215. The United States appealed.

Sol. Gen. Aldrich and Felix Brannigan, for the United States. William W. Dudley, L. T. Michener, and R. R. McMahon, for appellee.

Mr. Justice BROWN delivered the opinion of the court.

This case depends upon the single question whether a district attorney is entitled to charge a per diem for services before a United States commissioner upon the same day that he is allowed a per diem for attendance upon the court.

By Rev. St. § 824, he is allowed five dollars "for each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, * * * and for his attendance when the court is held elsewere $5 for each day of the term," and also, "for examination by a district attorney before a judge or commissioner of persons charged with crime, $5 a day for the time necessarily employed." There is certainly no necessary incompatibility between these two clauses. In neither case is it required that he spend the entire day in attendance. If his attendance before the court be necessary, he is entitled to his per diem, though it may only be necessary to remain a few minutes; and if he attend before a United States commissioner, and the case be disposed of without requiring his presence the entire day, there is no reason why he is not as much entitled to his fees as the commissioner. U. S. v. Jones, 134 U. S. 483, 10 Sup. Ct. Rep. 615. In neither event can he draw more than $5, though he be engaged for the entire day, unless a case be in some manner finally disposed of by the court, *687 when he becomes entitled, under another clause of the section, to an additional fee of from $5 to $50.

It is insisted, however, that Rev. St. § 831, prohibiting a double per diem or other allowance for attendance "when the circuit and district courts sit at the same time," should be construed as indicating that congress intended to legislate against double per diems in all cases, and that it should be extended to cases like this, where the per diem is claimed for services before a commissioner on the same day that it is allowed for attendance upon the court. Upon the contrary, we think it clear that congress did not intend to forbid a double per diem in such cases, and that the maxim "expressio unius est exclusio alterius" should apply. Indeed, we have just held in U. S. v. Jones, 13 Sup. Ct. Rep. 437, that this statute should be limited to circuit and district courts sitting not only at the same time, but at the same place; and that, where the circuit court was sitting at one place in the district, and the district court at another, the clerk was entitled to his per diem in the one case and his deputy to a per diem in the other. The relative importance of the service rendered by the district attorney in court and before a commissioner is of no significance. In the one case the per diem is for attendance, though no service be rendered; in the other there must be an examination conducted or a proceeding taken incidental thereto, as was held in U. S. v. Jones, last above cited.

The judgment of the court below is therefore affirmed.

(147 U. S. 591)

NEW YORK, L. E. & W. R. CO. v. ESTILL et al.

(March 6, 1893.)

No. 127.

VENUE—ACTION AGAINST FOREIGN CORPORATION—LIVE-STOCK SHIPMENTS—NEGLIGENCE—DAMAGES—INTEREST.

1. The fact that a foreign railroad company has a business office in a certain county in Missouri does not make it a resident of that county, or of the state, and hence does not remove it from the operation of Rev. St. Mo. 1879, § 3481, subd. 4, which provides that a suit against a nonresident defendant, instituted by summons under section 3489, subd. 4, may be brought in any county of the state. Stone v. Insurance Co., 78 Mo. 655, followed. 41 Fed. Rep. 849, affirmed.

2. Plaintiffs imported cattle for breeding purposes, and, in the course of their transportation by a railroad company, they were so injured in a collision due to its negligence that many of them, which were with calf, aborted. In an action for the resulting damages, plaintiffs offered the testimony of the herder who accompanied the cattle from oversea that the ocean voyage, and subsequent shipment by rail, would not cause them to abort, unless some unusual accident happened to them. *Held*, that the testimony was admissible.

3. Instructions that the carrier was bound to deliver the cattle at their destination in as good order as it received them, and that if it failed so to do it must pay the difference between their value in such condition and their value in the condition in which they were actually delivered, are not misleading, when the jury are told in the same charge that the carrier is liable only for injuries directly traceable to its negligence.

4. Where both parties at the trial have accepted the value of the cattle at their ultimate destination as the basis upon which the damages are to be computed, defendant cannot contend on appeal that the true basis of damages was the value of the cattle as they were delivered at the terminus of its road.

5. The measure of damages being the difference between the market value of the animals, as sound as when received by the defendant, and their value in the condition in which it delivered them, evidence that, after they reached their destination, some died, and others aborted, is admissible, as showing the extent to which they had been injured at the time of delivery, and is not objectionable as allowing a double assignment of damages for the animals that died.

6. It is not necessary to show that the carrier had notice that the cattle were with calf, in order to charge it with the damages resulting from abortions produced by its negligence, where there is nothing to show that any special or unusual care was requisite by reason of their being pregnant. 41 Fed. Rep. 849, followed.

7. As to such of the animals as lost their calves prematurely, the amount of plaintiffs' damages is the difference between their market value, had they reached their destination in calf, and their market value after losing their calves. 41 Fed. Rep. 849, affirmed.

8. Rev. St. Mo. 1879, § 2126, provides that "the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure." Section 2723 allows interest on moneys due on written contracts, on accounts, and sundry other money demands. *Held*, that interest is not allowable in an action against a carrier for injuries to goods, caused by its negligence in transportation. 41 Fed. Rep. 849, modified. Kimes v. Railroad Co., 85 Mo. 611, and other Missouri cases, followed.

In error to the circuit court of the United States for the western district of Missouri. Judgments modified.

Garland Pollard and Percy Werner, for plaintiff in error. W. M. Williams and John Cosgrove, for defendants in error.

*934 *Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a single writ of error, involving two suits, each of which was brought in the circuit court of Saline county, in the state of Missouri.

The first suit was commenced November 21, 1883, by Wallace Estill, Hugh W. Elliott, and William R. Estill, against the New York, Lake Erie & Western Railroad Company. The petition set forth that the plaintiffs were the owners of 70 head of polled Angus or Aberdeen cattle, imported from Scotland, and of the value of $35,000; that the cattle were intended for the Missouri market, and the defendant had full knowledge of their value, and the purposes for which they were intended; that the defendant operated a railroad through the states of New York and Ohio, and was a common carrier of live stock and other freights over the line of its railroad in those states; that on or about September 12, 1883, the plaintiffs delivered to the defendant, as such common carrier, to be transported over its line of railway, the 70 head of cattle, and the defendant received them as such common carrier, well knowing their character, and the importance of transporting them with care and reasonable dispatch; that on the receipt of them the defendant undertook and became bound to transport them safely over its railway, and to deliver them at the terminus thereof within a reasonable time; that the plaintiffs paid the usual freight and charges for transporting the cattle; that the defendant failed to transport them with reasonable dispatch and safety, but, about September 16, 1883, at Nankin, Ohio, negligently ran its train of cars, on which the cattle were being transported, into another train of cars, and by reason thereof broke a large number of the cars in which the cattle were, threw the cattle violently against the cars and each other, and greatly jarred, bruised, maimed, and injured them; that 55 of the cattle were cows in calf at the time of the accident, and about 20 of them had since the accident, and in consequence thereof, prematurely lost their calves; that the cattle were detained at the place of the accident for about 36 hours after it occurred, without *935 suitable *food, water, or attention, and in consequence were greatly reduced in value and damaged; that in consequence of the injuries received by the cattle the plaintiffs had been put to great trouble and expense in caring for them, and the value of the cattle had been greatly reduced; and that by reason of the premises the plaintiffs had sustained damages in $12,000, for which sum, and costs of suit, they asked judgment.

The other suit was commenced November 27, 1883, by Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, against the same defendant, for a like cause of action. The petition contained substantially the same averments as that in the Estill suit, except that it was founded on damage to 306 head of imported polled Angus or Aberdeen and Galloway cattle, alleged to be of the value of $200,000. It averred that the defendant negligently ran the two trains, or sections of a train, upon which the cattle were being carried, into and against each other, so that about 16 of the cars, in which the cattle were at the time, were broken to pieces, and demolished, and 7 of the cattle were killed, or so badly injured that they were rendered worthless; and that about 250 of the cattle were cows in calf, and about 60 of them, since the accident, and in consequence thereof, had prematurely lost their calves. Damages in the sum of $50,000 were alleged, and judgment was asked for that sum and costs of suit.

In each of the two cases a writ of attachment was issued by the court to the sheriff of Saline county, and to the sheriff of the city of St. Louis, against the property of the defendant, each of which attachments contained also a direction that the sheriff summon the defendant to appear in the court on a day specified to answer the petition. The sheriff of the city of St. Louis made return on each of the writs issued to him, that he had executed it in the city of St. Louis on January 7, 1884, by delivering a copy of the writ and petition to one W. E. Conner, city passenger agent of the defendant, "who was in its business office, and had charge thereof, at the time of said service," and that "the president or any other chief officer of said defendant could not be found in the city of St. Louis at the time of said service."

*936 *On the 11th of February, 1884, the defendant filed in the state court, in each of the two cases, a petition for the removal thereof

to the circuit court of the United States for the western division of the western district of Missouri. Each petition stated that the defendant appeared "only for the purpose of making this application;" that it was a corporation of the state of New York; and that the plaintiffs were at the commencement of the suit, and still are, citizens of the state of Missouri. A proper bond was given in each case, and the state court approved the bond, granted the application, and made an order removing the cause.

A transcript of the record in each case was duly filed in the circuit court of the United States. The defendant then made a motion in that court, which was heard before Mr. Justice Brewer, then circuit judge, to quash the writ of summons issued to the sheriff of the city of St. Louis, and the return of that officer thereon, (which motion stated that the defendant appeared specially, and only for the purpose of making it,) on the ground that the writ and return were void, and conferred no jurisdiction over the defendant, because, (1) being a foreign corporation, operating a railroad in New York and Ohio, which did not terminate opposite any point in Missouri, it could not be brought into the courts of Missouri by writ of summons; (2) the cause of action sued on did not accrue in Saline county, where the suit was brought, and the business office of the defendant at the time of the alleged service was not in that county, but in the city of St. Louis; and (3) the record failed to show that at the time of the service, or at any time, the defendant was engaged in business in Missouri. The circuit court overruled the motion, and defendant excepted to its order and decision, and the court signed and sealed a bill of exceptions setting forth those facts.

The defendant then filed an answer in each case denying all the allegations of the petition. A stipulation was then made and filed, entitled in both suits, that they might be transferred for trial to the eastern division of the western district of Missouri, and placed on the docket for trial at the next term of the court for that division; that no question should be raised as to the jurisdiction of the court to which the cases were to be transferred, at Jefferson City, Mo., which could not be raised to the jurisdiction of the circuit court of the United States for the western division of the western district; and that no question as to the jurisdiction of the latter court should be waived.

Both cases were duly tried at Jefferson City in April, 1888, before Judge Thayer, the district judge for the eastern district of Missouri, and the same jury. In the Estill case the jury found the issues for the plaintiffs, and assessed their damages at $8,750, and allowed interest in the sum of $2,362.50, making the total damages assessed $11,112.50. In the Leonard case the jury found the issues for the plaintiffs, and assessed their damages at $44,000, and allowed interest in the sum of $11,880, making the total damages assessed $55,880.

The defendant filed a motion for a new trial, entitled in both cases, setting forth as the grounds thereof (1) that the court gave improper instructions to the jury; (2) that it refused proper instructions asked by the defendant; (3) that it admitted improper and incompetent evidence; (4) that it made improper rulings on the evidence offered by the plaintiffs; (5) that it excluded proper and competent evidence offered by the defendant; (6) that the verdict was against the law and evidence; (7) that the damages were excessive; and (8) that the court erred in overruling the defendant's motion to quash the service of the summons in the cases. The motion for a new trial was heard before Judge Thayer, Judge Philips sitting with him; and on the 19th of November, 1888, each of the judges filed an opinion denying the motion. 41 Fed. Rep. 849, 853. On the 20th of November, 1888, an order was entered in the Estill case, overruling the motion for a new trial, and entering judgment in favor of the plaintiffs for $11,112.50, with interest at the rate of 6 per cent. per annum from the date of the verdict, May 1, 1888, on the $11,112.50, until the same should be paid, and for costs. On the same day an order was entered in the Leonard suit, stating that the plaintiffs had voluntarily remitted from the amount of their verdict $5,880, so as to reduce the verdict to $50,000, (the amount claimed in the petition,) overruling the motion for a new trial, and entering a judgment in favor of the plaintiffs for $50,000, being the damages assessed by the jury less the amount so remitted, and awarding to the plaintiffs interest at 6 per cent. per annum from the date of the verdict, May 1, 1888, on the $50,000 until the same shall be paid, and for costs and charges.

It was then stipulated between the parties, by a stipulation entitled in both suits, and dated November 20, 1888, that one bill of exceptions, covering all matters that arose on the trial of the two causes, might answer for both; that the bill of exceptions, signed by Judges Thayer and Philips, might be incorporated in the record, and used in this court as the bill of exceptions in either or both of the cases, without objections from either party; that one writ of error and one citation should be sufficient; and that one supersedeas bond might be given to cover both cases. There is one bond, reciting both judgments, and referring to a single writ of error to reverse both judgments, and a single citation. There is only one citation, addressed to the plaintiffs in the two judgments, but referring to "the judgment." There is only one writ of error, but it refers to the two suits by name. The certificate of the clerk of the court below refers to the transcript as a transcript of the record and proceedings in both of the cases.

The assignment of errors is entitled in both

eases, and alleges as error (1) that the circuit court erred in overruling the motion of the defendant to set aside the return of the sheriff on the original writs issued in the causes, and to quash those writs; (2) that it erred in admitting improper and incompetent evidence offered by the plaintiffs; (3) that it erred in excluding proper and competent evidence offered by the defendant; (4) that the verdict was unsustained by the evidence; (5) that the court erred in charging the jury; (6) that it erred in refusing to charge the jury as requested by the defendant; and (7) that it erred in rendering judgments upon the verdicts in favor of the plaintiffs.

The circuit court (Judge Thayer) charged the jury as is set forth in the margin; the portions of the charge enclosed in brackets, and numbered from 1 to 10, being the parts to which, separately, the defendant duly excepted.[1]

[1]In these cases there is no controversy over the fact that the respective plaintiffs delivered to the defendant certain cattle, to be by it transported over its railroad, and delivered at the terminus of its line to plaintiffs, or to some connecting carrier. Estill and Elliott appear to have delivered to the defendant 67 head of cattle, and Leonard Bros. appear to have delivered about 306 head of cattle.

[1. Having received the cattle for the purpose of transportation, the defendant was bound to deliver the respective herds of cattle at the terminus of its line in as good condition as it received the same.] The complaint made is that defendant did not deliver the property in question, at the terminus of its line, in the condition that it received the same, and damages are claimed by the respective plaintiffs on that account.

It is practically admitted, and you may take it as a conceded fact, that while these two herds of cattle were in defendant's custody, and in transit to their destination, a collision occurred at Nankin, Ohio, between two freight trains of the defendant, in which the cattle were being transported. Now, the main and about the only question you will have to consider is the nature and extent of the injuries, if any, that were sustained by the cattle immediately in consequence of the collision. When you have settled those questions you will have practically decided the case; and it is to be hoped that you will give these questions a careful and fair consideration, and decide the same according to the evidence, and rules of law which I will now state for your guidance.

The law is that a common carrier, like the defendant, must pay the market value, at the point of destination, of all property intrusted to it for transportation, which, through its fault, is lost or destroyed, and is not delivered. [2. The law, also, is that if a carrier receives property for transportation, and delivers it at the end of its route, but through its fault it is damaged, and it fails to deliver it in the same condition as when received, it must pay the difference between the value of the property in its damaged condition, at the point of destination, and what the value of the property would have been at that place if delivered in the same condition as when it was received for transportation. These are the general rules of law which must be applied in the assessment of the damages in the two cases now on trial.]

[3. The testimony tends to show that seven (7) head of Leonard Bros.' cattle (5 heifers and 2 bulls) were left at Nankin, Ohio, where the collision occurred, either killed, or very badly hurt, and were never delivered at the point of destination, or at the end of defendant's line. If you find such to be the fact, you will allow Leonard Bros., for those seven (7) head, their market value, as shown by the evidence, at the point of destination, in Saline county, at the time they should have arrived.]

The other damages claimed by Leonard Bros. may be conveniently divided into three classes. [4. In the first place, it is contended by Leonard Bros. that some of the cattle in question died after they reached the point of destination, of injuries received in the collision at Nankin, Ohio. Abiel Leonard claims that 3 Galloway bulls died from such cause on his place. William H. Leonard claims that 3 heifers died from such cause on his farm, and Leverett Leonard says that 7 heifers died on his place after their arrival. Now, if the evidence in the case satisfies you that any of the cattle did die, as stated by these witnesses, and that their death was the direct result of injuries sustained by the collision, then you will allow Leonard Bros. the market value in Saline county, as shown by the testimony, of the cattle that so died.]

[5. In the second place, it is claimed by Leonard Bros. that some of the other cattle received injuries of various kinds by the collision, which did not terminate fatally, but nevertheless lessened the market value of the cattle so injured. The class of injuries to which I now refer are strains, bruises, etc., which some of the cattle are said to have received. The plaintiffs themselves, and Dr. Glover and Judge Sparks, have spoken of about 48 head, altogether, that are said to have received such injuries, including, no doubt, the 13 head that are said to have died. Dr. Glover and Judge Sparks say that they found 25 or 30 head of injured cows and heifers, and 5 or 6 injured bulls. The plaintiffs themselves make the number of injured bulls somewhat greater. Abiel Leonard says he had 5 injured bulls in his portion of the herd. W. H. Leonard says he had 5 injured bulls in his herd. Leverett Leonard says that he had two bulls broken down in the back and lions, and 8 others that were unserviceable for a year or more. You will recall their evidence on this branch of the case. I call your attention to this testimony for the purpose of saying that you should weigh it carefully, and determine how many cattle, if any, received injuries by the collision of the character last described, and to what extent, if any, such injuries lessened their market value.

If you are satisfied by the evidence that any

The defendant asked the court to instruct the jury as follows: "(1) The jury are instructed that plaintiffs are only entitled to recover in this case such damages as they have shown, by the preponderance of the evidence, were the natural and proximate consequence of the acts complained of in the petition, and that they are not entitled to recover any damages which could have been avoided or prevented by the plaintiffs, by the exercise on their part of reasonable and proper care and prudence. (2) The jury are further instructed that before they can allow the plaintiffs damages on account of abortions, as claimed in the petition, they must be satisfied by a preponderance of the evidence that the abortions, if any, were caused directly by the alleged collision. (3) If the jury are satisfied by a preponderance of the evidence that the cows or heifers mentioned in the petition were with calf at the time of the collision alleged in the petition, and that

some of them aborted their calves in consequence of injuries received in said collision, and that ordinary care and prudence required that such aborting cow or cows should be separated from the other pregnant cows of plaintiffs, and that this was not done, but such aborted cow or cows was or were allowed to be and remain with the other pregnant cows, by reason of which such other pregnant cows, or some of them, aborted their calves, by contagion or sympathy, they should not allow damages for or on account of abortions thus caused by contagion or sympathy. (4) If the jury find that the plaintiffs' cows aborted their calves after the alleged collision, and that some of said abortions were caused by said collision, and that some were the result of poison, fatigue, heat, exhaustion, or any cause other than the collision, and the jury are unable to determine

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of the cattle received injuries, such as strains, bruises, etc., which rendered them less valuable in the market at the point of destination than they would have been but for such injuries, then you may allow Leonard Bros., on that account, such reasonable sum as will, in your judgment, under all the evidence, make good such depreciation in value.]

[6. In the third place, it is claimed that certain cows and heifers that were with calf at the time of the collision, in consequence of the collision, lost their calves, and damages are claimed on that account. There is evidence tending to show that about 94 or 95 head of the Leonard Bros. cows lost their calves after the collision. Abiel Leonard says that 25 head lost their calves on his place; Wm. H. Leonard says that 27 head lost their calves on his place; and Leverett Leonard says that 43 head lost their calves on his farm. With reference to this matter, I will say that if Leonard Bros.* have satisfied you, by the evidence, that any cows or heifers that were with calf when the collision occurred, as the direct result of that collision, lost their calves, and that such premature casting of their calves made the animals less valuable in the market than they would have been but for such loss, then they are entitled to recover the amount of the depreciation in value of any of the animals that so lost their calves.] In this connection I instruct you, however, that the burden is on them to show, not only that the cattle sustained injuries, but to furnish the evidence as to the result of such injuries, and evidence that will enable you to assess the damages with reasonable accuracy. Inasmuch as the cattle came into their possession shortly after the collision, and they thereafter had the custody of the cattle, the rule should be strictly enforced, requiring them to show by satisfactory evidence the nature of the injuries received, the result of the injuries, and to what extent the market value was thereby impaired.

What I have said about the assessment of damages in the case of Leonard Bros. applies equally well in the case of Estill and Elliott. This difference is to be noted in the two cases, however: None of the Estill and Elliott cattle appear to have been killed in the collision, or to have subsequently died from injuries claimed to have been received in the collision. You will have no claim of that kind to consider in the Estill and Elliott case. In this case there is evidence tending to show specific injuries sustained by three bulls, one of which was injured in the testicles, and two in the back or loins. W. N. Marshall and Benjamin E. Nance, who claim to have examined the Estill and Elliott cattle on their arrival, describe injuries to three bulls said to have been hurt in the back, loins, or testicles. They also say, generally, that from 10 to 15 cows and heifers were in very bad condition, and that one cow had lost an eye. The plaintiffs themselves have given some testimony as to the condition of their herd on arrival at Estill's. I call your attention to their testimony, and ask you to consider it carefully.

[7. In the Estill and Elliott case, there is also evidence tending to show that 5 of Estill's and Elliott's cows aborted their calves before they reached Estill's; that 4 or 5 aborted their calves prior to October 26, 1883, when a portion of the herd was taken to Kansas City; and two afterwards,—making 11 or 12 in all. With reference to these two kinds or species of injuries claimed to have been sustained by the Estill and Elliott cattle, I instruct you, as before, that if the evidence shows to your satisfaction that any of the animals sustained such injuries, as the immediate result of the collision, and that the injuries so sustained lessened the market value of the stock so injured at the point of destination, then you will be authorized to allow Estill and Elliott such reasonable sum as in your opinion, under the evidence, will make good the depreciation in the value of any of the animals that you find to have been injured either by strains, bruises, etc., or by losing their calves.]

* Now, gentlemen, on the other side of this case, you have testimony of Mr. Baldwin, Mr. McCullough, and Mr. Geagan, who claim to have examined the stock of Estill and Elliott and Leonard Bros. on the 27th and 28th days of September, 1883, (11 and 12 days after the collision,) with a view of ascertaining the injuries the stock had received. I will direct your attention to the salient points of their testimony: Mr. Baldwin says that, among the Estill and Elliott cattle, he found, in a lot of 49 cows and calves, one or two a little lame. In another lot, consisting of two bulls and one heifer, he found the heifer had a sore foot, and the bulls were a little stiff, and that one other heifer was pointed out as having lost her calf. McCullough's testimony with reference to the same herd is to the effect that he found one bull a little stiff, one (1) cow very stiff, two other bulls, (one in a stable and one in a pasture) both a little stiff, and one heifer with a sore foot.

In relation to the Leonard cattle, Mr. Baldwin says he found 3 stiff or lame heifers in a herd of 35 animals; one cow a little stiff in a herd of 29 cows, and three that were said to have lost their calves; one heifer, also, that was said to have lost her calf; one lame cow in a herd of 30 animals; one other cow in a herd of 32 animals that was said to have lost her calf; one bull in a herd of 17, lame in the fore leg; two other bulls in a herd of (9) animals, slightly injured,—one lame or stiff, and one with slight flesh wound; one other bull with hoofs swollen, and wound in left hind leg. Mr. McCullough's testimony as to the same herd (that is, with reference to the Leonard cattle) is to the following effect, namely, that he found 3 footsore heifers (one very sore) in a herd of 35 animals; 3 heifers said to have lost their calves in a herd of 29 head; 2 lame bulls in a herd of 5 animals,—one footsore, and one said to be not fit to serve cows; 2 lame cows in a herd of 26 cows and calves; 1 bull noticeably lame in a herd of 17 bulls; 1 bull with a slight wound in his thigh; and one other with a slight flesh wound.

All three of these witnesses say that the injuries to the two herds were not greater or different than might be expected to result from an ordinary long railroad journey, and that none of the injuries, in their judgment, were serious, or liable to produce permanent disability.

From a summary of the evidence, as I have noted it, gentlemen, the testimony for the plaintiffs tends to show that about 48 animals

from the evidence which cows, and how many, aborted in consequence of the collision, and which from other causes, they should not allow damages on account of abortion from any cause. (5) The court instructs the jury that the burden is not upon the defendants to account for the abortions amongst cows and heifers of plaintiffs, if there were such abortions, but upon the plaintiffs to prove and establish by a preponderance of the evidence that such abortions were caused by the collision alleged in the petition, and if, upon all the evidence, the jury are not convinced that such abortions were caused by the injury, they should not allow damages for such abortions, although they may not be able to determine from the evidence what the real cause of such abortions was. (6) The court instructs the jury that, unless the defendant knew that some company is not responsible for the loss so occasioned.

There is also some testimony tending to show that when one or more cows in a herd give birth to calves prematurely, or abort, as the saying is, other cows in the same herd, unless separated from the cows that have aborted, are liable to cast their calves, through sympathy or contagion, although they have themselves received no physical injury. This is a matter that requires your attention. If it be true, and you so find, that cows will abort through sympathy, or by contagion, then it was the plaintiffs' duty, if they could have done so, to have separated cows that had aborted from other pregnant cows, and to have done so with reasonable and ordinary diligence; and if plaintiffs failed to exercise reasonable and ordinary diligence and caution in that regard, and any cows lost their calves in consequence of such negligence, then the defendant is not liable for such losses, as they were not the immediate and direct result of the collision, but the result of plaintiffs' neglect.

I will also say that defendant cannot be held liable for losses occasioned by premature birth of calves, or by the death of stock, if such births or deaths were the result of overfeeding, or the result of change of climate, or fatigue or heat, or of a long voyage on the ocean or by rail, or of all such causes combined. In other words, gentlemen, the defendant is only liable for such premature births and deaths as are shown by the testimony to have been directly occasioned by injuries sustained in the collision. [9. The question as to what causes led some of the animals in the two herds to lose their calves, or to die, after arrival, is a question which you may find some difficulty in solving, as, in the nature of things, these are questions that do not admit of solution by positive or direct proof. I will only say that you must apply your best judgment and your experience to the solution of these questions, giving to all the testimony, including that of the experts, such weight as you think it fairly deserves.] If, upon a fair consideration of the subject, you deem the evidence insufficient to establish what was the cause of the abortions, then it will be your duty to disallow the plaintiffs' claims for damages on that account. If the evidence establishes to your satisfaction that some of the abortions were the direct result of the collision, but leaves you undecided as to the cause of other abortions, then you should allow damages for such as you are satisfied were the result of the collision, and disallow the plaintiffs' claims as to the residue.

[10. When you have assessed the damages in each case, you may compute interest on the damages in each case at six (6) per cent. per annum from the time suit was brought—on November 21st, 1883, in the Estill case, and November 27, 1883, in the Leonard case—to this date. I will further direct you to state in your verdict the amount of interest which you award in each case.]

In conclusion, I ask you to give the cases a careful and unbiased consideration. Consider the evidence in behalf of both parties in the same spirit of fairness that you would have it considered if you were yourselves personally interested, as plaintiffs or defendants, in the result of the suit.

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in Leonard Bros.' herd, (18 bulls and about 30 cows,) after their arrival in Saline county, showed visible evidence of having been injured in the collision, whilst, according to the evidence for defendant, there were only 10 animals (5 bulls and 5 cows and heifers) which bore any visible marks of having been hurt. In the Estill and Elliott case it appears from the plaintiffs' testimony that 3 bulls, and from 10 to 15 cows, sustained injuries,—the injury to the bulls being of a serious character,—whilst, according to the testimony of defendant's witnesses, only 4 animals (3 bulls and one cow) bore any evidences of injuries. In the foregoing summary, you will understand that I do not include cows or heifers that are said to have lost their calves. I refer only to animals that are said to have shown outward signs of injury.

[8. In the light of the testimony, both for the plaintiffs and defendant, to which I have alluded, and in the light of any other testimony in the case which you may recall, and bearing in mind that the burden of proof is on the plaintiff to show that the cattle in question received injuries, and the extent and result of such injuries, you will have to determine the following important questions of fact, namely: (1) How many cattle in each herd were injured in any manner, in consequence of the collision, to such extent as to lessen their market value at the point of destination? (2) How many of Leonard Bros.' cattle were killed or badly injured, and left at Nankin, Ohio, in consequence of the collision, and what would have been the value of such cattle in Saline county, at the time they should have arrived, if they had been delivered in the condition in which the defendant received them? (3) How many of Leonard Bros.' cattle, if any, died of injuries received by the collision after they had been delivered to Leonard Bros., and what was the reasonable market value in Saline county of those cattle, if they had arrived uninjured? (4) How many animals in each herd lost their calves as the direct result of the collision, and to what extent did such loss of their calves lessen their market value at the point of destination? (5) What number of cattle in each herd, besides those that are said to have died or lost calves, were otherwise injured by the collision, by strains, bruises, etc., so as to materially lessen their market value, and what was the amount of such depreciation in value?] To arrive at a just and intelligent verdict in these cases, you will have to determine from the testimony each of the foregoing questions.

There are one or two other matters to which I will refer briefly. There is testimony in the case tending to show that in the last days of August, 1883, some of Leonard Bros.' cattle (and possibly some few of Estill and Elliott's cattle) found some Paris green, and ate it, at Concord, Mass. The proof tends to show that 5 head of Leonard Bros.' cattle died of poison at Concord, and that about 30 other animals were made sick by it, and were treated. You will understand, of course, that if any of Leonard Bros.' cattle that are said to have died after they reached Saline county, or if any of the cows in either herd that are said to have lost their calves, died or lost calves in consequence of eating Paris green, then the railroad

of the cattle of the plaintiffs were cows or heifers in calf, plaintiffs are not entitled to recover for abortions, although they may have been caused by the wreck, as in that event damages on account of abortion could not have been in the contemplation of the defendant at the time the cattle were received."

*508 The bill of exceptions states that the court refused to give to the jury instruction 6, and that the defendant excepted to the action of the court in refusing that instruction. It is to be inferred that the court gave to the jury the other five instructions asked for.

The case made by the evidence is, in substance, as follows: The plaintiffs bought in Scotland a large number of high-bred cattle, and imported them to this country for sale for breeding purposes. Some were bulls, but the majority were heifers which were in calf at the time of the collision. The cattle were shipped from Liverpool to Boston, the ocean trip occupying 12 days. They reached Boston in good condition, and were kept for a while at Waltham, and then removed to Concord. While at Concord some of the Leonard cattle ate some Paris green, and 5 of them died from its effects. About 30 others were affected more or less by the poison, but after two days they were turned out with the rest of the cattle as having fully recovered. The Estill cattle did not have access to the poison, and were in a separate lot from the Leonard cattle, which did. The cattle remained in Concord two or three weeks after the Paris green was eaten, and were then shipped to Missouri in good order and condition. On the journey, in Ohio, during the transportation over the railroad of the defendant, the train carrying the cattle was divided, and run in two sections. On reaching Nankin, Ohio, the first section was put on one side, on a switch, and stopped; and the second section ran into it. Several of the cars were almost demolished by the collision; some were thrown from the track; and nine or ten of them were so badly damaged that the cattle in them had to be transferred to other cars. By the collision, some of the cattle were knocked down, the ropes by which some of them were tied were broken, and some were lying down, with others standing upon them, when they were found, after the collision. Some were knocked against others, and against the cars, and the shock of the collision was very great. The cattle were detained about 30 hours without suitable food or water. The collision occurred on a Sunday, between 4 and 5 *509 o'clock A. M., and the train did not start west again until the next day. The cattle were greatly bruised and injured, and the day after the collision the heifers began to abort, or prematurely cast their calves. Five of them lost their calves while on the cars, in the next two or three days; and from day to day, during the next several weeks, abortions occurred among them. The number of abortions, and the character of other injuries, are summarized by the court in its charge to the jury.

The evidence for the plaintiffs further showed that an ordinary railroad journey would not have caused the abortions, and that the aborting cattle were fed in the same way as those which did not abort. The plaintiffs also introduced some expert testimony to show that the abortions were the result of the collision. The testimony for the plaintiffs further showed that a cow which had once lost her calf prematurely was an uncertain breeder, and could not be sold in the market for a breeder, but was worth only what she would bring as beef; that the heifers were worth, in calf, $400 or $500 in the Missouri market, in the fall of 1883; but that a heifer which had prematurely lost her calf would not be worth more than $25 or $35,—the price for beef. The evidence also stated in detail the injuries to others of the cattle, and the nature thereof.

The defendant gave evidence tending to show that, where one cow in a herd aborted, others would do likewise, through sympathy or contagion, and that the aborted cow ought to be separated from the herd. This fact of abortion through sympathy or contagion was controverted by other witnesses. The plaintiffs showed that the cattle were cared for in the best manner possible. The defendant offered testimony as to the cattle that were injured, and the extent of their injuries, and also examined some experts who stated that the abortions might not have been caused by the wreck.

1. The first point urged for a reversal of the judgments is that the circuit court erred in overruling the defendant's motion to quash the writs issued by the state court to the sheriff of the city of St. Louis, and the returns of that sheriff thereon. It is contended that the fact that the defendant, at the time of the alleged services, had a business office in St. Louis, at which office the writs were *510 served on its city passenger agent, who had charge of such office at the time of the service, prevented it from being a nonresident of Missouri, within the meaning of the statutes of that state regulating the subject of jurisdiction and the service of process.

Writs of attachment were sued out in the suits, but no property was levied on, and hence the suits stand as if they had been instituted by summons alone. It has been held by the courts of Missouri that a nonresident corporation, which has a business office and an agent in the state, is amenable to the jurisdiction of its courts. McNichol v. Reporting Agency, 74 Mo. 457. In that case it was held that service of a summons upon a nonresident corporation, having an office or doing business in Missouri, in the manner provided by the fourth subdivision of section 3489, Rev. St. 1879, has the effect of personal service, and gives the court jurisdiction to enter a general judgment, and that the legislature

had power to pass an act authorizing the service of legal process upon any nonresident corporation having an office or doing business within the state, by leaving the same with an agent of the corporation within the state and authorizing the rendition of a general judgment upon such service.

Said section 3489 provides that a summons shall be executed, except as otherwise provided by law, in any one of six different methods specified in the section, the fourth of which reads as follows: "Or, fourth, where defendant is a corporation or joint-stock company organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company, in charge of any office or place of business, or, if it have no office or place of business, then to any officer, agent, or employe in any county where such service may be obtained."

In the case cited the court held that the effect of the enactment, in 1879, of the fourth subdivision of section 3489 was to make all foreign corporations having an office and doing business in Missouri, or an agent or employe there, suable in precisely the same manner as any other defendant, by the delivery of a copy of the writ and petition, and *608 that it must be presumed *that the legislature intended that the ordinary consequences should attend such service. See, also, Insurance Co. v. French, 18 How. 404; Railroad Co. v. Harris, 12 Wall. 65; Pacific Co. v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. Rep. 44; Gibbs v. Insurance Co., 63 N. Y. 114; 2 Mor. Corp. § 977. The principle applicable under such circumstances is that, if the corporation does business in the state, it will be presumed to have assented to the statute, and will be bound accordingly.

It is contended for the defendant, however, that, as its office was in St. Louis, it was a resident of that city, and that, under the statute of Missouri fixing the place of bringing suits, it could be sued only in a court of that city. But we are of the opinion that under the statutes of Missouri the circuit court of Saline county had jurisdiction of the present suits, although the agent and business office of the defendant were in St. Louis, and not in Saline county; that the service in St. Louis of the summons issued by the circuit court of Saline county was valid; and that the defendant was within the provisions of the Missouri statute which made nonresidents suable in any county of the state.

It is provided by section 3481 of the Revised Statutes of Missouri of 1879 that suits instituted by summons shall, except as otherwise provided by law, be brought in five specified ways, the fourth of which is that, "when all the defendants are nonresidents of the state, suits may be brought in any county." Farnsworth v. Railroad Co., 29 Mo. 75; Stone v. Insurance Co., 78 Mo. 655; Swallow v. Duncan, 18 Mo. App. 622; Insurance Co. v. Reisinger, 43 Mo. App. 571. The defendant, by establishing its business office in Missouri, subjected itself to suit in such of the courts of the state as had jurisdiction conferred upon them, and was suable in any county in the state.

If, under section 3481, suit may be brought against nonresidents in any county, regardless of the county in which the defendants may be found, it follows necessarily that the court in which the suit is brought may send its summons to the county in which service can be obtained upon such nonresidents. *609 *Otherwise, if the summons could be issued only to the county wherein the court is held, suit could only be brought in the county where the defendant could be found, which was the provision of section 5 of article 1 of the Revised Statutes of 1845, (page 805,) which provision was abrogated by section 1 of article 4 of the session acts of 1849, (page 70,) providing that if all the defendants were nonresidents of Missouri, and an action would lie against them, it might be brought in any county, which latter provision was continued in section 3481 of the Revised Statutes of 1879. This construction has been held by the courts of Missouri. Stone v. Insurance Co., 78 Mo. 655; Insurance Co. v. Reisinger, 43 Mo. App. 571. The city of St. Louis is placed by the statutes of Missouri on the same footing as a county.

It is further contended by the defendant that it was a resident of the city of St. Louis, within the meaning of section 3481. But the supreme court of Missouri has held that a foreign corporation doing business in the state is a nonresident, and under section 3481 is suable in any county. Stone v. Insurance Co., 78 Mo. 665, 668. It is suggested that in that instance the defendant was a foreign insurance corporation, and its case was provided for by section 6013, which requires foreign insurance companies doing business in Missouri to appoint an agent upon whom service can be made in suits against the companies, and expressly authorizes such suits to be brought in any county, and that what was said in that case about section 3481 was merely obiter dictum. But section 6013 does not provide as to where suits may be brought against foreign insurance companies. It merely requires them to appoint an agent upon whom service may be made, and leaves the place of instituting suits to be determined by the general law, and regulates only the manner of service. Hence it was necessary, in the case of Stone v. Insurance Co., for the court to determine, as it did, whether a foreign corporation doing business in Missouri was to be sued as a resident or as a nonresident, under section 3481; and it was held that such a corporation was a nonresident, within the meaning of section 3481. Section 6013 in no manner interferes with section 3481.

*610 *It is quite apparent from the case of Insurance Co. v. Reisinger, 43 Mo. App. 571, that the case of Stone v. Insurance Co. was regarded as holding that, as the defendant in that case was a nonresident, suit might have been brought against it in any county.

In Farnsworth v. Railroad Co., 29 Mo. 75, and in Swallow v. Duncan, 18 Mo. App. 622, foreign corporations were treated as within the statutory provisions relating to nonresidents. This court will adopt the construction placed upon the statutes of Missouri by the courts of that state.

The ruling of the supreme court of Missouri, that corporations created by other states do not become residents of Missouri by engaging in business in that state, agrees with the rulings of the federal courts. Ex parte Schollenberger, 96 U. S. 369; Myers v. Murray, 43 Fed. Rep. 695.

In the cases of Farnsworth v. Railroad Co., 29 Mo. 75; Robb v. Railroad Co., 47 Mo. 540; and Middough v. Railroad Co., 51 Mo. 520,—there is nothing which militates against the foregoing views, or which holds that corporations created by other states become residents of Missouri by engaging in business in Missouri.

Not only did Mr. Justice Brewer overrule the motion to quash the writ of summons and the return of service by the sheriff, but Judge Philips, in his opinion on the motion for a new trial, (41 Fed. Rep. 853,) held that a foreign corporation having an office in Missouri was to be treated, under the statute, as a nonresident defendant; that the provisions of subdivision 4 of section 3481 applied; and that, therefore, the suit could be brought in any county. He said that the provisions of the statute invoked by the defendant must refer, and must be limited, to domestic corporations; and he quoted a remark made by the court in Stone v. Insurance Co., 78 Mo. 655, 658, that "the defendant, being a nonresident of the state, was subject to suit in any county in this state, (Rev. St. § 3481,) and could be personally served in the manner pointed out by the section under consideration;" that is, section 6013.

*611 *Judge Philips remarked, also, that there could be no question but that, if the suit had remained in the state court, and the defendant, after moving to suppress the sheriff's return, had pleaded and gone to trial on the merits, the defective service would have been waived, citing Kronski v. Railway Co., 77 Mo. 362, and Scovill v. Glasner, 79 Mo. 454, 455, and adding that where a party had thus removed the cause into the federal court, tried it on its merits, had one new trial, and had again tried it on the merits, in its own approved jurisdiction, it would be trifling with the administration of justice to allow it to escape judgment on the ground that it had never been in court. Judge Thayer, in his opinion, (41 Fed. Rep. 849,) stated that the views of Judge Philips were in accord with his own.

We conclude, therefore, that the defendant was a nonresident of Missouri; that the suits were properly brought against it in Saline county, under section 3481; and that service of process was properly made, under subdivision 4 of section 3489.

It is insisted by the plaintiffs that the defendant waived any objection to the service of the summons by appearing in the state court, and filing petitions for the removal of the causes into the federal court. Each of the petitions for removal states that the defendant appears "only for the purpose of making this application," and the motion made in the federal court to quash the writ of summons and the sheriff's return states that the defendant appears specially, and only for the purpose of making that motion. The plaintiffs cite in support of their view the cases of West v. Aurora City, 6 Wall. 139; Bushnell v. Kennedy, 9 Wall. 387; and Sayles v. Insurance Co., 2 Curt. 212.

The opposing view is that the removal statute provides that after removal the cause shall proceed in the federal court in the same manner as if it had been originally commenced there.

To this it is replied that the exception to jurisdiction is a personal privilege of the defendant, and may be waived; that the construction contended for would enable the *612 nonresident *defendant to remove the suit into the federal court, and then, by there moving to dismiss it, defeat the jurisdiction of both courts; that the defendant is not in the federal court against its consent, but is there by its voluntary action, in view of the necessary statement in the petition for the removal that the suit is properly brought against it and is pending; that, as the state court had jurisdiction of the subject-matter, it is too late for the defendant, after appearing to the merits, to raise an objection to personal jurisdiction; that, although the petitions for removal state that the defendant appeared only for the purpose of making the application for removal, it could not make such application without admitting, necessarily, that the suit was properly pending; and that, therefore, the special appearance reserved nothing, and amounted to nothing.

We do not find it necessary to decide this point, after holding that the circuit court of Saline county acquired jurisdiction. There are different decisions on the question referred to in the circuit courts of the United States. In Construction Co. v. Simon, 53 Fed. Rep. 1, it was held, in the sixth circuit, that a defendant who removes a cause to a federal court will not there be allowed to say that he was not properly brought before the state court, when he failed to raise that point before applying for removal. On the other hand, in the second circuit, in Bentlif v. Finance Corp., 44 Fed. Rep. 667, it was held

citing several cases, that a defendant could have a suit of which the state court acquired no jurisdiction dismissed on that ground, even after it had been removed by the defendant to the federal court.

2. During the trial, on the examination, as a witness for the plaintiffs, of John Cunningham, who came with the cattle from Scotland to the United States, and accompanied them on the railroad journey, he was asked: "Judging from your experience as a shipper of this class and blood of cattle from Scotland to this country, would the trip across the ocean, and detention in quarantine, and shipment by rail to Missouri, cause cows to prematurely lose their calves or abort them, if no unusual accident had occurred to them?" The defendant objected to that question, claiming that, under the circumstances, it was not liable for abortions, and was liable for nothing except injuries to the animals; that damage from abortions was too remote; that it was something that the defendant could not anticipate or know anything about; that it was not alleged in the petitions; and that, so far, there was no proof that the defendant knew that the cattle were in calf. The court, after hearing the argument, ruled as follows: "My opinion is that if a railroad company receives a cow or any other animal for transportation that is with calf, and such animal is of greater value at the point of destination by virtue of her being in such condition than she would otherwise be, and in the course of the journey, through the fault of the carrier, the animal receives an injury that is the direct and immediate cause of her losing her calf, that is an item of damage that is recoverable from the carrier. It stands upon the same footing as an ordinary physical injury to the animal. Of course there may be some difficulty on both sides in proving or disproving the fact alleged that a particular injury sustained led to the loss of calves, but the fact that there is difficulty in making the proof don't alter the rule of law. The difficulty is one of fact, and not a difficulty in the law. I shall allow you to proceed on both sides, and try that issue of fact." The defendant then asked whether such ruling was without regard to the knowledge of the carrier. The court replied: "I don't think that has anything to do with it. The carrier had a right to make any inquiry it saw fit, before it received the property, as to the condition the cows were in, and to make its arrangements accordingly. If no inquiries were made, and the cattle were received, the rule stated applies." The defendant excepted to such ruling of the court. The witness answered to the question, "It would certainly not." Like rulings were made, under the objection and exception of the defendant, in regard to other questions of the same character.

We are of opinion that the evidence referred to was properly admitted, and that the above ruling of the court thereon was correct. Some remarks on the subject will be made further on.

The defendant objects to those parts of the charge of the court which are marked in brackets 1 and 2; but it is not proper to select detached sentences in the charge and predicate on them an objection. They must be read in connection with the whole charge, and for that reason we have set it forth in full. The court correctly told the jury that the defendant was liable only for the damages directly traceable to its negligence. There was nothing in the two sentences complained of which could have misled the jury. Railway Co. v. Whitton, 13 Wall. 270.

As to paragraph 3 in brackets, it is contended by the defendant that the court should have directed the jury that the value of the cattle when delivered at the western terminus of the railroad of the defendant, in Ohio, and not their value at the final destination of the cattle, in Saline county and Howard county, Mo., should be the basis on which to estimate the damages; but it does not appear that any such claim was made in the court below. Both parties introduced their evidence and tried the cases on the theory that the value of the cattle in Saline and Howard counties was the proper basis for fixing the damages. No objection was made by the defendant to the evidence of value at the point of final destination, but it appears to have been conceded that it was proper to base the damages on the value of the cattle at that point. Evidence was introduced on the part of the plaintiffs, without objection, as to what the market value of the cattle would have been in the markets of Missouri, if they had arrived there in good order and condition. Various objections were made by the defendant to items in the evidence, but no objection was made on the ground that the testimony was not confined to the value of the animals at the terminus of the defendant's railroad; and the court said: "Inasmuch as the damage complained of consisted, in part, in the fact that certain of these cattle lost their calves, it appears to me to be competent to show what the difference in value was in the fall of 1883, when these cattle arrived in Saline or Howard county, between an animal that was then with calf, and liable to have a calf within the next two or three months, and one that had aborted its calf." The counsel for the defendant then said: "I concede that, unless it appears they have the power to prove its value exactly." Both parties introduced their evidence on that theory, and no question was raised about it; and it does not appear anywhere that the defendant objected to that mode of trying the cause. Neither side offered any evidence as to the value of the cattle at the terminus of the defendant's railroad. The defendant introduced its own evidence on that basis, and asked one of its witnesses what, in his opinion, was the value of the cattle on Estill's farm or at Kansas City, assuming that

they were in good order, and asked another what he would say was a fair price for the cattle per head, where they were, (i. e. on Leonard's farm, in Missouri,) or at Kansas City, assuming them to be in good condition, and recovered from the effects of the trip. The opinions on the motion for a new trial do not show that any such question as is now made was then presented. The jury were authorized to infer from the evidence that the defendant knew that the cattle were to be transported to Missouri, and were intended for the market there.

It is further contended for the defendant that, if the proper measure of damages is the difference between the market value of the cattle, in the condition in which they would have arrived, but for the negligence of the defendant, and the condition in which they did arrive, that value must be fixed as of the time when the cattle first reached their destination, and the plaintiffs could not show that subsequently some of the cattle died. It is further contended that two rules for a recovery by the plaintiffs were adopted: First, the difference between the two market values of all the cattle, in the condition in which they arrived; and, second, in addition thereto, the value of those that subsequently died.

The market value of the cattle at their destination would depend upon their condition when they reached it. Proof that the deaths subsequently resulted from injuries the cattle had received in the collision would simply show their real condition when they reached their destination. It would not establish any new injury or any additional damage. The plaintiffs were permitted to prove that some of the cattle had been so badly injured at the time of their delivery that they subsequently died from the effect of such injury, and therefore were of no value when delivered. There was, as to those animals, no double assessment of damages.

The charge of the court clearly pointed out the different items of damage. There is nothing in the record to show that the jury, under the charge, assessed the damages on the view that the value of the animals was depreciated, and afterwards allowed for the same animals on the ground that they became totally worthless. The evidence in question tended to show the condition and value of the cattle when they reached their destination. Judge Philips, in his opinion, (41 Fed. Rep. 853, 856,) said: "The rule as to the measure of damages permits the plaintiff, up to the time of trial, to show the condition of the injured animal, merely as a means of ascertaining the result of the injury inflicted, so as to better enable the jury to fix the damages at the time and place of delivery. If the cows did subsequently abort, this is proof only of the extent of the injury inflicted; as much so as if they had subsequently died from the effect of the collision. The only known limit to the inquiry up to the trial is whether or not the subsequent development in the condition of the animal is traceable directly to the injury inflicted by the carrier,"—citing Kain v. Railroad Co., 29 Mo. App. 53, 61, 62, and Sorenson v. Railroad Co., 36 Fed. Rep. 166, 167. To the same effect are Railway Co. v. Edwards, (Tex. Sup.) 14 S. W. Rep. 607, and Railroad Co. v. Rosenberg, 31 Ill. App. 47. See, also, Wilcox v. Plummer, 4 Pet. 172.

The circuit court required the witnesses for the plaintiffs to describe the specific injuries to particular cattle, so that it might be seen that such injuries resulted from the collision, and also permitted both parties to show the condition of the animals after their arrival at their destination, in order to show how badly they were hurt by the collision.

The measure of damages was properly stated by the court in its charge to the jury. The difference between the market value of the cattle in the condition in which they would have arrived but for the negligence of the defendant, and their market value in the condition in which, by reason of such negligence, they did arrive, constituted the proper rule of damages. Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. Rep. 566; Smith v. Griffith, 3 Hill, 333; Sturgess v. Bissell, 46 N. Y. 462; Cutting v. Railway Co., 13 Allen, 381; McCune v. Railroad Co., 52 Iowa, 600, 3 N. W. Rep. 615; Railway Co. v. Fagan, 72 Tex. 127, 9 S. W. Rep. 749; Railway Co. v. Edwards, (Tex. Sup.) 14 S. W. Rep. 607; Hutch. Carr. (2d Ed.) §§ 221, 770a.

It was not material whether the plaintiffs intended to keep the cattle upon their farms, for breeding purposes, or to sell them upon the market. The depreciation in value of the cattle was the same in either case.

It was claimed by the plaintiffs that many of the cattle were heifers, which were bred in Scotland, and were in calf when imported, and that a number of them prematurely cast their calves in consequence of the collision, and that the value of those heifers was thereby greatly depreciated. The court instructed the jury that the burden was upon the plaintiffs to show that such abortions were the direct result of the collision. The question was passed upon by the jury, and found in favor of the plaintiffs; and we cannot review their verdict upon the weight of the evidence. The bill of exceptions states that it contains all the evidence offered in the case on either side, and there was sufficient evidence to sustain the finding of the jury. Zeller v. Eckert, 4 How. 289; Express Co. v. Ware, 20 Wall. 543; Lancaster v. Collins, 115 U. S. 222, 6 Sup. Ct. Rep. 33; Railway Co. v. Ohle, 117 U. S. 123, 6 Sup. Ct. Rep. 632.

It was not necessary for the plaintiffs to show that the defendant had notice, at the

time of the shipment, that the heifers were in calf, in order to render it liable for the depreciation in their market value, in consequence of the abortions which were caused by its negligence. It was not claimed by the plaintiffs that, on account of the heifers being with calf, any special care was necessary in transporting them; and the suits were not brought on account of the absence of any such special care. In Hart v. Railroad Co., 112 U. S. 331, 340, 5 Sup. Ct. Rep. 151, it was said by this court: "As a general rule, and in the absence of fraud and imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them." See, also, Railroad Co. v. Fraloff, 100 U. S. 24; Baldwin v. Steamship Co., 74 N. Y. 125; McCune v. Railroad Co., 52 Iowa, 600, 3 N. W. Rep. 615; Stewart v. Ripon, 38 Wis. 584; 3 Suth. Dam. 191.

The circuit court gave the correct rule of damages as to the heifers which lost their calves. If, through the negligence of the defendant, the heifers lost their calves, the difference between their market value, if they had arrived in calf, and their market value after losing their calves, constituted the amount of the plaintiffs' damages. Railway Co. v. Fagan, 72 Tex. 127, 9 S. W. Rep. 749; McCune v. Railroad Co., 52 Iowa, 600, 3 N. W. Rep. 615.

There is no ground for applying a special rule to this case, or for holding that the plaintiffs ought to have traced each animal, and to have shown the amount received for it when sold. The circuit court correctly held that it was competent for the plaintiffs to show what the difference in value was in the fall of 1883, when the cattle arrived in Saline or Howard county, between a heifer that was then with calf, and liable to have a calf soon, and one that had lost her calf.

The plaintiffs may have received on the sale of the cattle more or less than their market value. The defendant might have brought out evidence as to what the animals were sold for by the plaintiffs, to contradict the evidence as to their market value; but the plaintiffs could not bind the defendant by the prices for which the animals were sold. The impracticability of adopting such a rule as is insisted upon by the defendant is pointed out in the opinions rendered on the motion for a new trial. Many of the cows were kept for months after their arrival in Missouri. Some of them were traded for ponies, and the ponies were sold at a loss. Others were sold with a warranty that they would become breeders, and were afterwards taken back by the plaintiffs. Some were shipped from point to point in the west, and sold. The suggested rule was therefore impracticable of application.

The circuit court refused to instruct the jury that, unless the defendant knew that some of the cattle shipped by the plaintiffs were cows or heifers in calf, the plaintiffs were not entitled to recover for abortions, although caused by the collision, as, without such knowledge, damages on account of abortions could not have been in contemplation of the defendant at the time it received the cattle. Exception was made to such refusal; but we have already remarked sufficiently on the proposition involved.

3. The circuit court further instructed the jury that, when they had assessed the damages in each case, they might compute interest thereon at 6 per cent. per annum, from the time suit was brought in each case, respectively; and the jury was directed to state in its verdict the amount of interest which it awarded in each case. In the Estill case it awarded in its verdict, as interest, $2,362.50; and in the Leonard case, $11,880. The defendant excepted to that part of the charge which related to interest, and which is paragraph 10 contained in brackets in the margin. The defendant calls attention to the fact that interest was not claimed in the petitions, and that sections 2126 and 2723 of the Revised Statutes of Missouri of 1879 do not, nor does any other statute of that state, authorize the recovery of interest in a suit for injury to property caused by negligence, and that the supreme court of Missouri has repeatedly so held. Section 2126 provides as follows: "The jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure." Section 2723 allows interest on moneys due on written contracts, on accounts, and sundry other money demands.

In Kenney v. Railroad Co., 63 Mo. 99, in 1876, the question arose whether, in a case of the loss of property set on fire by a locomotive engine on a railroad, the jury were authorized to allow to the plaintiff, in addition to the value of the property destroyed, damages by way of interest on its value, not exceeding 6 per cent. The court said that it was not apprised of any statutory provision which allowed a jury to give interest for such damages; that there was no such provision in the statute concerning interest; and that section 7 of the act concerning damages, which allowed interest in cases of the unlawful conversion of property by the party sued, would not, in terms or by analogous reasoning, embrace a case where no benefit could possibly have accrued to the defendant by the negligence which occasioned the destruction of the property. The judgment was reversed because of the allowance of interest.

In Marshall v. Schricker, 63 Mo. 308, in 1876, it was held that, in actions ex delicto, based upon the simple negligence of a party to whom no pecuniary benefit could accrue by reason of the injury thereby inflicted, interest was not allowable.

The same ruling was made in Atkinson v. Railroad Co., 63 Mo. 367, in 1876.

In Meyers v. Railroad Co., 64 Mo. 542, in 1877, which was an action for damages for the killing of a heifer through the negligence of a railroad company, the court held, citing two of the cases in 63 Mo., and Judge Norton delivering its opinion, that the jury could not allow interest on the damages from the time they accrued.

But, in 1878, in Dunn v. Railroad Co., 68 Mo. 268, in an action to recover damages against a carrier for negligence in transporting live stock, the court below having instructed the jury to allow interest on the damages at the rate of 6 per cent. from the institution of the suit until the verdict, the supreme court, Judge Norton delivering the opinion, held that the instruction was proper, citing the case of Gray v. Packet Co., 64 Mo. 47, 50, in which, in a case to recover damages for negligence by a common carrier in transporting an animal, the court below had directed the jury to add 6 per cent. interest from the time the animal was shipped to the damages found, and the judgment was affirmed, he himself delivering the opinion, and saying that it was a general rule that, when goods were not delivered by a common carrier according to contract, the measure of damages was the value of the goods, with interest from the day when they should have been delivered, less the freight, if unpaid. No allusion was made in either case to the cases in 63 Mo. or to section 2126.

In De Steiger v. Railroad Co., 73 Mo. 33, in 1880, while Judge Norton was still a member of the court, it was held, in a suit for the destruction of hay by fire escaping from the defendant's locomotive through its negligence, that interest was not allowable in cases of that character, citing the three cases in 63 Mo. and the case in 64 Mo. above referred to.

In Wade v. Railroad Co., 78 Mo. 362, in 1883, reference was made to the two cases to that effect in 64 Mo. and 73 Mo., and it was said that interest was not allowable in actions for negligence.

In Kimes v. Railroad Co., 85 Mo. 611, in 1885, which was an action against a railroad company for damages for negligence in killing a horse and breaking a wagon by a train of cars at a public road crossing, the court below had instructed the jury to allow 6 per cent. interest on the damages. The supreme court of Missouri, delivering its opinion by Judge Norton, held that the interest was not allowable, referring to the case in 73 Mo.; but, as the plaintiff remitted the amount of the interest, the judgment was affirmed, except as to the amount remitted.

In State v. Harrington, 44 Mo. App. 297, it was held, referring to the cases above cited from 63, 64, and 73 Mo., that where an action ex delicto is based upon the simple negligence of the defendant, to whom no benefit had accrued or could accrue by reason of the injury or wrong, interest was not allowable.

It may not, perhaps, be possible to reconcile with one another all of the foregoing cases; but, on the whole, we regard it as an established rule of the supreme court of Missouri, in the construction of the state statutes, that the jury is not warranted in allowing interest in a case like the present from the time suit was brought. When property is wrongfully injured or destroyed, it is supposed that the wrongdoer derives no benefit.

The defendant cites the case of Shockley v. Fischer, 21 Mo. App. 551, as holding that interest is not allowable when it is not claimed in the petition.

It is well settled as a general rule that the measure of damages in the case of a common carrier is the value of the goods intrusted to it for transportation, with interest from the time when they ought to have been delivered. Railway Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. Rep. 566; Gray v. Packet Co., 64 Mo. 47; Dunn v. Railroad Co., 68 Mo. 268; Hutch. Carr. (2d Ed.) § 771; 1 Suth. Dam. 629. But when the matter appears to have been regulated by statute in the state, and the statute has been interpreted by its highest court, the regulation of the statute will be followed in the courts of the United States.

We have considered all the questions raised by the defendant, and do not think it necessary to discuss them further.

The judgment in the Estill case is affirmed as to the $8,750 damages; but it is not affirmed as to the amount of interest, or any part thereof, awarded by the verdict or judgment. That judgment is modified as to such interest, and the case is remanded to the court below, with a direction to enter a judgment for the plaintiffs for $8,750, being the damages assessed by the jury, with interest on such judgment from the time it shall be entered until it shall be paid, and for the costs and charges of the plaintiffs in the circuit court.

The judgment in the Leonard case is affirmed as to the $44,000 damages; but it is not affirmed as to the amount of interest, or any part thereof, awarded by the verdict or judgment. The judgment is modified as to such interest, and the case is remanded to the court below, with a direction to enter a judgment for the plaintiffs for $44,000, being the damages assessed by the jury, with interest on such judgment from the time it shall be entered until it shall be paid, and for the costs and charges of the plaintiffs in the circuit court.

The costs of this court of the plaintiffs in error and the defendant in error shall be paid, one half of them by the plaintiffs in error, and the other half by the defendant in error.

(148 U. S. 80)

ASTIAZARAN et al. v. SANTA RITA LAND & MIN. CO. et al.

(March 6, 1893.)

No. 43.

MEXICAN LAND GRANTS—JURISDICTION OF COURTS.

Acts July 22, 1854, c. 103, § 8, (10 St. p. 309,) and July 15, 1870, c. 292, (16 St. p. 304,) reserving to congress final action in the adjustment and confirmation of claims under grants from the Mexican government of land in New Mexico and Arizona upon the report and recommendation of the surveyor general, preclude the ordinary courts of justice from entertaining suits to determine the validity of such grants pending the final action of congress upon such a report. 20 Pac. Rep. 189, affirmed.

Appeal from the supreme court of the territory of Arizona.

Suit in a district court of the territory of Arizona by Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, and others against the Santa Rita Land & Mining Company and the New Mexico & Arizona Railroad Company to quiet title to land. Judgment for defendants affirmed by the supreme court of the territory. 20 Pac. Rep. 189. Plaintiffs appeal. Affirmed.

Rochester Ford, for appellants. A. T. Britton and A. B. Browne, for appellees.

Mr. Justice GRAY delivered the opinion of the court.

This was a complaint filed June 25, 1887, in a district court of the territory of Arizona, and county of Pima, by Dolores G. Astiazaran and others against the Santa Rita Land & Mining Company and the New Mexico & Arizona Railroad Company to quiet the plaintiffs' title in three tracts of land known as ranchos "Tumacacori," "Calabasas," and "Huevavi," granted by the Mexican government to Francisco Alejandro Aguilar in 1844.

The plaintiffs claimed title as or under the heirs of Aguilar. The defendants claimed under alleged conveyances from Aguilar to Manuel Maria Gandara in 1856 and 1869, from Gandara to Charles P. Sykes in 1877, from Sykes of an undivided interest to John Curry in 1878, and from Sykes and Curry, on December 18, 1879, of the whole interest to the Calabasas Land & Mining Company, whose title had since vested in the defendants.

On June 9, 1864, Gandara presented a petition to the surveyor general for the territory of Arizona for a survey of the lands, in order that the title might be reported on and confirmed, in accordance with the treaty of Guadalupe Hidalgo of 1848 and the Gadsden treaty of 1853 and the laws of the United States.

On December 15, 1879, Curry and Sykes presented a similar petition to the surveyor general, who on January 7, 1880, made a report to congress, recommending a confirmation of their title. Congress never took final action upon this recommendation.

The district court gave judgment for the defendants, which was affirmed by the supreme court of the territory on January 19, 1889. 20 Pac. Rep. 189. The plaintiffs appealed to this court.

By article 8 of the treaty of Guadalupe Hidalgo and article 5 of the Gadsden treaty the property of Mexicans within the territory ceded by Mexico to the United States was to be "inviolably respected," and they and their heirs and grantees were "to enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." 9 St. pp. 929, 930; 10 St. p. 1035.

Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights and of fulfilling the obligations imposed upon the United States by the treaties belonged to the political department of the government; and congress might either itself discharge that duty, or delegate it to the judicial department. De la Croix v. Chamberlain, 12 Wheat. 599, 601, 602; Chouteau v. Eckhart, 2 How. 344, 374; Tameling v. Freehold Co., 93 U. S. 644, 661; Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525.

For the adjustment and confirmation of claims under grants from the Mexican government of land in New Mexico, and in Arizona, which was formerly a part of it, congress had not, when this case was decided below, established a judicial tribunal, as it had done in California, and as it has since done in New Mexico and Arizona by the act of March 3, 1891, c. 539, (26 St. p. 854.)

But congress reserved to itself the determination of such claims, and enacted that the surveyor general for the territory, under the instructions of the secretary of the interior, should ascertain the origin, nature, character, and extent of all such claims, and for this purpose might issue notices, summon witnesses, administer oaths, and do all other necessary acts, and should make a full report on such claims, with his decision as to the validity or invalidity of each under the laws, usages, and customs of the country before its cession to the United States; and that his report should be laid before congress for such action thereon as might be deemed just and proper, with a view to confirm bona fide grants, and to give full effect to the treaty of 1848 between the United States and Mexico. Acts July 22, 1854, c. 103, § 8, (10 St. p. 309;) July 15, 1870, c. 292, (16 St. p. 304.)

In Tameling v. Freehold Co., above cited, it was therefore held that the action of congress, confirming, as recommended by the

surveyor general for the territory, a private land claim in New Mexico, was conclusive evidence of the claimant's title, and not subject to judicial review; and Mr. Justice Davis, in delivering the opinion of the court, said: "No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim, reserved to congress, is, of course, conclusive, and therefore not subject to review in this or any other forum. It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before congress for its consideration and action." 93 U. S. 662. See, also, Maxwell Land Grant Case, 121 U. S. 325, 366, 7 Sup. Ct. Rep. 1015, and 122 U. S. 365, 371, 7 Sup. Ct. Rep. 1271.

The action of congress, when taken, being conclusive upon the merits of the claim, it necessarily follows that the judiciary cannot act upon the matter while it is pending before congress; for, if congress should decide the same way as the court, the judgment of the court would be nugatory, and, if congress should decide the other way, its decision would control.

There is nothing in Pinkerton v. Ledoux, 129 U. S. 346, 9 Sup. Ct. Rep. 399, cited by the appellant, inconsistent with this conclusion. The point there decided was that the report of the surveyor general, not acted on by congress, was no evidence to support ejectment upon a grant from the Mexican government, known as the "Nolan Grant;" and Mr. Justice Bradley, in delivering judgment, said: "The surveyor general's report is no evidence of title or right to possession. His duties were prescribed by the act of July 22, 1854, before referred to, and consisted merely in making inquiries and reporting to congress for its action. If congress confirmed a title reported favorably by him, it became a valid title; if not, not." And he guardedly added: "This case seems to have been very perfunctorily tried and discussed. There is a question which may be entitled to much consideration,—whether the Nolan title has any validity at all without confirmation by congress. The act of July 22, 1854, before referred to, seems to imply that this was necessary." 129 U. S. 351, 352, 355, 9 Sup. Ct. Rep. 401, 402.

The case is one of those, jurisdiction of which has been committed to a particular tribunal, and which cannot, therefore, at least while proceedings are pending before that tribunal, be taken up and decided by any other. Johnson v. Towsley, 13 Wall. 72; Smelting Co. v. Kemp, 104 U. S. 636; Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389; City of New Orleans v. Paine, 147 U. S. 261, 13 Sup. Ct. Rep. 303.

In this case congress has constituted itself the tribunal to finally determine, upon the report and recommendation of the surveyor general, whether the claim is valid or invalid. The petition to the surveyor general is the commencement of proceedings which necessarily involve the validity of the grant from the Mexican government under which the petitioners claim title; the proceedings are pending until congress has acted, and while they are pending the question of the title of the petitioners cannot be contested in the ordinary courts of justice.

Upon this short ground, without considering any other question, the judgment of the supreme court of the territory of Arizona is affirmed.

Mr. Justice BREWER concurred in the result.

(148 U. S. 31)

UNITED STATES v. CALIFORNIA & O. LAND CO.

(March 6, 1893.)

No. 1,073.

PUBLIC LANDS—ROAD GRANTS—BONA FIDE PURCHASERS.

1. Certain lands were donated to the state of Oregon in aid of the construction of a wagon road, which were to be patented to the state or its grantees upon the certificates of the governor that specified portions of the road had been completed. An act was afterwards passed, providing that suits in equity should be brought on behalf of the United States for the forfeiture of such grants, which recited in its preamble that the road had not been constructed as required, and that certificates of completion had been fraudulently obtained from the governor. These allegations were embodied in a bill, to which a grantee by mesne conveyances was made defendant; and this defendant filed two pleas,—one alleging that the road had been completed, and that the certificates thereof were not procured by fraud; and the other that defendant was a bona fide purchaser. *Held*, that it was not error to strike out the issuable allegations of the first plea, and to confine the inquiry to the bona fides of defendant's purchase; for that plea, if true, was a complete bar to the suit.

2. In support of this plea each of the individual purchasers composing defendant association testified that he had no knowledge of any defects in the title when the land was purchased; that nothing of the sort was disclosed by their agent whom they sent to investigate the matter; and that they had procured an opinion as to the title from reputable attorneys, who pronounced it valid. The certificates of the governor, in whom was reposed discretion to determine when the road was completed in accordance with the terms of the grant, were shown to be regular, and in proper form. *Held*, that this was sufficient to sustain the defense of bona fide purchase, even though the allegations of the bill that the road company, under which defendant claimed, had procured the requisite certificates by fraud, were not denied. 1 C. C. A. 330, 49 Fed. Rep. 496, affirmed.

3. A deed declared that the grantor did thereby "alien, release, grant, bargain, sell, and convey" to the grantee, his heirs and assigns, the "undivided one half of all and singular the lands lying and being in the state of Oregon, granted or intended to be granted to the state of Oregon by the act of congress, * * * to have

and to hold, all and singular, the lands and premises hereby conveyed," and "all the right, title, and interest" of the grantor therein. *Held*, that this was not a quitclaim deed, but a deed of bargain and sale. 1 C. C. A. 530, 49 Fed. Rep. 496, affirmed.

4. The receipt of a quitclaim deed does not of itself prevent the grantee from showing that he is a bona fide purchaser. Moelle v. Sherwood, 13 Sup. Ct. Rep. 426, 148 U. S. —, followed.

5. Assuming, however, that the receipt of a quitclaim deed precludes the grantee from showing himself a bona fide purchaser, this rule does not extend to one who holds directly by deed of bargain and sale, but has a quitclaim in his chain of title; and, as the rule is a highly technical one, it will not be applied to such a case even though the grantor in the deed of bargain and sale is a mere agent,—the conduit through which the title is passed,—and the real transaction is with his principal, who conveys to him by quitclaim.

Appeal from the United States circuit court of appeals for the ninth circuit. Affirmed.

Statement by Mr. Justice BREWER:

On July 2, 1864, congress passed an act granting lands to the state of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of the state. 13 St. p. 355. A proviso to the first granting section was "that the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever." The third and fourth sections read:

"Sec. 3. And be it further enacted, that said road shall be constructed with such width, graduation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the state of Oregon may prescribe.

"Sec. 4. And be it further enacted, that the lands hereby granted to said state shall be disposed of only in the following manner, that is to say: That a quantity of land, not exceeding thirty sections, for said road may be sold; and when the governor of said state shall certify to the secretary of the interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed; and if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States."

On October 24, 1864, the legislature of Oregon in its turn granted these lands to the Oregon Central Military Road Company, for the purpose of aiding it in constructing the road. Laws Or. 1864, p. 36. On June 18, 1874, congress enacted:

"Chap. 305. An act to authorize the issuance of patents for lands granted to the state of Oregon in certain cases.

"Whereas, certain lands have heretofore, by acts of congress, been granted to the state of Oregon to aid in the construction of certain military wagon roads in said state, and there exists no law providing for the issuing of formal patents for said lands: Therefore,

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the general land office to such corporation or corporations upon their payment of the necessary expenses thereof: provided, that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind except to provide for issuing patents for lands to which the state is already entitled." 18 St. p. 80.

On March 2, 1889, congress passed an act (25 St. p. 850) entitled "An act providing in certain cases for the forfeiture of wagon road grants in the state of Oregon," which commenced with this recital:

"Whereas, the United States have heretofore made various grants of public lands to aid in the construction of different wagon roads in the state of Oregon, and upon the condition that such roads should be completed within prescribed times; and whereas, said grants were transferred by said state to sundry corporations, who were authorized by the state to construct such wagon roads, and to receive therefor the grants of lands thus made; and whereas, the department of the interior certified portions of said lands to the state of Oregon upon the theory that said roads had been completed as required by the granting acts of congress, and upon the certificate of the governor of the state of Oregon as to such completion; and whereas, the legislature of the state of Oregon has memorialized congress, and therein alleged that certain of said wagon roads, in whole or in part, were not so completed, and that to the extent of the lands coterminous with unconstructed portions the certifications thereof by the department of the interior were unauthorized and illegal: Therefore,"—and directed the attorney general of the United States within six months to institute suits in the circuit court of the United States for the district of Oregon against all firms, persons, or corporations claiming to own or have an interest in lands granted to the state of Oregon by certain enumerated acts of congress,—among others, the act above referred to, of July 2, 1864,—"to determine the questions of the reasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect

of the several certificates of the governors of the state of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with the requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all bona fide purchasers of either of said grants, or of any portion of said grants, for a valuable consideration if any such there be. Said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried, with right to writ of error or appeal by either or any party as in other cases."

In pursuance of this act, on August 30, 1889, a bill was filed in the circuit court of the United States for the district of Oregon against the Oregon Central Military Road Company, the California & Oregon Land Company, and certain named individuals. The bill, it may be said in a general way, charged that the road was not in fact constructed; that certificates of construction were fraudulently obtained from the governors of the state; that, in pursuance of such false certifications, a large number of tracts had been certified or patented to the state of Oregon for the benefit of the Oregon Central Military Road Company; that thereafter these lands were conveyed to certain of the individuals named as defendants, and by them finally to the California & Oregon Land Company; and, further, that these parties received the deeds with full knowledge of the fact that the road was not constructed as required by the act, and that the certificates were false, and fraudulently obtained. To this bill, on October 24, 1889, the
*335 California & Oregon Land Company filed two pleas and an answer in support thereof. The case was set down for hearing on the pleas, and on February 18, 1896, they were sustained, and the bill dismissed. From such decree of dismissal the United States appealed to this court. On May 25, 1891, the decision of the circuit court was reversed, (140 U. S. 599, 11 Sup. Ct. Rep. 988,) and the case remanded for further proceedings. The opinion of this court was announced by Mr. Justice Blatchford, and in that opinion will be found a full history of all the matters affecting the litigation up to that time. The conclusion reached was that the circuit court erred in not permitting the United States to reply to the pleas, and in dismissing the bill absolutely. After the mandate had been filed in the circuit court, issue was joined on the pleas, testimony taken, and on December 7, 1891, a decree was again entered sustaining the second plea and dismissing the bill of complaint, as to the defendant, the California & Oregon Land Company. From this decree an appeal was taken to the circuit court of appeals, by which court, on March 10, 1892, that decree was affirmed, (7 U. S. App. 128, 2 C. C. A. 419, 51 Fed. Rep. 629,) and from this decree of affirmance the United States appeal to this court.

Asst. Atty. Gen. Parker, for the United States. John F. Dillon, A. T. Britton, and A. B. Browne, for California & Oregon Land Co. Jas. K. Kelly, for Dalles Military Road Co.

*Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The burden of complaint in this case is that the circuit court erred in restricting the scope of the inquiry. The government sought to introduce testimony to show that the road was never in fact constructed, as required by the act of congress; and also that the certificates of the governors, made as provided by section 4 of the act of 1864, were obtained by fraud and misrepresentation, as averred in the bill. But all of this testimony was excluded, and the inquiry limited to the single question whether the land company was a bona fide purchaser.

The first plea of the land company recited the fact that three several certificates had been issued by governors of the state of Oregon, to the effect that the road had been completed as required by the act of congress, and added "that each of said several certificates was made honestly and in good faith, and without any fraudulent intent or procurement or false representation by any person whomsoever." But upon application to the circuit court this clause in the plea was stricken out, leaving it to contain simply an averment of the certificates of the governors; and, as these had been set out at length in the bill, there was no issue of fact presented by this plea. The other plea was that the land company was a *purchaser in good faith, and to that question, as heretofore stated, the inquiry was restricted.

There was no error in this ruling. The decision of this court, as reported in 140 U. S. 599, 11 Sup. Ct. Rep. 988, was that "the decree of the circuit court, so far as it dismisses the bill, must be reversed, and the case be remanded to that court with a direction to allow the plaintiffs to reply to and join issue on the pleas," and the mandate which was sent to the circuit court recited this direction. That decision was the law of this case for the subsequent proceedings in that court. There was no adjudication that the pleas were insufficient in law; on the contrary, the plain implication of the opinion was that they were sufficient, and the question which was remanded to that court for inquiry was as to their truthfulness. There was no adjudication of insufficiency,

and no rehearing ordered on that question. If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree. The circuit court properly construed it, and proceeded in obedience thereto to permit the government to join issue on the pleas, and to entertain an inquiry as to their truthfulness, and that was the only matter open for inquiry.

Indeed, that would have been the rule if there had been no decision of this court, and if, in the first instance, issue had been joined on the pleas. It is true that the statute directed that these suits be brought "to determine the questions of the seasonable and proper completion of said roads," and "the legal effect of the several certificates of the governors;" and upon that counsel for the government insists that its mandate was that there should be full inquiry as to these matters; but that statute also provided "that said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried;" and the unquestionable right of a defendant in an equity suit is to let the facts averred in the bill go unchallenged, and by plea set up some special matter which, if established and sufficient, will defeat any recovery. Even if it were within the competency of congress to compel every party named as defendant to a suit in equity brought by it to bear all the expenses and submit to all the delay of a prolonged inquiry into the truth of the facts averred in the bill, it is obvious from the language we have quoted from the statute that congress did not intend to deprive any party of the rights ordinarily vested in defendants in suits in equity. If the sole purpose were to ascertain by judicial investigation whether the roads were in fact completed as required, that purpose could have been accomplished by making defendants only the original parties,—the wrongdoers. If other parties than they were made defendants, as is the fact here, such parties, within the terms of the statute, had the right by plea to set up any special matter which, as to them, constituted a full defense; and as between such parties and the government the inquiry, by settled rules of equity, was then limited to such matter.

In Farley v. Kittson, 120 U. S. 303, 314, 315, 316, 7 Sup. Ct. Rep. 534, the nature and functions of a plea were fully discussed. It was said: "But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitf. Eq. Pl. (4th Ed.) 14, 219, 295; Story, Eq. Pl. §§ 649, 652. The plaintiff may either set down the plea for argument, or file a replication to it. If he sets down the plea for argument, he thereby admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, joining issue upon the facts averred in it, and so puts the defendant to the trouble and expense of proving his plea, he thereby, according to the English chancery practice, admits that, if the particular facts stated in the plea are true, they are sufficient in law to bar his recovery; and, if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. Mitf. Eq. Pl. 302, 303; Story, Eq. Pl. § 697. That practice in this particular has been twice recognized by this court. Hughes v. Blake, 6 Wheat. 453, 472; Rhode Island v. Massachusetts, 14 Pet. 210, 257." And again: "In a case so heard, decided by this court in 1808, Chief Justice Marshall said: 'In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded.' Stead's Ex'rs v. Course, 4 Cranch, 403, 413. In a case before the house of lords a year afterwards, Lord Redesdale 'observed that a plea was a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required. If a plea were allowed, nothing remained in issue between the parties, so far as the plea extended, but the truth of the matter pleaded.' 'Upon a plea allowed, nothing is in issue between the parties but the matter pleaded, and the averments added to support the plea.' 'Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true.' Roche v. Morgell, 2 Sch. & L. 721, 725-727."

The right, therefore, of this defendant, the California & Oregon Land Company, to avail itself of a plea, cannot be doubted; and the plea which it made in this case—that of a bona fide purchaser—is one favored in the law. In the act directing these suits was a clause, "saving and preserving the rights of all bona fide purchasers of either of said grants, or of any portion of said grants, for a valuable consideration, if any such there be." In Story's Equity Jurisprudence (section 411) the author says: "Indeed, purchasers of this sort [bona fide purchasers] are so much favored in equity that it may be stated to be a doctrine now generally established that a bona fide purchaser for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute,

mortgage, or other incumbrance upon the same estate for his protection. If he can defend himself by any of them at law, his adversary will have no help in equity to set these incumbrances aside; for equity will not disarm such a purchaser, but will act upon the wise policy of the common law, to protect and quiet lawful possessions, and strengthen such titles." And the reason of this is given in Boon v. Chiles, 10 Pet. 177, 210, as follows: "This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity. A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it." See, also, Lea v. Copper Co., 21 How. 497, 498; Croxall v. Shererd, 5 Wall. 268.

In U. S. v. Burlington & M. R. R. Co., 98 U. S. 334, 342, it was said: "It [the United States] certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees." And again, in Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 313, 8 Sup. Ct. Rep. 131: "It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preemption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States, sufficient, in equity, as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect."

The land company, therefore, had a right to set up a special plea, and the plea which it did set up—that of a bona fide purchaser—was sufficient, if true. And this brings us to an inquiry as to whether this plea was sustained by the testimony. The purchase was made by a party of gentlemen living in California, in the spring and fall of 1874, the first purchase being of an undivided one half, and the second of the remaining moiety. Ten persons were named as grantees in the first deed, and 11 in the second, some of whom were also grantees in the first. The title remained thus distributed among these several individuals until 1877, when, for convenience in the care and sale of the property, they all united in a conveyance of their respective interests to the California & Oregon Land Company, of which they were the stockholders. The price for these lands—$200,000—was paid, and paid in cash, the several purchasers each contributing his respective proportion. Since the purchase they have expended in the care of the property, including taxes, $140,000, while their receipts for sales and rentals amount to only about $23,000. More than half of the parties interested in the purchase died before the taking of testimony in this suit. The survivors were all called as witnesses, and each for himself testified, as strongly as language can express it, that his purchase was made in good faith; that he had no knowledge of any defect in the title, or of anything wrong in the actions of the military road company, or of any failure on its part to fully construct the road. There was no opposing testimony; and, if the question be one simply of fact, there can be no doubt that these parties were bona fide purchasers within the rule laid down in 2 Pom. Eq. Jur. § 745, to wit: "The essential elements which constitute a bona fide purchase are, therefore, three: a valuable consideration, the absence of notice, and presence of good faith." Indeed, counsel for the government does not seriously dispute that this is the necessary conclusion from the testimony. In this connection it is worthy of notice that the purchasers, when their attention was called to the fact that this property was for sale, sent an agent to Oregon, to examine into the matter. While such agent is dead, and what he ascertained is, therefore, not affirmatively shown, yet it does appear that to the survivors, at least, of the purchasers, he brought no intimation or suggestion of any defect in the title of the land. On the contrary, an abstract of title was presented to them, showing the certificates of the governors of the completion of the work, together with an opinion from the firm of Mitchell & Dolph, two of the leading lawyers in the state of Oregon, that the title of the road company was perfect.

Further, the significance of the certificates of the governors, as an independent matter in this inquiry, must not be overlooked. Under the decision in Land Co. v. Courtright, 21 Wall. 310, the title to the first 30 sections did not depend on the completion of the road, and with respect to the residue of the land the fourth section of the act of 1864 gave to the governor of the state the power to determine when it should be fully earned; for it reads that "when the governor of said state shall certify to the secretary of the interior that any continuous ten miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed." And because there was no express provision for the issue of formal patents, the act of 1874, which took effect intermediate the first and second deeds from the road company, provided that when the roads were "shown by the certificate of the governor of the state of Oregon,

as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state" or its grantee. Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of U. S. v. Arredondo, 6 Pet. 691, 729, this court said: "It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, (Marbury v. Madison, 1 Cranch, 170, 171,) legislative, (McCulloch v. State, 4 Wheat. 423; Satterlee v. Matthewson, 2 Pet. 412; Bank v. Billings, 4 Pet. 563,) judicial, (Perkins v. Fairfield, 11 Mass. 227; McPherson v. Cunliff, 11 Serg. & R. 429, adopted in Thompson v. Tolmie, 2 Pet. 167, 168,) or special, (Rogers v. Bradshaw, 20 Johns. 739, 740; Shand v. Henderson, 2 Dow, 521, etc.,) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." See, also, the following cases: Foley v. Harrison, 15 How. 433, 448; Johnson v. Towsley, 13 Wall. 72, 83; Smelting Co. v. Kemp, 104 U. S. 636, 640; Shepley v. Cowan, 91 U. S. 330, 340; Moore v. Robbins, 96 U. S. 530, 535; Quinby v. Conlan, 104 U. S. 420, 426; Steel v. Refining Co., 106 U. S. 447, 450, 1 Sup. Ct. Rep. 389; Lee v. Johnson, 116 U. S. 48, 51, 6 Sup. Ct. Rep. 249; Wright v. Roseberry, 121 U. S. 488, 509, 7 Sup. Ct. Rep. 985.

It is true that the bill alleges that these certificates were procured by the road company by and through the false and fraudulent representations of its officers, agents, etc., and also true that the averment in the first plea that the certificates were made honestly and in good faith was stricken out, and testimony offered to show the way in which the certificates were obtained was rejected. Therefore, as the inquiry is now presented, it must be in the light of the uncontested allegation that the certificates were obtained through the fraudulent acts of the road company. It may be that, in view of this situation of affairs, the road company could not avail itself of such determinations by the governors as decisive of its title, and it may also be that the purchasers are likewise precluded from claiming that these determinations are in and of themselves conclusive in their favor; but at the same time they are significant with respect to that element of good faith which consists in diligence. The testimony shows that the purchasers knew of nothing wrong in respect to the title, or the proceedings of the road company, or any officials connected with the transfer of title. They knew that determination of the question as to the completion of the road was committed by the statute to the governor of the state. They saw his adjudication upon that question, and it may well be held that they took all the active measures which, under the circumstances, they could be required to take when they ascertained that the authorized official, and that official the chief executive of the state, the grantee named in the congressional act, had officially determined that the road was completed, there being nothing in any of the circumstances surrounding the parties to suggest a suspicion of wrong. Can it be that they must be adjudged derelict in diligence because they did not make a personal examination of the road, and determine for themselves whether it was in its entire length completed so as to satisfy all of the terms of the grant? If a patent from the government be presented, surely a purchaser from the patentee is not derelict, and does not fail in such diligence and care as are required to make him a bona fide purchaser, because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested.

As against these evidences and conclusions of good faith but a single proposition is raised, one upon which the dissenting judge in the circuit court of appeals rested his opinion, and that is the proposition that the conveyances from the road company were only quitclaim deeds, and that a purchaser holding under such a deed cannot be a bona fide purchaser, and in support of this proposition reference is made to the following cases in this court: Oliver v. Piatt, 3 How. 410; Van Rensselaer v. Kearney, 11 How. 297; May v. Le Claire, 11 Wall. 217, 232; Villa v. Rodriguez, 12 Wall. 323, 339; Dickerson v. Colgrove, 100 U. S. 578; Baker v. Humphrey, 101 U. S. 494; Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. Rep. 147. The argument, briefly stated, is that he who will give only a quitclaim deed in effect notifies his vendee that there is some defect in his title, and the latter, taking with such notice, takes at his peril. It must be confessed that there are expressions in the opinions in the cases referred to which go to the full length of this proposition. Thus in Baker v. Humphrey, 101 U. S 494, 499, Mr. Justice Swayne, in delivering the opinion of the court, uses this language: "Neither of them was in any sense a bona fide purchaser. No one taking a quitclaim deed can stand in that relation." Yet it may be remarked that

*46 In none of these cases was it necessary to go to the full extent of *denying absolutely that a party taking a quitclaim deed could be a bona fide purchaser; and in the later case of McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, it was held, in a case coming from Arkansas, and in harmony with the rulings of the supreme court of that state, that while ordinarily a person holding under a quitclaim deed may be presumed to have had knowledge of imperfections in his vendor's title, yet that the rule was not universal, and that one might become a bona fide purchaser for value although holding under a deed of that kind; and in that case the grantee so holding was protected as a bona fide purchaser; while in the case of Moelle v. Sherwood, (just decided,) 148 U. S. —, 13 Sup. Ct. Rep. 426, the general question was examined, and it was held that the receipt of a quitclaim deed does not of itself prevent a party from becoming a bona fide holder, and the expressions to the contrary in previous opinions were distinctly disaffirmed.

But, further, and even if the doctrine were now recognized to be as heretofore stated, this fact would take the case out from the reach of the rule. The title passed from the road company to the purchasers by four conveyances; two from the road company to one Pengra, its agent and superintendent, and two from Pengra to the purchasers. Now, the deeds from Pengra are not quitclaims. They do not purport to be merely releases of his right, title, and interest, but are strictly deeds of bargain and sale. The granting clause is in these words: "The said parties of the first part have aliened, released, granted, bargained, sold, and by these presents they do alien, release, grant, bargain, sell, and convey, unto the said parties of the second part, their heirs and assigns, in proportions hereafter specified, the equal undivided one half (½) of all and singular the lands lying and being in the state of Oregon, granted or intended to be granted to the state of Oregon by act of congress," etc. And the habendum is: "To have and to hold, all and singular, the lands and premises hereby conveyed, to wit, said undivided one half of all the above-described grant of lands, listed and to be listed, and all the right, title, and interest of the party of the first part therein."

*47 Such a deed is clearly something more than one of *quitclaim and release. It is a deed of bargain and sale, and will convey an after-acquired title. Such is the ruling of the supreme court of Oregon. Taggart v. Risley, 4 Or. 235. Now, even in those courts in which the rule was announced that one who takes under a quitclaim deed cannot be a bona fide purchaser, it was sometimes limited to the grantee in such a deed, and not extended to those cases in which a quitclaim was only a prior conveyance in the chain of title, (Snowden v. Tyler, 21 Neb. 199, 31 N. W. Rep. 661;) and this is certainly a most reasonable limitation, because the rule is obviously, at the best, arbitrary and technical; for a party who receives a quitclaim deed may act in the utmost good faith, and in fact be ignorant of any defect in the title, and this, although he has made the most complete and painstaking investigation, and only takes the quitclaim deed because the grantor, for expressed and satisfactory reasons, declines to give a warranty. It would be unfortunate, in view of the fact that in so many chains of title there are found quitclaim deeds, to extend a purely arbitrary rule so as to make the fact of such a deed notice of any prior defect in the title.

It may be said that the real transaction was between the road company and the purchasers; that the agent and superintendent of the road company was merely a go-between,—a conduit through which the title passed from the road company to the purchasers; and that the spirit, if not the letter, of the rule requires that the form of conveyance used by the road company should be controlling as to the the bona fides of the purchasers. But as it is, wherever enforced, a merely technical and arbitrary rule, justice requires that it should not be carried beyond its express terms, nor used to disprove the good faith, which, in this case, all the other testimony shows in fact existed in the purchasers. And in this respect it is well to consider the obvious reason for the unwillingness of the road company to itself execute a warranty deed. The original act of 1864 said nothing about patents. It simply granted the lands to the state, and authorized their sale; and only after the arrangement had been made for the purchase of one half of these lands, and the *conveyances made therefor, was the act of 1874 passed, providing in terms for patents. The claim of the road company was that their title was a perfect legal title, even without a patent; and yet, there being a doubt in respect thereto,—a doubt which was solved only by the act of 1874,—it was not strange that it preferred to quitclaim its interest in the granted lands, rather than to formally convey them by a warranty of the legal title. But it is not to be inferred therefrom as a matter of law that the road company in any way doubted its full equitable title, or that, by the fact of a quitclaim, it notified the purchasers of any other matter than this omission in the statute. On the contrary, the plain import of the language used in the conveyance from the road company to Pendra was that it intended to convey the lands which it had received under the grant, and to which it believed it then had a full equitable, if not legal, title. Our conclusions, therefore, are that the decision of the circuit court and the court of appeals was correct.

Before closing this opinion, we think it proper to notice one matter, which, though of no significance in determining the legal rights of the parties, may throw light upon the

transaction, and perhaps relieve the original donee of the grant by the state—the road company—from the imputation of wrong cast upon it by the filing of this bill. The grant was made in 1864, and the last certificate of the governor of Oregon was dated the 12th of January, 1870. The memorial of the legislature of the state of Oregon was adopted in 1885,—that memorial which induced the act of congress and this litigation. In other words, the state of Oregon and its citizens, including those living along this road, remained silent for 15 years after its alleged completion. The terms of the original grant were limited to the construction of the road, and imposed no duty of thereafter keeping it in good condition. Having earned the grant by constructing the road, it may well be that the road company took no further interest in it, and an ordinary wagon road, uncared for during 15 years, particularly that part of it which runs through mountainous country, would be almost completely destroyed by the action of the elements; and so it may be that those who in 1884 and 1885 investigated the matter found little semblance of a road, and hence concluded, though erroneously, that none was ever constructed, and from this the complaint, the memorial, and the litigation proceeded; and this is consistent with the fact that the road company fully discharged its duty, and fairly earned the lands. Of course, this is a mere suggestion; but it has the probabilities in its favor, and relieves all parties from condemnation. But, whether this be true or not, for the reasons we have heretofore stated our conclusion is clear that the title of the purchasers and the land company is beyond challenge.

The decree is affirmed.

(148 U. S. 49)

UNITED STATES v. DALLES MILITARY ROAD CO. et al.

(March 6, 1893.)

No. 1,159.

Appeal from the United States circuit court of appeals for the ninth circuit.

In equity. Bill by the United States against the Dalles Military Road Company and others to forfeit a land grant. The United States appeals from a decree of the circuit court of appeals (2 C. C. A. 419, 51 Fed. Rep. 629) affirming a decree of the circuit court dismissing the bill.

For other opinions rendered in the course of this litigation, see 40 Fed. Rep. 114; 41 Fed. Rep. 493; 140 U. S. 599, 11 Sup. Ct. Rep. 988.

Asst. Atty. Gen. Parker, for the United States. John F. Dillon, A. T. Britton, and A. B. Browne, for California & Oregon Land Co. Jas. K. Kelly, for Dalles Military Road Co.

BREWER, Circuit Justice. The questions in this case are substantially the same as those in No. 1,073,—U. S. v. California & Oregon Land Co., 13 Sup. Ct. Rep. 458. It is unnecessary, therefore, to state the facts in detail, and it is sufficient to say that the same decree of affirmance will be entered.

(147 U. S. 692)

UNITED STATES v. McCANDLESS.

(March 6, 1893.)

No. 900.

CLERKS OF COURT—FEES.

1. The same person may hold the office of clerk of the United States district and circuit courts and also commissioner of the circuit court, and is entitled to the per diem fee of five dollars for attendance on court when in session, and also "for hearing and deciding on criminal charges" as commissioner, although both functions were discharged on the same day.

2. The clerk of a federal court is not entitled to docket fees in cases where the grand jury have ignored the indictment. U. S. v. Payne, 13 Sup. Ct. Rep. 442, followed.

3. Docket fees cannot be taxed until the case is finally disposed of, and no such fee can be allowed where the jury disagrees, unless it appears that the case has terminated.

4. A claim by a clerk for "miscellaneous fees, entering orders of court, making copies, certificates, and seals" is objectionable as being too general; for, while the clerk is undoubtedly entitled to fees for entering the orders of court, he is not entitled to fees for making copies, certificates, and seals, unless they are required by law or the practice of the department.

5. A clerk's claim for fees for issuing commitments to jail in addition to copy of the order of removal is too general, and cannot be allowed unless it appears that the writ was not issued to bring a prisoner into court, or for remanding him from the court, for in such cases commitments are declared to be unnecessary by Rev. St. § 1030.

Appeal from the court of claims. Reversed.

Statement by Mr. Justice BROWN:

This was a petition by the clerk of the district court for the western district of Pennsylvania for payment of certain fees which had been disallowed in the settlement of his accounts by the officers of the treasury. Petitioner averred the approval of his accounts by the court, and that his whole compensation, if said fees were paid, would not exceed the maximum compensation of $3,500. The court directed a judgment to be entered in his favor for $171.15, and the United States appealed.

Sol. Gen. Aldrich, for the United States. C. C. Lancaster, for appellee.

*693 Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

Objection was made to the following items, which will be considered in their order:

1. Sixteen days' attendance on court when in session, at five dollars per day, not allowed because same days were charged and allowed in his accounts as a commissioner of the circuit court "for hearing and deciding on criminal charges." In the Case of Erwin, 13 Sup. Ct. Rep. 443, (just decided,) we held that a district attorney was entitled to his per diem for services before a commissioner, notwithstanding he was allowed a per diem for his attendance upon the court on the same day. The reasons for double

allowance in this case are much stronger than in the Case of Erwin, since the commissioner acted in a double capacity—First, as clerk of the court; and, second, as a commissioner of the circuit court. There is no incompatibility between these offices, and, as congress has never legislated against their being held by the same person, the practice has obtained in most of the districts of appointing the clerk a commissioner. It was held by this court in the case of U. S. v. Saunders, 120 U. S. 126, 7 Sup. Ct. Rep. 467, that sections 1763, 1764, and 1765 had no application to the case of two distinct offices, places, or employments, each with its own compensation and duties, held by one person at the same time. We think that within the rule laid down in that case there *604 is no legal objection to the same person holding the office of clerk and commissioner, and that the person so holding them is entitled to the fees and emoluments of both.

2. Docket fees in cases where the grand jury returned, "Not true bill." This item is disallowed, upon the authority of U. S. v. Payne, 13 Sup. Ct. Rep. 442, (just decided.)

3. Docket fees in cases where trial was had, verdict and sentence, or jury failed to agree, and case was continued. We think that a docket fee is not taxable until the case is finally disposed of. In the three clauses of section 828, allowing docket fees, the words "taxing costs and all other services" are used, indicating that it is not to be allowed until the costs are taxed, and the case is finally disposed of. It does not appear in this item that the cases in which the jury disagreed had reached that point where costs are taxed, or where the cause had been terminated. This item must, therefore, be reduced by rejecting cases in which the jury disagreed.

4. Miscellaneous fees, entering orders of court, making copies, certificates, and seals. This item was properly objected to as too general. While the clerk is undoubtedly entitled to his fees for entering orders of court, he is not entitled to fees for making copies, certificates, and seals, unless such copies, certificates, and seals are required by law or the practice of the department.

5. The sixth item is for issuing commitments to jail, in addition to copy of order of removal. This item is also objectionable on account of its indefiniteness. By Rev. St. § 1030. "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal." Before this item can be allowed, we think it should be made to appear that the commitments were issued in cases not falling within the above section, and hence that they were a proper charge under the circumstance of each particular case. It is entirely possible that the clerk may be entitled to the fees charged. At the same time, we think he should make it appear in the rendition of his accounts that the commitment was made in a case where it was necessary.

6. An item for entering orders of court approving accounts of officers, and copies of certificates and seals, is controlled by the opinion of this court in the case of U. S. v. Van Duzee, 140 U. S. 169, 171, par. 3, 11 Sup. Ct. Rep. 758; U. S. v. Jones, 13 Sup. Ct. Rep. 437; U. S. v. King, 13 Sup. Ct. Rep. 439.

The judgment of the court below is therefore reversed, and the case is remanded for further proceedings in conformity with this opinion.

(147 U. S. 647)

BAUSERMAN v. BLUNT.

(March 6, 1893.)

No. 107.

FEDERAL COURTS — FOLLOWING STATE DECISIONS —RUNNING OF STATUTE OF LIMITATIONS — SUSPENSION BY ABSENCE OR DEATH—PLEADING.

1. The settled construction by the highest court of a state of the state statute of limitations will be recognized as a rule of decision by the United States supreme court, and the duty of the court to follow such construction is not affected by the adoption of a different construction of a similar statute in another state.

2. Under Comp. Laws Kan. c. 80, § 21, which provides that if, when a cause of action accrues against a person, "he be out of the state," the period limited for the commencement of the action shall not begin to run "until he comes into the state," and if, after the cause of action accrues, "he depart from the state," "the time of his absence" shall not be computed as part of the period within which the action must be brought, the statute of limitations does not run in favor of a debtor while he is personally absent from the state, notwithstanding that he continued to have a usual place of residence in the state, where service of a summons could be made on him, in accordance with section 64 of the same chapter. Railway Co. v. Cook, 22 Pac. Rep. 988, 43 Kan. 83, followed.

3. The allegation in a pleading that the defendant was absent from the state "for more than five years" cannot be treated as definitely describing a longer period than five years and one day.

4. The operation of the Kansas statute of limitations is suspended after the death of the debtor for the 50 days, only, during which the creditor, under Comp. Laws Kan. c. 37, § 12, could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the 50 days. Bauserman v. Charlott, 26 Pac. Rep. 1051, 46 Kan. 480, followed.

5. Delay by the creditor in applying for appointment of an administrator until more than 5 months and 20 days have passed after the expiration of such 50 days is unreasonable, when there is no suggestion of ignorance of the death of the debtor, or other excuse.

In error to the circuit court of the United States for the district of Kansas. Reversed.

Statement by Mr. Justice GRAY:

This was an action brought February 13, 1886, in a court of the state of Kansas, by Elbridge G. Blunt, a citizen of Illinois, against Bauserman, a citizen of Kansas, and

administrator of James G. Blunt, deceased, upon a promissory note for $3,204.34, made by James G. Blunt at Chicago, Ill., July 1, 1875, and payable to Elbridge G. Blunt in 1 day after date, with interest annually at the rate of 10 per cent.

The petition, after setting forth the making of the note at the time and place aforesaid, alleged that James G. Blunt, at the time of making the note, and for a long time before and after, was a citizen and resident of Kansas, and died intestate in July, 1881, leaving property in that state; that no administrator of his estate was appointed until the defendant was appointed administrator, on December 14, 1885; that James G. Blunt, after the making of the note, and before his death, was absent from and out of the state of Kansas, as well as the state of Illinois, "for more than five years;" and that no part of the note, or of the interest thereon, had been paid, except $100 paid December 1, 1875, and indorsed on the note.

*646 *The defendant demurred to the petition, and assigned for cause of demurrer "that said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant, and that it appears by the said petition that the alleged cause of action therein stated is barred by the statute of limitations."

On March 13, 1886, the case was removed by the defendant into the circuit court of the United States, in which, on June 10, 1886, as appeared by its record, the following proceedings were had: "Demurrer herein came on to be heard, and was argued by counsel, on consideration whereof the court doth overrule said demurrer; to which ruling and decision of the court said defendant duly excepts. It is ordered by the court that the defendant have sixty days from this date to file answer."

On June 23, 1886, the defendant filed an answer setting up the statute of limitations, and alleging that the debtor, from the making of the note until his death, had his home and usual place of residence, where his family lived, and where process on him might have been served, in the city of Leavenworth, and state of Kansas, and that his absence from the state was only temporary, and with the intention of returning to that home and residence. The plaintiff filed a replication denying all the allegations of the answer, except as admitted in the petition, and alleging that the debtor, after the maturity of the note, and before his death, was out of the state of Kansas, and personally absent therefrom, for spaces of time aggregating the full period of five years, and that this action was commenced within one year after the appointment of an administrator of his estate. The parties afterwards, in writing, waived a trial by jury, and agreed that the action might be tried by the court.

The evidence at the trial tended to prove the following facts: The plaintiff and James G. Blunt were brothers. The note sued on was given at its date, in Chicago, in settlement for work previously done by the plaintiff for the maker; and the maker, a few days afterwards, left Chicago, and went to Washington, in the District of Columbia, and between that *time and his death was absent *649 from the state of Kansas more than five years, but during all this time, and for many years before, kept and maintained his usual place of residence and home in Kansas, open and occupied by his wife and children, and at which service of a summons might have been made on him. He died intestate July 25, 1881, and the defendant was duly appointed and qualified as his administrator by a probate court in Kansas on December 14, 1885.

The plaintiff relied on the following sections of chapter 80 of the Compiled Laws of Kansas of 1879 and 1885:

"Sec. 18. Civil actions, other than for the recovery of real property, can only be brought within the following period after the cause of action shall have accrued, and not afterwards: First. Within five years: An action upon any agreement, contract, or promise in writing."

"Sec. 21. If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he departs from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

The defendant, to maintain the issues on his part, relied upon the following section of the same chapter:

"Sec. 64. The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day."

Also upon the following section of chapter 37 of those laws:

"Sec. 12. Administration of the estate of an intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled thereto in the following order, to wit:

"First. His widow, or next of kin, or both, as the court may think proper; and if they do not voluntarily either take or renounce the administration within thirty days *650 after the *death of the intestate, they shall, if resident within the county, upon application of any one interested, be cited by the court or judge for that purpose.

"Second. If the persons so entitled to administration are incompetent or evidently unsuitable for the discharge of the trust,

or if they neglect for twenty days after service of said citation, without any sufficient cause, to take administration of the estate, the court shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust.

"Third. If there be no such creditors, and the court is satisfied that the estate exceeds the value of one hundred dollars, the court shall commit administration to such other persons as it shall deem proper."

Thereupon the court, on November 26, 1888, "being of opinion that the personal absence of the debtor from the state of Kansas, notwithstanding his residence in the state, where service of a summons could be made on him, was sufficient to prevent the bar of the statute of limitations, and that the statute of limitations was suspended from the debtor's death until the appointment of his administrator," found and adjudged that the plaintiff recover of the defendant the sum of $7,396.02, with interest at the yearly rate of 10 per cent. from that date, and allowed a bill of exceptions to that opinion and finding.

The defendant sued out this writ of error, and assigned as errors—First, that the petition and the matters therein contained were insufficient for the plaintiff to maintain his action; second, that by the record it appeared that the findings and judgment were given for the plaintiff, whereas, by law, they ought to have been given for the defendant.

J. H. Gilpatrick and Frank Hagerman, for plaintiff in error. S. Shellabarger and J. M. Wilson, for defendant in error.

*Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

This is an action on a promissory note. The defense is the statute of limitations. The note was payable July 2, 1875. The debtor died in July, 1881. An administrator of his estate was appointed and qualified December 14, 1885. The action was brought February 13, 1886.

By the statute of limitations of Kansas, an action upon any agreement, contract, or promise in writing must be brought within five years after the cause of action accrues; but it is provided that "if, when a cause of action accrues against a person, he be out of the state," "the period limited for the commencement of the action shall not begin to run until he comes into the state," "and if, after the cause of action accrues, he depart from the state," "the time of his absence" "shall not be computed as any part of the period within which the action must be brought." Comp. Laws Kan. c. 80, §§ 18, 21.

The statutes of Kansas also provide that a summons in a civil action may be served either upon the defendant personally, or by leaving a copy at his usual place of residence, and further provide that administration of the estate of an intestate may be granted as follows: First, to his widow or next of kin; second, if they do not apply, or are unsuitable, to one or more of his creditors; and, third, if there are no creditors competent and willing to undertake it, to such other persons as the court shall deem proper. Comp. Laws Kan. c. 37, § 12; Id. c. 80, § 64.

The two principal questions presented by the record and argued by counsel are—First, whether the statute of limitations began and continued to run during the personal absence of the debtor from the state, retaining a usual place of residence therein, where a summons upon him might be served; second, whether the running of the statute was suspended after the death of the debtor until the appointment of an administrator of his estate, more than 4 years and 4 months afterwards, although the plaintiff, as a creditor of the deceased, could, at the end of 50 days from his death, have applied to have an administrator appointed.

Both these questions appear by the bill of exceptions to have been treated as arising upon the evidence at the trial, and to have been ruled upon in entering final judgment. The first one certainly was; and, if the second was not unequivocally raised at that stage of the case, it was clearly presented by the demurrer to the petition, inasmuch as, by the practice in Kansas, the defense of the statute of limitations, when all the requisite facts appear on the face of the petition, may be taken advantage of by demurrer. Zane v. Zane, 5 Kan. 134; Bartlett v. Bullene, 23 Kan. 606, 613; Bank v. Lowery, 93 U. S. 72. The defendant having answered over by leave and order of the court, reserving his objection to the overruling of the demurrer, the question whether the demurrer was rightly overruled is open on this writ of error, sued out after final judgment against him. Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. Rep. 420; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44.

Both questions depend upon the local law of Kansas. By a provision inserted in the first judiciary act of the United States, and continued in force ever since, congress has enacted that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Act Sept. 24, 1789, c. 20, § 34, (1 St. p. 92; Rev. St. § 721.) No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a state, and

as construed by its highest court. Higginson v. Mein, 4 Cranch, 415, 419, 420; Shelby v. Guy, 11 Wheat. 361, 367; Bell v. Morrison, 1 Pet. 351, 360; Henderson v. Griffin, 5 Pet. 151; Green v. Neal, 6 Pet. 291, 297–300; McElmoyle v. Cohen, 13 Pet. 312, 327; Harpending v. Dutch Church, 16 Pet. 455, 493; Leffingwell v. Warren, 2 Black, 599; Sohn v. Waterson, 17 Wall. 596, 600; Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137; Kibbe v. Ditto, 93 U. S. 674; Davie v. Briggs, 97 U. S. 628, 637; Amy v. Dubuque, 98 U. S. 470; Mills v. Scott, 99 U. S. 25, 28; Moores v. Bank, 104 U. S. 625; Bank v. Eldred, 130 U. S. 693, 696, 9 Sup. Ct. Rep. 690; Penfield v. Railroad Co., 134 U. S. 351, 10 Sup. Ct. Rep. 566; Barney v. Oelrichs, 138 U. S. 529, 11 Sup. Ct. Rep. 414.

In Patton v. Easton, 1 Wheat. 476, 482, and again in Powell v. Harman, 2 Pet. 241, this court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the supreme court of the state, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in Green v. Neal, 6 Pet. 291, a judgment of the circuit court of the United States, which had held itself bound by those cases in this court, was reversed because of more recent decisions of the state court, establishing the opposite construction.

In Pease v. Peck, 18 How. 595, it was because the statute of limitations of Michigan, as published by authority of the legislature, and acted on by the people for 30 years, contained an exemption of "beyond seas," that this court declined to treat those words as not part of the act, although it was shown that they were not in the original manuscript preserved in the public archives, and that they had, therefore, been recently adjudged by the supreme court of the state to be no part of the act. The question there was not of the construction of the text of the statute, but what the true text was; and we are not now required to consider whether that decision can be reconciled with later cases, in which this court has held that an act of the legislature of a state, which has been held by its highest court not to be a statute of the state, because not duly enacted, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state. South Ottawa v. Perkins, 94 U. S. 260; Post v. Supervisors, 105 U. S. 667. See, also, Norton v. Shelby Co., 118 U. S. 425, 440, 6 Sup. Ct. Rep. 1121.

In Leffingwell v. Warren, 2 Black, 599, 603, Mr. Justice Swayne, speaking for the court, laid down, and supported by references to earlier decisions, the following propositions: "'The courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the judicial act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

In Levy v. Stewart, 11 Wall. 244, which arose in Louisiana, the question was not of the construction of the terms of a statute of limitations, but of an implied exception, by reason of the effect of the state of war existing during the Rebellion, while the courts of the states held by the rebels were closed to the citizens of the rest of the Union; and this court declined to be bound by decisions of the courts of Louisiana restricting such effect, because they were inconsistent with its own earlier decisions in Hanger v. Abbott, 6 Wall. 532, and The Proctector, 9 Wall. 687, which had dealt with that question as one of public and international law, upon which this court is never obliged to accept the opinion of the state courts. Huntington v. Attrill, 146 U. S. 657, 683, 13 Sup. Ct. Rep. 224.

In Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 143, this court, following the decisions of the court of appeals of New York, held that a foreign corporation could not avail itself of the statute of limitations of that state; and Mr. Justice Bradley, in delivering judgment, said: "These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles."

In Amy v. Dubuque, 98 U. S. 470, 471, Mr. Justice Harlan, summing up the result of the previous decisions in the very words of some of them, said that "it is not to be questioned that laws limiting the time of bringing suit constitute a part of the lex fori of every country. They are laws for *administering* justice,—one of the most sacred and important of sovereign rights,"—and that it is as little to be questioned that "the courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals.'

Upon the question how far a saving clause as to married women in a statute of limitations is affected by a subsequent statute of the state enlarging the rights of married women, this court, in two comparatively recent cases, has come to differing conclusions by following in each case a single decision made by the highest court of the state since the case was brought to this court from the circuit court of the United States. Kibbe v. Ditto, 93 U. S. 674; Moores v. Bank, 104 U. S. 625.

In Kibbe v. Ditto, which arose in Illinois, the course of decision in the highest court of the state was shown to be as follows: In Emerson v. Clayton, 32 Ill. 493, in which the statute of limitations was not in question, the decision was that a married woman might maintain replevin for her chattels without joining her husband, because, as the court said, the subsequent statute, which gave her the right of sole control over her separate property, "necessarily confers the power to do whatever is necessary to the effectual assertion and maintenance of that right." But in Rose v. Sanderson, 38 Ill. 247, and in Cole v. Van Riper, 44 Ill. 58, it was decided that the married woman's act did not affect an estate by the curtesy vested in a husband at the time of its passage; and it was directly adjudged in Morrison v. Norman, 47 Ill. 477, and again distinctly asserted in Noble v. McFarland, 51 Ill. 226, that as to real estate in which the husband had a tenancy by the curtesy, the statute of limitations did not run against the wife until after his death. Such was the state of the law in Illinois when the circuit court of the United States, in Kibbe v. Ditto, held that the statute of limitations ran against the wife in the husband's lifetime; and its judgment was affirmed by this court solely because of a *650 subsequent decision of the supreme court of Illinois in Castner v. Walrod, (since reported in 83 Ill. 171,) reviewing and modifying or overruling the earlier cases in that state, and which, this court said, "establishes a rule of property in Illinois, which binds the courts of the United States, and presents an insuperable bar." 93 U. S. 680.

In Moores v. Bank, which arose in Ohio, a judgment of the circuit court of the United States, holding, in accordance with a previous decision of the superior court of Cincinnati, that the saving clause in favor of married women in the statute of limitations of Ohio was repealed by a subsequent statute authorizing a married woman to sue alone in actions concerning her separate property, was reversed by this court, without any discussion of the merits of the question, because a subsequent decision of the supreme court of the state, holding that the statute of limitations did not, at the least, begin to run against a married woman until after the passage of the later statute, should be followed by this court. 104 U. S. 629.

What, then, are the decisions of the supreme court of Kansas upon the two questions presented by this record?

Upon the question relating to the debtor's personal absence from the state in his lifetime, it is to be observed that the saving clause of the statute speaks only of where the debtor is, and does not (like the statute of New York, which governed Penfield v. Railroad Co., 134 U. S. 351, 10 Sup. Ct. Rep. 566, and Barney v. Oelrichs, 138 U. S. 529, 11 Sup. Ct. Rep. 414) use the words "reside" or "residence." The words of the Kansas statute are: "If he be out of the state," "until he comes into the state," "if he depart from the state," and "the time of his absence." When this case was before the circuit court, it was clearly settled by a uniform series of decisions of the supreme court of Kansas, extending over a period of 20 years, that the words of the statute were to have their natural meaning, and that personal absence of the debtor, even if he retained a residence within the state at which process against him might be served, was sufficient to take the case out of the statute. Lane v. Bank, 6 Kan. 74; Hoggett v. Emerson, 8 Kan. 262; Morrell v. Ingle, 23 Kan. 32; Conlon v. Lanphear, *37 Kan. 431, 15 Pac. Rep. 600. The later decisions of that court recognize the same rule. Railway Co. v. Cook, 43 Kan. 83, 22 Pac. Rep. 988; Bauserman v. Charlott, 46 Kan. 480, 482, 26 Pac. Rep. 1051.

The supreme court of the adjoining state of Nebraska, indeed, as the plaintiff in error has pointed out, has held a precisely similar provision of its own statute of limitations not to include the case of a debtor temporarily absent from the state, and having a usual place of residence therein, at which a summons to him might be served. Neb. Code Civil Proc. § 20; Blodgett v. Utley, 4 Neb. 25; Forbes v. Thomas, 22 Neb. 541, 35 N. W. Rep. 411. But what may be the law of Nebraska is immaterial. The case at bar is governed by the law of Kansas, and the duty of this court to follow, as a rule of decision, the settled construction by the highest court of Kansas of a statute of that state is not affected by the adoption of a different construction of a similar statute in Nebraska or in any other state. Shelby v. Guy, 11 Wheat. 361, 367; Christy v. Pridgeon, 4 Wall. 196, 203; Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 235, 10 Sup. Ct. Rep. 1013.

It was therefore rightly held by the circuit court that the statute of limitations did not run while the debtor was personally absent from the state, notwithstanding that he continued to have a usual place of residence in the state, where service of a summons could be made on him.

The question whether the statute of limitations ceased to run from the death of the debtor until the appointment of his administrator, four years and more than four months afterwards, requires more consideration.

In the absence of express statute or controlling adjudication to the contrary, two general rules are well settled: (1) When the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue. Walden v. Gratz, 1 Wheat. 292; Mercer v. Selden, 1 How. 37; Harris v. McGovern, 99 U. S. 161; McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. Rep. 142. (2) The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means with-

in his power to prosecute or to preserve his claim. Richards v. Insurance Co., 8 Cranch, *84; Braun v. Sauerwein, 10 *Wall. 218; U. S. v. Wiley, 11 Wall. 508, 513, 514; Kirby v. Railroad, 120 U. S. 130, 140, 7 Sup. Ct. Rep. 430; Amy v. Watertown, 130 U. S. 320, 325, 9 Sup. Ct. Rep. 537.

But the supreme court of Kansas has always held that the death of the debtor suspends the operation of the statute of limitations. Toby v. Allen, 3 Kan. 399; Hanson v. Towle, 19 Kan. 273; Nelson v. Herkel, 30 Kan. 456, 2 Pac. Rep. 110. In each of those cases it was said that the operation of the statute was suspended until an administrator had been appointed; and they were evidently the foundation of the ruling of the circuit court in this case, that the statute of limitations was suspended from the debtor's death until the appointment of his administrator.

But those cases, when examined, do not disclose any intention to decide or to intimate that the operation of the statute of limitations would be suspended during a longer time between the death of the debtor and the appointment of an administrator than would be sufficient to enable the creditor to have an administrator appointed. In Toby v. Allen, and in Hanson v. Towle, there is nothing to show that an administrator was not appointed as soon as possible after the debtor's death. And in Nelson v. Herkel, although it appears in the statement of the case that four years and nearly nine months had elapsed between the debtor's death and the administrator's appointment, that fact does not appear to have been urged by counsel, or regarded by the court, which treated the case as governed by its previous decisions.

The cases of Green v. Goble, 7 Kan. 297; Carney v. Havens, 23 Kan. 82; and Mills v. Mills, 43 Kan. 699, 23 Pac. Rep. 944,—cited at the argument of the present case, related to the death of the creditor, not of the debtor, and have no important bearing on this case.

Since the judgment of the circuit court in the case at bar, the supreme court of Kansas, upon careful and elaborate examination of the question, has held that an action by another creditor against this defendant was barred by the statute, because the plaintiff had unreasonably delayed to apply for the *698 appointment of an administrator. Chief Justice *Horton, (who had delivered the opinion in Nelson v. Herkel,) after referring to the cases, mentioned above, as holding that the "death of the debtor operates to suspend the statute." added: "But this court has never said, when the question was properly presented, that the creditor can indefinitely prolong the time of limitation by his own omission or refusal to act, or that the death of the debtor operates to suspend the statute of limitations indefinitely." He then referred to a number of authorities, and among others to the statement of Mr. Justice Bradley, speaking for this court, in Amy v. Watertown, above cited, that, "when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it;" and to the decisions in Atchison, T. & S. F. R. Co. v. Burlingame Tp. 36 Kan. 628, 633, 14 Pac. Rep. 271, and in Rork v. Douglas Co., 46 Kan. 175, 181, 26 Pac. Rep. 391, as establishing that "a person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him;" and that "to permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote." "Following these decisions," the chief justice concluded that the plaintiff's claim was barred by the statute, and said: "The reasonable time within which a creditor, having a claim against a decedent, and wishing to establish the same against his estate, should make application for administration, would be, under the statute, fifty days after the decease of the intestate, or at least within a reasonable time after the expiration of fifty days. But a creditor cannot, as in this case, postpone the appointment for months and years, and then recover upon his claim. If he can do so for several months or several years, he can do so for any indefinite length of time, and then resort to administration, and establish his claim. This is not in accord with the policy of the statutes, nor with our prior decisions." Bauserman v. Charlott, 46 Kan. 480, 483–486, 26 Pac. Rep. 1051.

*That decision was evidently deliberately *699 considered and carefully stated, with the purpose of finally putting at rest a question on which some doubt had existed. It is supported by satisfactory reasons, and is in accord with well-settled principles, and there is no previous adjudication of that court to the contrary. In every point of view, therefore, it should be accepted by this court as conclusively settling that the operation of the statute of limitations of Kansas is suspended after the death of the debtor for the 50 days, only, during which the creditor could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the 50 days.

It remains only to apply the rule thus established to the facts of this case, as alleged in the petition and admitted by the demurrer. Taking the statement of those facts as strongly as possible in favor of the plaintiff, the time which elapsed from the maturity of the note, on July 2, 1875, to the commencement of this action, on February

13, 1886, was 10 years, 7 months, and 11 days. The allegation that the debtor, before his death, was absent from the state "for more than five years," cannot be treated as definitely describing a longer period than 5 years and 1 day; and, after deducting that period, there remain 5 years, 7 months, and 10 days, from which, if we deduct the 5 years period of limitation, as well as the 50 days next after the debtor's death, during which the creditor could not have applied for administration, there still remain 5 months and 20 days.

It is argued for the plaintiff that this was not more than a reasonable time within which he might have applied for the appointment of an administrator after the expiration of the 50 days from the death. To this there are two answers: First, the plaintiff did not so apply within that time, nor was any administrator appointed until almost four years afterwards; and it is hard to see how any reasonable time to enable the plaintiff to have an administrator appointed can be computed in his favor when he has taken no steps whatever to that end. Second, if a reasonable time for *199 that purpose, although the plaintiff did not avail himself of it, can be computed in his favor, and the case be treated as if the time during which he might have applied, but did not apply, for the appointment of an administrator, was 5 months and 20 days, only, yet his delay for that time, being more than thrice the period of 50 days next after the debtor's death, which was allowed for the next of kin to obtain administration, was, upon the facts appearing by this record, and without any suggestion that the plaintiff was ignorant of his brother's death, clearly unreasonable, and could not prevent or postpone the running of the statute of limitations.

The defendant below, the plaintiff in error here, is therefore entitled to judgment upon his demurrer to the petition, unless the circuit court shall see fit to allow an amendment to the plaintiff's allegations so as to aver more definitely the length of time during which the debtor was absent from the state after the maturity of the note, and before his death.

Judgment reversed, and case remanded to the circuit court for further proceedings in conformity with this opinion.

(147 U. S. 623)

LOVELL MANUF'G CO., Limited, v. CARY et al.

(March 6, 1893.)

No. 110.

PATENTS FOR INVENTIONS—ANTICIPATION—FURNITURE SPRINGS.

Letters patent No. 116,266 were granted June 27, 1871, to Alanson Cary for an improvement in furniture springs. The improvement related to spiral springs usually made in a conical form of steel wire, and used in upholstering sofas, chairs, etc. Such springs were made of hard-drawn wire, coiled and forced to a proper shape; but in coiling the metal was unavoidably weakened, the outer portion being stretched, and the inner portion crushed. The invention consisted in subjecting the spring to "spring-temper heat," which is about 600° F., by means of which a complete homogeneity in the metal was produced, thereby increasing its durability and power of resistance. The same process, however, had been long before used in the manufacture of "wire bells" for clocks, and in the manufacture of hair balance springs for marine clocks; the object being in the one case to give tone to the bell, and in the other to increase the elasticity and durability of the spring. *Held*, that this use constituted an anticipation, notwithstanding that the purpose of the process was different from the purposes of the prior use, and that experts in the tempering of steel were surprised by the results produced by the patented process. 31 Fed. Rep. 344, reversed.

Appeal from the circuit court of the United States for the western district of Pennsylvania. Reversed.

W. Bakewell, Thos. W. Bakewell, and John K. Hallock, for appellant. W. C. Witter and W. H. Kenyon, for appellees.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought March 14, 1885, in the circuit court of the United States for the western district of Pennsylvania, by Alanson Cary and Edward A. Moen against the Lovell Manufacturing Company, Limited, an association under the laws of the state of Pennsylvania, to recover for the alleged infringement of letters patent No. 116,266, granted to Alanson Cary June 27, 1871, for an improvement in modes of tempering springs.

The specification of the patent is as follows: "Be it known that I, Alanson Cary, of city, county, and state of New York, have invented a new and useful improvement in furniture springs, and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same. This invention relates to spiral springs, usually made in a conical form, of steel wire, and extensively used in upholstering sofas and chairs and for bed bottoms, etc., and consists in subjecting the spring to a tempering process after it has been completed in the usual manner, whereby its strength, elasticity, and durability are greatly increased. The ordinary furniture spring is made of hard-drawn wire, coiled and forced to the proper shape, and when this is done the spring is considered finished, without having been subjected to any tempering process other than what is incidental to the drawing of the wire. To give them a finished appearance, however, copper or other material is frequently applied by suitable means. The metal being greatly condensed and hardened in the process of drawing the wire, a good degree of elasticity is given the wire thereby; but in bending or coiling the wire into the proper shape the metal is unavoidably weak

ened, the outer portion of the wire coil is drawn or stretched, while the inner portion is crushed or shortened. When straight bars or wire is subjected to the bending process, the stretching or drawing of the outer and crushing of the inner portions are inevitable results. This greatly reduces the elasticity, strength, and durability of the spring. Being a manufacturer of furniture springs, and aware of this difficulty, I have tried many experiments with a view of restoring the wire, after being bent or formed into springs, to its normal condition. This, I have discovered, can be done by subjecting the spring to a degree of heat known as 'spring-temper heat,' which is about 600°, more or less, and that a subjection to this temperature for about eight minutes is sufficient to produce the result desired. This temperature I have found to be sufficient to so far relax or produce a complete homogeneity of the metal of the spring as to add from twenty to thirty per cent. to the value of the spring consequent on its increased powers of resistance. Thus treated the spring will bear much heavier pressure, and its strength and elasticity are much less impaired than the ordinary spring after long-continued use. For carrying out and putting in practice my discovery, I have invented a tempering oven, for which I have an application for letters patent now pending."

The claim is as follows: "The method of tempering furniture or other coiled springs, substantially as hereinbefore described."

The answer set up various defenses, and among them want of novelty and noninfringement. It averred that the process set forth in the specification of the patent was merely a method of increasing the elasticity of steel, applicable not only to furniture springs and other coiled springs, but also springs and other articles made of steel, whether coiled, bent, twisted, or straight; that the same was old, well-known, and in common use or practice for many years prior to the alleged invention by Cary, and for more than two years before he filed his application for the patent; that said process or method had been so practiced on coiled springs, uncoiled springs, hard-drawn steel wire, and other articles of steel in various forms, for the purpose of increasing their elasticity; and that the patent was therefore void. It also set forth the names of many persons to whom the process described in the patent, whether considered as a restoring process or as a tempering process merely, was known, and by whom it was practiced, prior to the alleged invention thereof by Cary; and it averred that by reason of such prior knowledge and use the patent was void. It also averred that it was a common practice to subject furniture springs and other coil springs, made of hard-drawn steel wire, to 600° of heat, more or less, in the process of finishing such springs; that the same was practiced long prior to the alleged invention by Cary, by sundry persons, whose names were given in the answer; that there was not, at the time of the grant of the patent or of the alleged invention by Cary, any patentable novelty in the process described and claimed in the patent, or in the application of the process to the tempering of coiled springs for furniture, and that the patent was therefore void. It also set up various United States and English patents, and various printed publications, in which the alleged invention of Cary was said to have been described prior to the making of his alleged discovery and prior to his application for the patent. A replication was filed to the answer, and proofs were taken.

Prior to the filing of the bill in this suit, the patent had been sustained by a decision made by Judge Wheeler on February 7, 1885, in the circuit court of the United States for the southern district of New York, in Cary v. Wolff, 24 Fed. Rep. 139. On the basis of that decision a preliminary injunction was granted in the present suit by Judge Acheson on June 12, 1885. 24 Fed. Rep. 141. In Cary v. Spring Bed Co., in the circuit court for the district of New Jersey, on July 28, 1885, in a suit on the same patent, Judge Nixon, following Judge Wheeler and Judge Acheson, granted a preliminary injunction. 27 Fed. Rep. 299. On January 6, 1886, (26 Fed. Rep. 38,) Judge Nixon dissolved the injunction in the New Jersey suit, on the presentation of new affidavits relating to the novelty of the invention, and on February 2, 1886, the preliminary injunction in the present suit was suspended on the giving by the defendant of a bond.

After the proofs were taken in the present suit, it was brought to a final hearing before Judges McKennan and Acheson, and they sustained the patent, following Judge Wheeler's decision. Their opinions are reported in 31 Fed. Rep. 344, 347. On August 3, 1887, the court entered an interlocutory decree, holding the patent to be valid and to have been infringed, awarding to the plaintiffs a recovery of profits and damages, with costs, referring it to a master to take the account of profits and damages, and granting a perpetual injunction. The master reported six cents damages and costs in favor of the plaintiffs. The plaintiffs excepted to his report, and the court, on a hearing of the exceptions, entered a final decree, on February 16, 1889, awarding to the plaintiffs a recovery of $8,745.34, and costs. The opinion of the court on the exceptions is found in 37 Fed. Rep. 654. The defendant has appealed to this court.

The invention claimed, as appears from the specification, is a method of restoring steel wire which has been mechanically strained, by subjecting it to a temperature of 600°, more or less, whereby its disturbed and disarranged molecules are allowed to assume their normal relation. The claim limits the method to its application to "furniture or other coiled springs;" but it appears from

the evidence that the process, as applied to those springs, is in no respect different, in method or effect, from the same process when applied to any mechanically strained wire, or to steel made in straight pieces or strips, or otherwise. The claim covers broadly the described method of tempering applied to any coiled springs, as well as coiled springs for furniture, and, if the evidence shows that, prior to Cary's invention, the method had been used for the restoration of any springs of strained steel, or other articles of strained steel having the resiliency which is a well-known property of steel, the claim is substantially anticipated. Particularly if the method claimed had been used by others to restore articles of coiled spring steel, even though they were not used for furniture springs, the claim is anticipated.

*628 *In the testimony for the plaintiffs it appears to be contended that, in order to establish the charge of infringement, the patent is to be construed so as to cover the restoring of strained steel springs by the application of any temperature, less than a red heat, which will produce in the metal a blue color. If that be true, the patent must be so construed also in comparing it with the prior state of the art. Mr. Brevoort, an expert for the plaintiffs, says that if a coiled spring is attempted to be used, without further treatment, for a furniture spring, the wire will take a set, and lose its resilient properties, and its usefulness will be lost. He adds: "To cure this defect the spring must be tempered, as it is called in the trade, and the way of doing this upon such springs constitutes the process of the Cary patent. The process described in the patent gives to the spring apparently the same qualities as would be imparted to steel by tempering; but I do not know that the process is really one of tempering, strictly so called, although it produces like results."

The date of Cary's alleged invention is December, 1870, and the question is, what was the state of the art at that date? Mr. Brevoort explains "the ordinary tempering process" as follows: "Steel is ordinarily tempered substantially in the following way: The steel is first best heated to a cherry red. It is then suddenly cooled, either in water or oil. It is then in a very brittle and exceedingly hard condition, and is extremely liable to be warped or bent during the hardening, as well as during the heating. The next step is to reheat the article carefully and gradually, and watch the appearance of a bright portion of the surface of the article, when certain colors will be noticed, following one another in succession; first, a very light yellow, then a deeper yellow, shading into purple, then a deeper purple, until finally the purple merges into blue, and lastly a blue color; yellow, purple, and blue being the three prominent colors. The colors indicate different degrees of hardness in the steel, and act as guides, telling when the proper degree of temper has been reached for any desired article. Thus, for example, when the yellow just begins to shade into the purple, the proper degree of hardness for a penknife has been reached, and the further drawing of the temper is stopped. Thus, if a spring is to be made, the temper is drawn until a blue color shows, when the further drawing of the temper is stopped. The above is an outline of the ordinary tempering process as I have known it for the last twenty years." The metal is partially restored to its original condition by heating it to a blue heat if the condition of spring temper is desired, or to a red heat if it is wished to have a perfect restoration of the metal. In making wire the metal is rolled into the form of a rod, which is drawn, when cold, through successively smaller holes in a drawplate. It is thus gradually reduced in diameter, and the effect of the strain is to compact it, and make it very hard, increasing its elasticity up to a certain point, and finally weakening the material. For many years, in drawing wire to small sizes it has been the practice to heat it to a red heat between successive drawings, and thus to completely restore it, rendering it less brittle, and preventing the fracture of it by the strain of the drawing process. At the conclusion of the drawing operation, when the wire has passed through the dies several times, and is hardened and elastic, the wire is called "hard-drawn," and in that state it comes to the hands of the makers of furniture springs. It is shown by the evidence to have been well known in the art that wire weakened and strained by drawing could be completely restored to its original soft state by heating it to a red heat, and gradually cooling it, producing thus, by the operation of annealing, the opposite of the "hard-drawn wire," of which Cary speaks in his specification. It was also known that if such strained and weakened hard-drawn wire was heated to a temperature less than red heat, but sufficient to blue it, a partial process of restoration would be effected, which would add strength and elasticity to the wire, and fit it for making springs and corset steels. The defendant's witnesses Roberts and Booth state that, prior to the date of Cary's alleged invention, they practiced this method of bluing hard-drawn wire, so as to increase its strength and elasticity. The testimony shows the prior use of the Cary process applied to wire to effect the same results, and to correct the same undesirable consequences of mechanical strain, which are described in the Cary specification.

*629 *The two principal matters relied on by the defendant to show the invalidity of the patent are (1) the prior use of what are called the New England wire clock bells; and (2) the blued hairsprings. It is clearly shown by the witnesses for the defendant that, prior to Cary's alleged invention, wire clock bells and hairsprings had been subjected to heat in the manner described in the Cary specification, and with the same bluing effect. The treat-

ment to which the articles were subjected was in all respects the same in the prior use as in the patented process. The only contention of the plaintiffs is that the purpose of the prior use was not the same, and that the results, so far as they were those of the patent, were accidental.

Higgins, a witness for the defendant, thus describes the way in which wire clock bells were made prior to Cary's alleged invention. He says that "the untempered steel wire was taken from the hank, and straightened by machinery, cut off at the proper length, and then tumbled in sawdust to clean the oil from it. Then the brass collet was driven onto one end, a small coil of silver was put on for the purpose of brazing the steel and brass together, then borax and water were put on, and they were brazed together, and then were tumbled in sawdust to clean off the borax, and then was wound on a wooden block, then turned by a pair of plyers to the proper shape, then was blued and oiled and then they were ready for use." He also says that the method of "bluing" was this: "They were put in piles of a hundred each, and then spread onto a sheet-iron pan, and then put into an oven, and there kept until the heat blued them, and then taken out and oiled ready for use; they were cooled in the air;" that the object of the winding was to put them into a "bell" form; that the effect of the winding was to make the vibration,—to give them the sound; that the bluing stiffened them, and gave them the tone; and that the bell, when struck by a clock hammer, before blueing had no sound, while after bluing it had a good tone.

Horton, a witness for the defendant on the same subject, says that he used to make bells of untempered steel wire, although some of it was drawn harder than others; that some of it was hard-drawn steel wire, and that the object of heating the coiled wire was to make it sound, and to stiffen it. He also describes the manufacture by him, during the 10 or 12 years succeeding 1846, of wire clock bells of a spiral form, not helical, which were blued in the same way, and for the same purpose.

Andrews, a witness for the defendant, gives testimony to the same effect, and says that the coiling of the wire, to give it the shape of a "bell," weakens the spring, and causes it to lose its elasticity, while subjecting it to heat makes it more springy and elastic.

Thomas, a witness for the defendant, states that he had known the wire clock bells for 40 years, that they were made from hard, untempered steel wire, straightened, cut into lengths, then wound on a form, and subjected to the bluing process to make the spring, and that there was no spring to the wire until it was blued.

Warner, a witness for the defendant, states that the wire was steel wire, used just as it was drawn, that the coiling of the wire upon a block, to give it the form of a wire bell, stretched the outside and upset the inside, and weakened the wire, and that the bluing process restored it, and gave it more elasticity.

Broomhead, a witness for the defendant, states that as early as about 1863 he saw hard-drawn steel wire used in the manufacture of clock bells.

Higgins also testifies that he discovered, as early as 1866, that the bluing process made the steel stiffer than it was before, and that he had known since 1866 that the tendency of the spring to keep its shape, and to restore itself to its proper shape when the coils were drawn apart or pressed together, was increased by the bluing process.

Gardner testifies that he knew that heating of strained bell steel stiffened it, making it stronger and more elastic, and that he would have known that the process of blue-heating steel wire in the form of furniture springs would have increased its stiffness and elasticity in a measure.

As to the hairsprings, they are used in marine clocks to control the balance, and are steel springs, made of steel wire, rolled down. Hubbell, a witness for the defendant, made them as early as 1848. He describes the way in which they were made by him in 1848 as follows: "The first process was taking the wire in the coil, and passing it between two steel rolls to a required thickness. They were cut up to the proper lengths, fastened to a hub, wound on a disc, and wound down solid. We wound them down according to the tension of the wire, so that when they were let loose the outside coils were of about or nearly the right diameter. The next process was twisting them into a snail of a required form, and bluing them. I blued them on an iron placed over a fire. They were then removed from the snail. All the inequalities were remedied by bending and twisting by a pair of plyers into the proper shape. They were then ready for use." He says that he used steel wire, untempered; that the object of bluing the spring after it had been so wound was to equalize the density,—the elasticity; that the bluing process had that effect; and that he had repeatedly tested blued hairsprings and unblued hairsprings, to compare their elasticity with each other, and that the blued spring would sustain double the tension or strain that the unblued one would, without bending.

Wright, a witness for the defendant, describes the use of the same process by him on hairsprings for seven years following 1848, and says that the steel wire was untempered, just as it came from the wire-maker, and that the bluing increased its elasticity.

Testimony to the same effect was given by the witness W. B. Barnes, who said that the steel wire was hard-drawn and untempered, and that the bluing had the effect of keeping the spring near the shape of the snail, and also giving it temper or elasticity.

Hendrick, another witness for the defendant, testified to the same effect.

It is contended for the plaintiffs that the bell-making process was for a different purpose from that contemplated by Cary in his specification; that the results were not analogous; and that, therefore, the patent was not anticipated. But we are of opinion that in the Cary process and the bell-making process the operations are precisely the same. In both the operator is dealing with wire which is strained by being bent past the elastic limit, and is deadened thereby. The wire is blued by subjecting it to a degree of heat sufficient for the purpose, and is then allowed to cool. The result in both cases is the same, namely, the restoration, stiffening, and equalizing of the wire, and the only difference is in the use to which the resulting article is put. In both the wire is made stiffer and more springlike, these qualities being utilized, in one case in a furniture spring, and in the other in a clock bell. Cary observed that, in winding furniture springs, the wire, already weakened by the drawing process, was still further strained and deadened, so as to impair the quality of the spring. The question was how to equalize and stiffen the mechanically-strained steel wire. The same problem had been solved by the clock-bell makers, and the solution of the problem was merely the use of the knowledge possessed by those skilled in the art. The wire used in making the clock bells was also hard-drawn wire; but it does not appear that the process of the patent acts differently, when applied to strained hard-drawn wire, from what it would if applied to strained wire that was not hard-drawn.

The difference contended for by the plaintiffs between the process of bluing wire clocks bells and the process of bluing furniture springs, in that one deals with spiral articles and the other with articles of a helical form, is not a difference in the process, but is at most a difference in the articles to which the process is applied. If the straining of furniture springs is peculiarly aggravated because of their shape, the difference is merely one of degree, not of kind. Moreover, the Cary claim describes the process as applicable to the manufacture of furniture springs "or other coiled springs." A coiled wire bell, although not a furniture spring, is a coiled spring; and it appears from the evidence that any wire drawn through dies, although not coiled, is, when heated to a blue color, stiffened, and its elasticity increased.

In rebuttal of the defendant's evidence as to wire clock bells and hairsprings, it is admitted that the plaintiffs show that sundry witnesses would not have known that the bluing process was applicable to the treatment of such heavy material as furniture springs, and that it was not used in tempering clock springs of wide, flat steel, but there was applied to such springs what is called in the record the old process of tempering. But, in the first place, these witnesses were not manufacturers of furniture springs; and, in the second place, the reason why the old process of tempering is not used on furniture springs is that their upright shape, like an hourglass or the half of an hourglass, precludes them from being heated to a red heat without their sagging and becoming distorted. The clocksprings can be laid flat upon a support, so as not to sag while heated, and there is no reason, in regard to them, for changing the old process of tempering for another. In addition, even some of the plaintiffs' witnesses admitted, on cross-examination, that they knew that the treatment of the wire bells stiffened the steel, and allowed its molecules to return to their proper relations, and that they would have expected the application of the bluing process to furniture springs to increase their elasticity to some extent. But it does not amount to invention to discover that an old process is better in its results, when applied to a new working, than would have been expected; the difference between its prior working and the new working being only one of degree, and not one of kind. It has been often held that the mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee is not a defense to a charge of infringement. It follows necessarily that the public cannot be deprived of an old process because some one has discovered that it is capable of producing a better result, or has a wider range of use than was before known.

In Smith v. Nichols, 21 Wall. 112, it was held that a mere carrying forward, or new or more extended application, of the original thought; a change only in form, proportions, or degree; the substitution of equivalents; doing substantially the same thing in the same way, by substantially the same means, with better results,—was not such invention as would sustain a patent; and in Roberts v. Ryer, 91 U. S. 150, it was held that it was no new invention to use an old machine for a new purpose, and that the inventor of a machine was entitled to the benefit of all the uses to which it could be put, no matter whether he had conceived the idea of the use or not.

It is contended, as against the wire bells, that the evidence does not show the application of the patented process to an article designed to be used as a spring. But the clock hairsprings are quite as truly springs as the furniture springs, for they require the exercise and use of the resiliency of tempered steel. Both are subjected to the same strains in coiling; both, for the same reasons, need restoration; and in both the application of a blue heat produces the same desirable results.

Within the rule laid down by this court in

Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. Rep. 717, there was nothing more than mechanical skill in arriving at the alleged invention, in view of the state of the art. Cary says, in his specification, that "in bending or coiling the wire into the proper shape the metal is unavoidably weakened;" that "this greatly reduces the elasticity, strength, and durability of the spring;" that "being a manufacturer of furniture springs, and aware of this difficulty," he had made many experiments with a view to restoring the wire, after being bent or formed into springs, to its normal condition, and that he had discovered that that could be done "by subjecting the spring to a degree of heat known as 'spring-temper heat,' which is about 600°, more or less, and that a subjection to this temperature for about eight minutes is sufficient to produce the result desired."

It is contended, however, by the plaintiffs that the application of the former processes is contradicted by the fact that no one had used them for the manufacture of furniture springs, and that, as soon as Cary's process was made known the art of making furniture springs was revolutionized. But it was said by this court in McClain v. Ortmayer, 141 U. S. 419, 428, 12 Sup. Ct. Rep. 76: "That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market, and large commissions to dealers, as by the intrinsic merit of the articles themselves;" and (page 429, 141 U. S., and page 79, 12 Sup. Ct. Rep.) that while, "in a doubtful case, the fact that a patented article had gone into general use is evidence of its utility, it is not conclusive even of that, much less of its patentable novelty."

In the present case it appears that it was not until a short time before 1870 that furniture springs began to be commonly made of steel wire. It was not until 1868, when the general introduction of Bessemer steel and open hearth steel afforded a cheap substitute for iron, that the use of steel became general in the art in question. It was then natural that there should be introduced into that art methods of treatment which were well known as applied in allied arts. The method of the patent, already in use, thus occurred to Cary; but he was appropriating a method which was common property. When steel was adopted for the first time in any art, it was natural that existing methods of treating it should be applied to its new use in the given art. The case is merely one of a double use. Nor is it of force that experts expressed surprise that the process in question was applicable to furniture springs.

Cary was not the first to discover the process described in his specification for the restoration of steel. He claims only the process, and the use made of the article after it is subjected to the process does not affect the nature of the process itself. As a process, there is nothing new in the subject-matter of the claim. The claim does not cover an improvement in furniture springs or other coiled springs, as a new article of manufacture; and the "coiled springs," to which, by the claim, the method of tempering is to be applied, include all such springs, irrespective of the use to which they are to be applied. The method or process claimed is substantially the old method of restoring mechanically strained steel.

The present case is covered by cases of Vinton v. Hamilton, 104 U. S. 485; Stow v. Chicago, Id. 547; Locomotive Truck Case, 110 U. S. 490, 4 Sup. Ct. Rep. 220; Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. Rep. 692; Thompson v. Boisselier, 114 U. S. 1, 5 Sup. Ct. Rep. 1042; Miller v. Foree, 116 U. S. 22, 6 Sup. Ct. Rep. 204; Dreyfus v. Searle, 124 U. S. 60, 8 Sup. Ct. Rep. 390; Brown v. District of Columbia, 130 U. S. 87, 9 Sup. Ct. Rep. 437; Aron v. Railway Co., 132 U. S. 84, 10 Sup. Ct. Rep. 24; Watson v. Railway Co., 132 U. S. 161, 10 Sup. Ct. Rep. 45; Marchand v. Emken, 132 U. S. 195, 10 Sup. Ct. Rep. 65; Royer v. Roth, 132 U. S. 201, 10 Sup. Ct. Rep. 58; Hill v. Wooster, 132 U. S. 693, 701, 10 Sup. Ct. Rep. 228; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. Rep. 394; Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 10 Sup. Ct. Rep. 570; Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. Rep. 20; Roller Mill Co. v. Walker, 138 U. S. 124, 11 Sup. Ct. Rep. 292; Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 11, 12 Sup. Ct. Rep. 601; Ryan v. Hard, 149 U. S. 241, 12 Sup. Ct. Rep. 919. The principle deducible from those cases is that it is not a patentable invention to apply old and well-known devices and processes to new uses in other and analogous arts. The decision in Ansonia Brass & Copper Co. v. Electrical Supply Co., supra, is very pertinent. In the opinion in that case the cases were reviewed which established (1) that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result had not before been contemplated; and (2) that, on the other hand, if an old device or process be put to a new use, which is not analogous to the old one, and the adaptation of the old process to the new use is of such a character as to require the exercise of the inventive faculty to produce it, such new use will not be denied the merit of patentability.

In the case of Cary v. Wolff, 24 Fed. Rep. 139, Judge Wheeler remarked that the discovery of Cary was that the application of heat would restore the lost strength and

elasticity of the wire, consequent on the displacement of its particles; that the application of heat for that purpose was not known until it was applied to that kind of springs in their peculiarly weakened state; that the discovery was of a new application of an old process, which produced a new and highly useful result; that wire bells for clocks were made to have sonorous properties by the same process in kind, but for a different purpose and with a different result; that what seemed to be the nearest to it was the method of shaping and spacing the coils of hair balance springs for marine *638 clocks, by coiling the wire into a mold of the required shape, called a "snail," and subjecting it to heat while there in place, to make it retain its shape, but there was no displacement of the particles of which the wire was composed by distortion, and the process was not a restoration of any lost quality, but a mere shaping of the wire into the article desired; that the discovery of that effect of restoration by Cary's mode was new; that experts called by the defendants admitted that they had not believed the result would be produced until they saw the process tried in connection with that litigation; and that such production of a new and useful result, although by a new application of an old process, was patentable,—citing Crane v. Price, 1 Webster, Pat. Cas. 393; Smith v. Goodyear Co., 93 U. S. 486; and Loom Co. v. Higgins, 105 U. S. 580.

In the present case, in the opinion of Judge Acheson granting the preliminary injunction, (24 Fed. Rep. 141,) the court cited and followed the decision of Judge Wheeler.

In the opinion of Judge Nixon in Cary v. Spring Bed Co., 27 Fed. Rep. 299, he stated that in ordering the preliminary injunction, he had followed the decision of Judge Wheeler; and that is shown also by his opinion granting such injunction. 27 Fed. Rep. 299.

In the opinion of Judge Acheson in the present case, on final hearing, (31 Fed. Rep. 344,) concurred in by Judge McKennan, (31 Fed. Rep. 347,) it is stated that the process of the patent is based on the fact that the evils resulting from the distortion of hard-drawn steel wire, in the ordinary operation of coiling it into springs for furniture, can be removed by a single application of heat, as set forth in the specification, so as to result in a greatly improved spring; that furniture springs so treated came into immediate and very general use on their introduction into the market, largely superseding springs not subjected to that treatment; and that experts and others practically familiar with the treatment and behavior of steel were greatly surprised at the result effected by the patented process, it being contrary to all their previous conception and experience. The opinion then cites and quotes from the opinion of Judge Wheeler, and states that the latter opinion held that the Cary process was new and patentable, *639 although previously, in the manufacture of wire bells for clocks, heat had been applied to them for the purpose of giving them the desired sound and tone, and hair balance springs for marine clocks were subjected to heat while coiled in grooves of a metallic plate, for the purpose of permanently setting the coils in proper relation to each other. The opinion of Judge Acheson further said that, after giving to the subject-matter an independent investigation, the court saw no reason to doubt the correctness of Judge Wheeler's conclusions, and added: "The purpose, object, and result of the application of heat in the practice of the Cary invention are so entirely different from those aimed at and attained by the application of heat in the manufacture of wire clock bells, hair balance springs for marine clocks, and the other shown instances of its prior use, that we do not hesitate to adopt the conclusion of Judge Wheeler upon this branch of the case."

But we are of opinion that the same principle set forth in the patent was developed in the manufacture of the wire bells for clocks and of the hair balance springs, that there was no patentable invention in applying that principle to the springs mentioned in the specification, and that the case is merely one of a double use.

It results that the decree of the circuit court must be reversed, and the case be remanded to that court, with a direction to dismiss the bill, with costs.

Mr. Justice BREWER did not sit in this case, or take any part in its decision.

(147 U. S. 391)

UNITED STATES v. HALL.

(March 6, 1893.)

No. 459.

UNITED STATES COMMISSIONERS—FEES.

1. Act Cong. Aug. 4, 1886, making an appropriation to supply deficiencies in the appropriations for the fiscal year ending June 30, 1886, and, among other things, for fees of commissioners, and providing that the commissioners should receive no docket fees, did not merely except payment of such fees out of the appropriation, but abolished them altogether. U. S. v. Ewing, 11 Sup. Ct. Rep. 743, 140 U. S. 142, 147, followed.

2. A commissioner of a circuit court of the United States can only charge one fee for taking an acknowledgment in a criminal cause by the accused and his sureties, unless it appears that it was necessary to take separate acknowledgments. U. S. v. Ewing, 11 Sup. Ct. Rep. 743, 140 U. S. 142, 147, followed.

Appeal from the district court of the United States for the northern district of Ohio. Reversed.

Statement by Mr. Justice BROWN:

This was an action by a commissioner of the circuit court of the United States for the northern district of Ohio for docket fees, and for fees for taking the acknowledgment

of sureties upon recognizances. The court rendered a judgment in favor of the petitioner for $336.75, and the United States appealed.

Sol. Gen. Aldrich, for the United States.
C. C. Lancaster, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves but two items:

(1) The charge for docket fees must be disallowed upon the authority of U. S. v. Ewing, 140 U. S. 142, 147, par. 7, 11 Sup. Ct. Rep. 743.

(2) The claim for acknowledgments is based upon the allegation of the petition that the plaintiff "took and certified 103 acknowledgments of sureties on recognizances of defendants in prosecutions brought by the United States, for each of which acknowledgments plaintiff was entitled by the statutes of the United States to receive the sum of twenty-five cents." This item must also be reduced to a fee of 25 cents for taking a single acknowledgment in each case, since it was held in the case of U. S. v. Ewing, above cited, (page 146, par. 2, 140 U. S., and page 743, 11 Sup. Ct. Rep.,) that the taking of an acknowledgment in a criminal cause by the accused and his sureties is a single act, for which only one fee can be charged. If, for any reason, it was necessary to take them separately, that fact should have been made to appear. The burden of proof was upon the plaintiff.

The judgment of the court must, therefore, be reversed, and the case remanded, with instructions to reduce the judgment in conformity with this opinion.

(147 U. S. 695)

UNITED STATES v. TAYLOR.

(March 6, 1893.)

No. 795.

CLERKS OF COURT—FEES—FINAL RECORD.

1. The clerk of a federal court can charge but one fee for taking the acknowledgment of a defendant in a criminal case and his sureties, unless it be made to appear that it was necessary to take them separately. 45 Fed. Rep. 531, reversed. U. S. v. Ewing, 11 Sup. Ct. Rep. 743, 140 U. S. 142, followed.

2. The clerk is entitled to fees for copies of orders directing the marshal to pay witnesses and jurors, and for certificates thereto, but not for seals to the copies. 45 Fed. Rep. 531, modified. U. S. v. Van Duzee, 11 Sup. Ct. Rep. 759, 140 U. S. 169, followed.

3. The clerk is not entitled to a fee for filing orders from the district attorney discharging witnesses from attendance. Under Rev. St. § 877 it is proper that the district attorney should officially inform the clerk of the discharge of a witness, but the discharge should not be filed. 45 Fed. Rep. 531, reversed.

4. The clerk is entitled to a fee of 10 cents for administering the oath to witnesses respecting their mileage and attendance, but not for preserving the affidavit as a part of the records of the court.

5. The clerk is also entitled to fees for services actually and necessarily performed in the making up of a criminal record when the practice of a particular state or district requires a judgment record to be made. U. S. v. Van Duzee, 11 Sup. Ct. Rep. 759, 140 U. S. 169, followed.

6. The best definition of a common-law record in a criminal case under the American practice is as follows: "The record should consist of the indictment properly indorsed, as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict, and the judgment of the court." And this is all that is required, unless it is designed for use in the review by the appellate court of the rulings below; and hence, in the absence of a rule requiring them to be incorporated, the proceedings before a commissioner form no part of the record, neither do affidavits, warrants, subpoenas, or capiases, except the one upon which the arrest was made.

7. The comptroller of the treasury cannot prescribe the length of capiases or bonds, or limit the clerk in his charge to a certain number of folios. Such matters are to be determined by the practice of the court.

In error to the circuit court of the United States for the eastern district of Tennessee. Reversed.

Statement by Mr. Justice BROWN:

This was a petition by the clerk of the circuit court of the United States for the eastern district of Tennessee for fees earned between July 1, 1887, and December 23, 1889, which had been disallowed in the settlement of the accounts rendered by him to the treasury department. The court directed judgment to be entered in his favor for $1,066, (45 Fed. Rep. 531;) and the United States appealed.

Sol. Gen. Aldrich, for the United States.
Geo. A. King, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The government objected to the allowance by the court below of the following items:

(1) For taking acknowledgments in criminal cases of defendants and their sureties to appeal bonds. It appears by the petition that these acknowledgments were taken jointly, and under the case of U. S. v. Ewing, 140 U. S. 142, 146, par. 2, 11 Sup. Ct. Rep. 743, but one fee can be allowed for taking the acknowledgment of a defendant and his sureties, at least unless it be made to appear that it was necessary to take them separately. See, also, U. S. v. Hall, 13 Sup. Ct. Rep. 478.

(2) For certificates of the clerk and seals to copies of orders of the court directing the marshal to pay witnesses and jurors. Charges for copies of orders and certificates thereto are allowable, but the charge for seals is disallowed upon the authority of U. S. v. Van Duzee, 140 U. S. 169, 174, par. 6, 11 Sup. Ct. Rep. 759.

(3) Filing orders from the district attorney discharging witnesses from attendance, at 10 cents each, $119.80. By Rev. St. § 877,

"witnesses who are required to attend any term of a circuit or district court on the part of the United States shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney." While it is proper that the clerk should be informed officially by the district attorney of the discharge of witnesses, it is difficult to see why the discharge should be filed. It is a piece of information for the clerk
*697 upon which he acts in computing the amount due the witnesses for mileage and attendance, and when this is done the discharge is functus officio. It has accomplished all that it was ever required to do, is not needed as a voucher, and no advantage is gained by cumbering the files of the court with it. The magnitude of this incumbrance may be judged by the fact that the clerk charges for filing in less than 2½ years 1,198 of these discharges, (243 were filed in a single term,) at a useless expense of $119.-80. In U. S. v. King, 13 Sup. Ct. Rep. 439, the clerk's charges for the payment of a witness aggregated $1.15, not including the affidavit of the witness, or this item for filing the discharge. If these be added, it is made to cost the government $1.40 in clerk's fees to pay off a witness,—a tax out of all proportion to the service rendered, or to the usual amount of the witness's compensation. This practice of multiplying fees for the simple service of paying a witness compensation, which may not exceed the amount of a single day's attendance, should not be permitted, and the item in question will be disallowed.

(4) There is an additional claim in items 12 and 16 of $95.85 for affidavits of witnesses as to their mileage and attendance. The clerk is entitled to a fee of 10 cents for administering the oath to witnesses repecting their mileage and attendance, but there is no reason for preserving the affidavit as a part of the records of the court. This item should be reduced accordingly. It is but just to say that no charge is made for filing these affidavits.

(5) Item 9 includes charges for papers entered by the clerk upon the final record of the cases, and disallowed by the comptroller as forming no proper part of the judgment record, and unnecessarily burdensome to the government. When the practice of a particular state or district requires a judgment record to be made up in each case, of course the clerk is entitled to his fees for services actually and necessarily performed in that connection, (U. S. v. Van Duzee, 140 U. S. 169, 176, par. 9, 11 Sup. Ct. Rep. 759;) but as to what shall be incorporated in such record there is no settled practice and some
*698 diversity of opinion.

*A record is substantially a written history of the proceedings from the beginning to the end of the case, but nothing which is not properly matter of record can be made such by inserting it therein. In several of the states the matters properly incorporated in judgment rolls are enumerated by statute. Code Civil Proc. N. Y. § 1237; Code Wis. § 191; Code Civil Proc. Cal. § 670.

In Mandeville v. Perry, 6 Call, 78, the court of appeals of Virginia, in answering the question "what this court will consider as constituting the record of which it is to take notice in cases of common law," says: "I answer, the writ for the purpose of amending by, if necessary; the whole pleadings between the parties. Papers of which a profert is made, or oyer demanded; and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules or in court, until the rendition of the judgment, constitute the record in any common-law suits, and are to be noticed by the court, and no others." Mr. Chitty, in his work upon Criminal Law, says (1 Chitty, Crim. Law, p. 720) that "the record in case of felony states the session of oyer and terminer, the commission of the judges, the presentment by the oath of the grand jurymen by name, the indictment, the award of the capias or process to bring in the offender, the delivery of the indictment into court, the arraignment, the plea, the issue, the award of the jury process, the verdict, the asking the prisoner why sentence should not be passed on him, and judgment of death passed by the judges." Perhaps the most satisfactory definition of a common-law record in a criminal case under the American practice is found in McKinney v. People, 7 Ill. 552, wherein it is said: "In a criminal case, after the caption, stating the time and place of holding the court, the record should consist of the indictment, properly indorsed, as found by the grand jury; the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict, and the judgment of the court. This, in general, is all *that the record need state." And in Dyson v. State, 26 Miss. 362, it is stated that "the record must affirmatively show those indispensable facts without which the judgment would be void, such as the organization of the court; its jurisdiction of the subject-matter and of the parties; that the cause was made up for trial; that it was submitted to a jury sworn to try it, (if it be a case proper for a jury;) that a verdict was rendered, and judgment awarded."

Mr. Freeman, in his work upon Judgments, (section 79,) thus summarizes from the authorities "the matters which are not (unless made so by bill of exceptions, or by consent, or by order of the court) matters of record," namely: "Matters of evidence, written or oral, including note, bond, or mortgage filed in the case, and upon which suit is brought; an agreed statement of facts, not in nature of

special verdict; all motions, including motions to quash the writ, to amend the pleadings, for extensions of time, for continuances of bonds, for prosecution, for bills of particulars; pleas stricken from the files; notices of motions; affidavits of claimants; bonds for trial of rights of property; affidavits in relation to conduct of jurors; all affidavits taken during the progress of the cause; memorandum of costs; power of attorney to confess the judgment, and affidavit in relation to the death of the maker thereof; report of judge of proceedings at the trial; reasons for his opinion in rendering judgment or in deciding application for a new trial; rulings of the court upon the admission of evidence; the instructions to the jury; statement of facts made by the judge for the purpose of taking the advice of the appellate court; and the ruling of the court upon an application to strike out a portion of the pleadings."

The extent to which a judgment record should go in its recital of the proceedings depends largely upon the purpose for which it is to be used. If it is designed for use in the review by the appellate court of the rulings of the court below, upon the introduction of testimony, or of the validity of the charge to the jury, it must contain in a bill of exceptions so much of the testimony or charge as is necessary to a clear understanding of the questions involved. But if, upon the other hand, it be designed only for the purpose of preserving a record of the conviction in perpetuam rei memoriam, little more is necessary than to set forth the process and return thereto, the pleadings, journal entries, verdict, and judgment. All the authorities agree that, in a criminal case, it should show what the prisoner is charged with; that the court had jurisdiction of the case; that the defendant was duly convicted; and the sentence. It may be said, in general, that anything which is not necessary to support the validity of the judgment is, presumptively, at least, no part of the record, however material it may have been in the progress of the case. It is entirely clear that it is unnecessary to set forth matters merely incidental to the charge, and which had no immediate bearing upon the result of the case, or of the validity of the judgment. Thus, in Inglee v. Coolidge, 2 Wheat. 363, it was held by this court that the report of the judge who tried the case at nisi prius, containing a statement of the facts, is not to be considered a part of the record. It was formerly held that, even in writs of error to a state court, the opinion of the court below was not a part of the record, (Williams v. Norris, 12 Wheat. 117, 119; Rector v. Ashley, 6 Wall. 142; Gibson v. Chouteau, 8 Wall. 314;) but the inconvenience of this rule became so great that it was subsequently changed, (Murdock v. City of Memphis, 20 Wall. 590;) and finally the eighth rule of this court was so modified, in 1873, as to require a copy of the opinion to be incorporated in the transcript. This court has also held, in Suydam v. Williamson, 20 How. 427, that the evidence and the exceptions thereto constitute no part of the record, unless incorporated in a bill of exceptions, signed and sealed by the presiding judge. See, also, Pomeroy v. Bank, 1 Wall. 592.

We have already held, in U. S. v. King, 13 Sup. Ct. Rep. 439, that, in the absence of a rule requiring them to be incorporated, the proceedings before a commissioner form no part of the record, and we think the same rule applies to affidavits, (England v. Gebhardt, 112 U. S. 502, 5 Sup. Ct. Rep. 287,) warrants, subpoenas, capiases, except the one upon which the arrest was made, but that the other charges included in item 9, including the bonds taken after indictment, captions of terms, and days upon which journal entries were made, were properly allowed. We are also of the opinion that the comptroller cannot prescribe the length of capiases or bonds, or limit the clerk to a certain number of folios. This is a matter to be determined by the practice of the court.

This disposes of all the questions raised upon the assignment of errors, and the judgment of the court below is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

(148 U. S. 71)

LEHNEN v. DICKSON.

(March 6, 1893.)

No. 125.

SUPREME COURT — REVIEW OF CASES IN FEDERAL COURTS — FINDINGS BY COURT WITHOUT JURY — FORCIBLE ENTRY AND DETAINER — EFFECT OF APPEAL AND SUPERSEDEAS BOND.

1. In an action for unlawful detainer, tried by the court without a jury, a general finding that defendant is guilty in manner and form as charged, with findings as to the amount of plaintiff's damages, and the value of the rents and profits, where there is no special finding of facts or agreed statement of facts, has, by Rev. St. §§ 648, 649, the same effect as the verdict of a jury, precludes the supreme court from examining the testimony, and limits its inquiry to the sufficiency of the complaint and the rulings preserved on questions of law arising on the trial.

2. Under Rev. St. § 700, allowing a review of the rulings of a court sitting without a jury, and a determination as to whether facts specifically found support the judgment, in the absence of special findings, there can be no inquiry as to whether the facts were sufficient to sustain the conclusion.

3. Mere recital of the testimony in the opinion of the trial court or in the bill of exceptions is not such a special finding of facts; neither do the words, "T., District Judge, after stating the facts as above," following a statement preliminary to the opinion proper, constitute such statement a finding of facts by the judge.

4. Evidence of the invalidity of a lease under which defendant claims in an action of unlawful detainer does not involve an inquiry into the merits of the title, prohibited by 2 Rev. St. Mo. 1889, § 5111, but is a proof of right under a derivative title, within section 5123, allowing proof of such rights. 37 Fed. Rep. 319, affirmed.

5. Where a tenant, after the expiration of his original term, claims a right to hold the

premises under a subsequent lease by his landlord to a third person, and such lease, for defects in its inception, has been decreed void, to the tenant's knowledge, before he acquired any claim thereunder, the facts that an appeal is pending from such decree, and that a supersedeas bond has been given thereon, do not impart any validity to such lease, that may make it available to the tenant as a defense to an action of unlawful detainer. 37 Fed. Rep. 319, affirmed.

6. Good faith of a tenant in holding over is not a defense to an action against him for unlawful detainer under the Missouri statutes, as, by Rev. St. Mo. § 5102, the complainant is not compelled to make further proof of the detainer than that he was lawfully possessed of the premises, and that defendant unlawfully detained the same.

In error to the circuit court of the United States for the eastern district of Missouri.

Action by Newton Dickson against David Lehnen for an unlawful detainer. Judgment for defendant. 37 Fed. Rep. 319. Plaintiff brings error. Affirmed.

*Statement by Mr. Justice BREWER:

On February 6, 1886, defendant in error commenced an action of unlawful detainer, before a justice of the peace in Montgomery county, Mo. The complaint charged an unlawful detention by the defendant, since January 2, 1886, of a tract of land of 800 acres, situated in that county. By certiorari, under the provisions of the state statute, the case was removed to the circuit court of Montgomery county, and thereafter, upon application of the defendant, on the ground of diverse citizenship, from that court to the circuit court of the United States for the eastern district of Missouri. There the case was tried, without the intervention of a jury, and on January 30, 1889, a judgment was entered in favor of the plaintiff for the restitution of the premises, for double damages, amounting to $5,940, and for $220 per month, double rent, from and after the entry of judgment. The opinion of Judge Thayer is found in 37 Fed. Rep. 319. To reverse such judgment, the defendant sued out a writ of error from this court.

D. P. Dyer, for plaintiff in error. James O. Broadhead, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The first matter to be considered is whether the record is in such shape as to present any question for determination. The case was tried by the court without a jury, and the journal entry shows simply a general finding that the defendant is guilty in manner and form as charged in the complaint, the amount of damages sustained by the plaintiff, and the value of the monthly rents and profits, and thereon the judgment for restitution of the premises, double damages, and double rent. There is no special finding of facts, and no agreed statement of facts. Obviously, therefore, inquiry in this court must be limited to the sufficiency of the complaint and the rulings, if any be preserved, on questions of law arising during the trial. Sections 648 and 649 of the Revised Statutes, while committing generally the trial of issues of fact to a jury, authorize parties to waive a jury and submit such trial to the court, adding that "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford in *Lancaster v. Collins, 115 U. S. 222, 225, 6 Sup. Ct. Rep. 33: "This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered." The finding of the court, to have the same effect, must be equally conclusive, and equally remove from examination in this court the testimony given on the trial. Insurance Co. v. Folsom, 18 Wall. 237; Cooper v. Omohundro, 19 Wall. 65. Further, section 700 provides that "when an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and, when the finding is special, the review may extend to the sufficiency of the facts found to support the judgment." Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings, there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury. Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. Rep. 321.

It is true if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. Supervisors v. Kennicott, 103 U. S. 554. Doubtless, also, cases may arise in which, without a formal special finding of facts, there is presented a ruling of the court, which is distinctly a ruling upon a matter of law, and in no manner a determination of facts, or of inferences from facts, in which this court ought to and will review the ruling. Thus, in Insurance Co. v. Tweed, 7 Wall. 44, where on the argument in this court counsel agreed that certain recitals of fact made by the trial court in its opinion, or "reasons for judgment," as it was called, were the facts in the case, and might be accepted as facts found by the court, it was held that, as they could have made such agreement in the court below, it

would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to upon which the judgment was based; and upon an examination it was further held that they did not support the judgment, and it was reversed. But still, as was ruled in Flanders v. Tweed, 9 Wall. 425, this court is disposed to hold parties to a reasonably strict conformity to the provisions of the statute prescribing the proceedings in the case of a trial by the court without a jury; and no mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts within its scope. Norris v. Jackson, 9 Wall. 125. See, also, the case of Alexandre v. Machan, 147 U. S. 72, 13 Sup. Ct. Rep. 211, in which the rule, as applicable to suits in admiralty, was reviewed, and similar conclusions were reached.

Beyond the ordinary matters of the record, which, for the reasons above stated, present no matter for consideration here, there was duly prepared and allowed a bill of exceptions, which recites all the testimony given at the trial, certain requests for declarations of law, and the action of the court thereon, the opinion filed in deciding the case, the motion for a new trial, and the opinion on the overruling of such motion. By this bill of exceptions, one ruling, in respect to the admission of testimony, is clearly preserved. In order to fully understand the question, a brief recital of the transactions as shown by the testimony is necessary.

On September 24, 1877, Edwin H. Farnsworth, the owner of the premises, made a written lease thereof to Thomas R. Summers, for a term of eight years, commencing January 1, 1878, and ending January 1, 1886. The lessee transferred this lease, with the approval of the lessor, to Godfrey Lehnen, the father of the defendant. The defendant took possession during the running of this lease, with the consent of his father. Farnsworth died on April 27, 1879, having devised this property to his only child, the wife of the plaintiff. The lease having expired the 1st of January, 1886, on the 23d of January, in that year, plaintiff served notice upon the defendant that he demanded the possession of the premises, and on the 6th of February the suit was brought. The defendant, to justify his holding over the 1st of January, 1886, introduced in evidence what purported to be a copy of a lease made by Farnsworth, April 7, 1879, 20 days before his death, to Sarah A. Kempinski, for a term of 10 years, commencing January 1, 1886, and a lease from Kempinski to the defendant Lehnen and his father, dated October 15, 1885, for a term of 14 months, also commencing January 1, 1886. In rebuttal, plaintiff offered a certified copy of the record of a suit commenced in the circuit court of Montgomery county, Mo., by Barbara Dickson and Newton Dickson, her husband, against Sarah A. Kempinski and A. Kempinski, her husband, in which suit there was a decree of the circuit court ordering and adjudging that the lease made by Farnsworth to Sara A. Kempinski be canceled, set aside, and held for naught, which decree, on review by the supreme court of the state, was affirmed. To the admission of this testimony the defendant objected on the ground that it was incompetent, irrelevant, and immaterial, which objection was overruled, and exceptions were taken. This objection was based upon this section of the forcible entry and detainer statute: "The merits of the title shall in no wise be inquired into, on any complaint which shall be exhibited by virtue of the provision of this chapter." Rev. St. 1879, § 2443; 2 Rev. St. 1889, § 5111.

But, if the lease is competent evidence to defeat the landlord's right of recovery, testimony tending to show that that lease is of no validity ought surely to be competent in rebuttal; and it has been held in Missouri that the tenant may defeat an action for unlawful detainer, brought by the landlord after the expiration of the lease, by proof that the title, since the execution of the lease, has passed away from the landlord to some other party to whom the tenant has attorned. Thus, in Pentz v. Kuester, 41 Mo. 447, 449, the court ruled that "though the tenant could not dispute the title of the landlord, nor set up a paramount title or an adverse possession against either the grantor or grantee, nor the court inquire into the matter of title in general, it was still competent for the defendant, under the statute, to show that the plaintiff's title and right of possession had been transferred to himself since the demise." The same doctrine was affirmed in Gunn v. Sinclair, 52 Mo. 327; Kingman v. Abington, 56 Mo. 46; Higgins v. Turner, 61 Mo. 249. Not only are these decisions in point, but, turning to the forcible entry and detainer statute, we find, after sections giving to heirs, devisees, grantees, assigns, executors, and administrators the same remedies as the ancestor, devisor, grantor, assignor, or intestate was entitled to by virtue of the statute, this section: "Evidence for proof of rights under derivative titles, provided for by this chapter, shall be admissible in actions instituted under this chapter." Rev. St. 1879, § 2457; 2 Rev. St. 1889, § 5123. In other words, these various persons can, in an action of unlawful detainer, offer evidence to establish their derivative titles from the original lessor. On the same principle, these decisions referred to permit the tenant who has attorned to parties claiming such a derivative title to introduce evidence of the transfer and attornment to defeat an action brought by the original landlord; and, surely, if he may offer testimony to prove a transfer of title away from the landlord, the latter may introduce testimony to show that the alleged transfer was of no validity, a mere pretense. Suppose, after the execution of a lease, the landlord dies, and at the termination of the lease his only son and heir at law should bring an action of

unlawful detainer, and the tenant in defense should introduce what purported to be a will made by the landlord, devising the real estate to some third party, and the record of the proper court probating that will, together with an attornment to such devisee; within the cases cited, such testimony would be competent. Would it not also be clearly competent for the heir, in rebuttal, to introduce a final decree from a competent court, in a suit between himself and the devisee, adjudging that will a forgery, and setting aside its probate? None of this testimony impeaches the lease, or challenges any rights *177 created by or under it. It is simply "evidence for proof of rights under a derivative title,"—evidence which, in terms, is authorized by the section last quoted. There was no error in admitting this testimony.

To obviate the objection that there is no finding of facts or agreed statement thereof, counsel for plaintiff in error insist that there is really no dispute as to the facts, no conflict in the testimony as to any substantial question, the only difference being as to a subordinate and unimportant matter, and that, therefore, it is the same as though the facts had been agreed upon or found. Further, they suggest that in the opinion delivered by the trial judge there is a narration of the facts we have heretofore recited, together with others, and then this statement preliminary to the discussion of the legal questions: "Thayer, District Judge, after stating the facts as above," and claim that such statement is equivalent to a finding of the facts as previously recited.

But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts; and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts. Neither in this case can that be said to be wholly an inconsequential matter upon which the witnesses differ. It may not be of controlling importance; yet it bears largely on the question of the good faith of Lehnen in taking the lease from Kempinski. With reference to the language of Judge Thayer, it is obvious that no such significance as is claimed *178 can be given to the words "after stating the facts as above." Reading the prior statement, it would seem to be only a succinct recital of the material testimony in the case. Norris v. Jackson, 9 Wall. 125.

But even if we waive all these objections, and take this statement as intended for and equivalent to special findings of facts, or regard the declaration of law asked by the defendant—that the court declares the law to be that under the evidence the plaintiff is not entitled to recover—as bringing properly before us the question whether there was any evidence to sustain the general finding for the plaintiff, and thus enter into an examination of the testimony, still we see no error in the conclusion of the court based thereon. The decree of the state circuit court, affirmed, as it was, by the supreme court, conclusively establishes the nullity of the lease from Farnsworth to Kempinski, at least as between the plaintiff and Kempinski. It will be noticed from the allegations in the complaint that the lease was not set aside and canceled by reason of anything transpiring since its execution. The defects existed in the inception of the instrument,—defects which rendered it void from the beginning, and which, when presented to the court, compelled an adjudication of its invalidity. The charge in the complaint was "that the said Farnsworth, at the time of the execution of said agreement, was not capable of entering into said contract or any contract, and was incapable of transacting his ordinary business or managing his property by reason of weakness and imbecility of mind produced by disease and old age; and that defendant, A. Kempinski, fraudulently took advantage of the imbecility and helpless mental condition of said Farnsworth, and induced and procured him to execute the said lease to his [the said Kempinski's] wife."

And the conclusion of the supreme court was that the lease was "either the product of a mind incapable of comprehending its force and meaning, or of a weak one imposed upon." It is true the last alternative stated by the court suggests an instrument only voidable; but in view of the charge in the complaint, and the testimony as disclosed in the opinion of the supreme court, it cannot be held that there was any error in the conclusion reached by Judge Thayer, that the "lease in question never was a valid instrument." Being in itself invalid,—a nullity from the beginning,—it could not be a foundation for a right in Lehnen, the defendant, as against his landlord. Nor can it be held that, because the decree in the circuit court was appealed to the supreme court, and a supersedeas bond given, pending such appeal, the lease to Kempinski had force and vitality. Whatever effect the appeal and supersedeas may have had upon the decree, they did not give validity to a void instrument. Though in form a lease, the writing was in fact no contract. That was its condition before the suit was begun, and there never has been a time when it had any life

and force. The decree did not create, it only established, the fact of its invalidity; and the affirmance of the decree reached back to the very inception of the instrument, and was a final adjudication that from the first it was not binding.

Neither can the contention of the plaintiff in error be sustained, that he was holding over under the bona fide belief that he had a right to do so, and, therefore, that such holding over was not "willful," within the meaning of the statute, for there is no finding or suggestion in the opinion of the trial court to the effect that Lehnen was acting in good faith in what he did. On the contrary, the testimony tends to show that he was cognizant of the fraud perpetrated by Kempinski, for he was a witness on the trial in the state circuit court, and that he knowingly took the lease with the view of assisting in the accomplishment of the intended wrong. Certainly, in the absence of a finding to the contrary, we should not feel warranted, from an examination of the testimony, in coming to the conclusion that the acts of Lehnen, the defendant, were characterized by good faith; nor are we satisfied that good faith would take the case out of the scope of the Missouri statute; for by section 2433, Rev. St. 1879, and section 5102, 2 Rev. St. 1889, it is provided that "the complainant shall not be compelled to make further proof of the forcible entry or detainer than that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained or unlawfully detained the same;" and that would seem to be the legislative interpretation of what was meant by "willfully holding over."

It is unnecessary to comment further upon the testimony. We see nothing in it justifying us in holding that the circuit court erred in its conclusions, and, therefore, the judgment is affirmed.

(148 U. S. 92)

CITY OF ST. LOUIS v. WESTERN UNION TEL. CO.[1]

(March 6, 1893.)

No. 94.

MUNICIPAL CORPORATIONS — TAXATION OF TELEGRAPH COMPANIES — INTERSTATE COMMERCE — WRIT OF ERROR—REVERSAL.

1. An ordinance compelling a telegraph company to pay five dollars per annum for every pole within the city "for the privilege of using the streets, alleys, and public places" is a charge in the nature of a rental, and is not a privilege or license tax, which would be invalid as applied to a corporation doing interstate business. 39 Fed. Rep. 59, reversed.

2. Act July 24, 1866, § 1, gave to any telegraph company organized under state laws the right to construct, maintain, and operate lines of telegraph along any military or post roads of the United States, then or thereafter declared such by act of congress. Rev. St. § 3964, declares that all letter-carrier routes established in any city or town are post roads. *Held*, that this franchise gave no unrestricted right to appropriate public property of a state or municipality, but that, like any other franchise, it was to be exercised in subordination to public and private rights, and therefore was no ground of objection to the imposition by a municipal corporation of a reasonable charge for the use of its streets by the erection of telegraph poles.

3. A municipal corporation has the right to impose a reasonable charge upon a telegraph company doing interstate business as compensation for the space occupied in its streets by the telegraph poles; but the reasonableness of any charge thus fixed is a matter for judicial investigation.

4. In an action at law tried by the court without a jury upon an agreed statement of certain facts, which, though not technically such an agreed statement as is equivalent to a special finding, is yet sufficient to put the court in possession of the material facts, a ruling, at the close of the trial, denying a motion for judgment in favor of plaintiff, presents a question of law reviewable in the supreme court; and it is immaterial that there was also some oral testimony, when it appears from the opinion of the trial court that its ruling was on a proposition of law not at all affected by the testimony, and which, in its judgment, was decisive of the case.

5. While it is true that in cases tried to the court without a jury, when all the facts are specifically found or agreed to, the supreme court of the United States may, in reversing, direct what judgment shall be entered, yet, when the agreed statement is defective, or when for any reason justice seems to require it, the court may simply reverse, and direct a new trial.

Mr. Justice Brown, dissenting.

In error to the circuit court of the United States for the eastern district of Missouri.

Action commenced in the circuit court of the city of St. Louis, Mo., by the city of St. Louis against the Western Union Telegraph Company, to recover the sum of $22,635 as a tax or rental for the use of the city streets by the erection of telegraph poles. The cause was removed to the United States circuit court for the eastern district of Missouri, and was tried by the court, without a jury. Judgment was entered for defendant, (39 Fed. Rep. 59,) and plaintiff brings error. Reversed.

Statement by Mr. Justice BREWER:

On February 25, 1881, the city of St. Louis passed an ordinance, known as "Ordinance No. 11,604," authorizing any telegraph or telephone company duly incorporated according to law, doing business or desiring to do business in the city of St. Louis, to set its poles, pins, abutments, wires, and other fixtures along and across any of the public roads, streets, and alleys of the city, subject to certain prescribed regulations. Sections 6, 8, and 9 read as follows:

"Sec. 6. Every telegraph or telephone company doing business in this city shall keep on deposit with the treasurer the sum of fifty dollars, subject to the order of the street commissioner, to be used by him in restoring any sidewalk, gutter, street, or alley pavement displaced or injured in the erection, alteration, or removal of any pole of such company, when said company refuses or fails to make such restoration to the satisfaction of such commissioner. Any com-

[1] For opinion on rehearing, see 13 Sup. Ct. Rep. 990.

pany failing to make such deposit within thirty days after the passage of this ordinance, or within five days after commencing business, if a new company, or which shall fail to make good the amount when any portion of it has been expended as herein provided, within five days after notice so to do has been sent by the street commissioner, shall be deemed guilty of a misdemeanor and punished as hereinafter provided."

"Sec. 8. Any company erecting poles under the provision of this ordinance shall, before obtaining a permit therefor from the board of public improvements, file an agreement in the office of the city register permitting the city of St. Louis to occupy and use the top cross arm of any pole erected, or which is now erected, for the use of said city for telegraph purposes free of charge.

"Sec. 9. Nothing contained in this ordinance shall be so construed as to in any manner affect the right of the city in the future to prescribe any other mode of conducting such wires over or under its thoroughfares."

On March 22, 1884, another ordinance, known as "Ordinance No. 12,733," was passed. This ordinance was entitled "An ordinance to amend ordinance number 11,604," etc., and amended that ordinance by adding certain sections, of which section 11 reads as follows:

"Sec. 11. From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes shall pay to the city of St. Louis, for the privilege of using the streets, alleys, and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys, and public places in said city."

This section continued in force, and was incorporated into and became a part of an ordinance of the city, entitled "An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city," approved April 12, 1887, and numbered 14,000, the section being in said revised ordinance known as "section 671 of article 8 of chapter 15."

The Western Union Telegraph Company being one of the companies designated in section 671, not taxed on its gross income for city purposes, and failing to pay the sum of five dollars per annum for each telegraph pole, as required by said section, on April 7, 1888, there was filed in the office of the clerk of the circuit court of the city of St. Louis a petition, setting forth these various ordinances, alleging that the telegraph company had during the three years last past held, owned, and used in the streets and public places of the city of St. Louis 1,509 telegraph poles, and praying to recover the sum of $22,635 therefor. This suit was removed by the telegraph company to the United States circuit court for the eastern district of Missouri, and on February 16, 1889, an amended answer was filed by the company, admitting its use of the streets of the city of St. Louis as charged, and that it was not taxed on its gross income for city purposes, but denying the validity of the said ordinance, and the authority of the city to pass it. It also set up as defenses that it was a corporation chartered, created, and organized under the laws of the state of New York; that it owned, controlled, and used lines of telegraph in various parts of the United States, which connected with its lines in the city of St. Louis; that on the 5th of June, 1867, it duly filed with the postmaster-general of the United States a written acceptance of the restrictions and obligations required by law under and in accordance with the act of congress of the United States, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," and that it had ever since been subject to and complied with the terms of such act; that the streets and public places of the city of St. Louis were established post roads of the United States, under and in pursuance of the laws of the United States, and of the authorized rules and regulations of the officers and departments of the United States, made, passed, and adopted in pursuance of said laws; that it has constructed, operated, and maintained its lines of telegraph in the city of St. Louis under and by virtue of the authority of said acts of congress; that while the city of St. Louis claims compensation from the defendant in the sum of five dollars per annum on account of each and every telegraph pole in the streets, alleys, and public places in the city, yet in fact the said sum so assessed and sought to be recovered from it is a privilege or license tax for the privilege of carrying on its business in the city of St. Louis; and that its assessment and attempted enforcement and collection are in violation of article 1, § 8, pars. 3, 7, of the constitution of the United States.

The defendant also alleged that it had complied with all the terms of ordinance No. 11,604; and, further, that during the time set forth in the petition all its property within the city of St. Louis was assessed in pursuance of law for the purpose of taxation by the state and city, and that it had paid all taxes levied thereon; and, still further, that the ordinance set forth imposed upon defendant a burden and tax additional to the taxes regularly assessed upon the property of defendant, without any corresponding or special advantage to the defendant; and that, in so far as it attempted to exact five dollars per annum for each pole, it was unreasonable, unjust, oppressive, and void. The case was tried by the court without a jury, and on June 17, 1889, a judgment

was entered in favor of the defendant, the court holding that the burden imposed was a tax, and imposed in such form that it could only be regarded as a privilege or license tax, which the city had no authority to impose. 39 Fed. Rep. 59. To reverse such judgment, the city sued out a writ of error from this court.

W. C. Marshall, for plaintiff in error. Elenelous Smith, John F. Dillon, and Rush Taggart, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

At the threshold of the case we are met with the objection that there are no special findings of fact, and that, therefore, our inquiry is limited to questions arising upon the pleadings, or upon rulings made by the court during the progress of the trial. We have had occasion in a recent case, coming from the same court, to consider to what extent our inquiry may go in a case tried by the court without a jury, in which there are no special findings of facts, and it is, therefore, unnecessary to consider that question at length. Lehnen v. Dickson, 148 U. S. —, 13 Sup. Ct. Rep. 481.

It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused, and exception taken; and this, as was held in Norris v. Jackson, 9 Wall. 125, presents a question of law for our consideration. Further, there was, as also appears in the bill of exceptions, an agreement as to certain facts, which, though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based. It is true that, in addition to these agreed facts, there was some oral testimony, but as it appears from the opinion of the court that it made a distinct ruling upon a proposition of law not at all affected by the oral testimony, and which in its judgment was decisive of the case, we cannot avoid an inquiry into the matter thus determined. We, therefore, pass to a consideration of such questions as are distinctly presented and clearly involved.

And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys, and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city,—that which may properly be called rental. "A tax is a demand of sovereignty; a toll is a demand of proprietorship." State Freight Tax Case, 15 Wall. 232, 278. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the center of business, and should purchase or build another more satisfactory in this respect; it would not thereafter be forced to let the old remain vacant, or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent; that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. While we think that the circuit court erred in its conclusions as to the character of this charge, it does not follow therefrom that the judgment should be reversed, and a judgment entered in favor of the city. Other questions are presented which compel examination.

Has the city a right to charge this defendant for the use of its streets and public places? And here, first, it may be well to consider the nature of the use which is made by the defendant of the streets, and the general power of the public to exact com-

pensation for the use of streets and roads. The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting, and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and its use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveler. This use is common to all
*65 members of the public, and it is a use open equally to citizens of other states with those of the state in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages.

We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies; nor is there involved here the question whether such use is a new servitude or burden placed upon the easement, entitling the adjacent lot owners to additional compensation. All that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the
*100 nature of rental. We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto.

It is claimed, however, by defendant, that under the act of congress of July 24, 1866, and by virtue of its written acceptance of the provisions, restrictions, and obligations imposed by that act, it has a right to occupy the streets of St. Louis with its telegraph poles. The first section of that act contains the supposed grant of power. It reads: "That any telegraph company now organized, or which may hereafter be organized under the laws of any state in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under, or across the navigable streams or waters of the United States: provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." By section 3964, Rev. St. U. S.: "The following are established post roads: * * * All letter-carrier routes established in any city or town for the collection and delivery of mail matter." And the streets of St. Louis are such "letter-carrier routes." So, also, by the act of March 1, 1884, (23 St. p. 3:) "All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-

house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control is in the state, and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways; they are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can by its legislation deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.

This is not the first time that an effort has been made to withdraw corporate property from state control, under and by virtue of this act of congress. In. W. U. Tel. Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. Rep. 961, the telegraph company set up that act as a defense against state taxation, but the defense was overruled. Mr. Justice Miller, on page 548, 125 U. S., and page 963, 8 Sup. Ct. Rep., speaking for the court, used this language: "This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the federal government, carries with it any exemption from the ordinary burdens of taxation. While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

If it is, as there held, simply a permissive statute, and nothing in it which implies that the permission to extend its lines along roads not built or owned by the United States carries with it any exemption from the ordinary burdens of taxation, it may also be affirmed that it carries with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highways.

Again, it is said that by ordinance No. 11,604 the city contracted with defendant to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross arm of any pole for its own telegraph purposes, free of charge; and in support of that proposition the case of New Orleans v. Great Southern Tel. & Tel. Co., 40 La. Ann. 41, 3 South. Rep. 533, is cited. But in that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard. As stated in the opinion, (page 45, 40 La. Ann., and page 535, 3 South. Rep.:) "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside, or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the Dartmouth College Case, 4 Wheat. 518." The same principle controlled the cases of Com. v. New Bedford Bridge, 2 Gray, 339; Kansas City v. Corrigan, 86 Mo. 67; Chicago v. Sheldon, 9 Wall. 50.

But the difficulty of the application of that doctrine in this case is that there is nothing to show that a single pole was erected under or by virtue of ordinance No. 11,604. The only statement in the agreed facts is that they were erected prior to July 1, 1884. If we turn to the oral testimony, there is nothing tending to show that any were erected after the 25th of February, 1881, the date of the passage of ordinance No. 11,604. On the contrary, that testimony shows that the company had been engaged in the telegraph business in the city of St. Louis for 15 years or more prior to 1881. There is nothing, either, in the agreed facts, as to the use of the top cross arm of any poles by the city of St. Louis, and the testimony tends to show that they were so used prior to 1881.

Whatever, therefore, of estoppel might arise if anything had been done by the telegraph company under the ordinance to change its position, as the case now stands

*104 none can be invoked, and all that can be said of the ordinance is that, in its application to the facts as they appear, there is simply a temporary matter of street regulation, and one subject to change at the pleasure of the city. It is unnecessary, however, to consider these matters at length, for on a new trial the facts in respect thereto can be more fully developed. It is true that in cases tried by the court, where all the facts are specifically found or agreed to, it is within the power of this court, in reversing, to direct the judgment which shall be entered upon such findings. At the same time, if for any reasons justice seems to require it, the court may simply reverse, and direct a new trial. Indeed, this has been done, under special circumstances, in cases where there were no findings of facts or agreed statement, or where that which was presented was obviously defective. Graham v. Bayne, 18 How. 60; Flanders v. Tweed, 9 Wall. 425.

Another matter is discussed by counsel which calls for attention, and that is the proposition that the ordinance charging five dollars a pole per annum is unreasonable, unjust, and excessive. Among other cases cited in support of that proposition is Philadelphia v. W. U. Tel. Co., 40 Fed. Rep. 615, in which an ordinance similar in its terms was held unreasonable and void by the circuit court of the United States for the eastern district of Pennsylvania. We think that question, like the last, may be passed for further investigation on the subsequent trial. Prima facie, an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If, within a few blocks of Wall street, New York, the telegraph company should place on the public streets 1,500 of its large telegraph poles, it would seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated; while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void. Indeed, it may *105 be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city.

We think that this is all that need be said in reference to the case as it now stands. For the reasons given, the judgment is reversed, and the case remanded for a new trial.

Mr. Justice BROWN, dissenting.

The tax in this case cannot be considered, and does not purport to be a tax upon the property of the defendant. The gross disparity of the tax to the value of such property is of itself sufficient evidence of this fact—the total valuation of all of defendant's property in the city of St. Louis in 1884, as fixed by the state board of equalization, being but $17,064.63, while the tax of $5 upon 1,509 poles amounted to $7,545, or more than 44 per cent. of the entire value of the property.

If it be treated as a tax upon the franchise, then it is clearly invalid, within the numerous decisions of this court, which deny the right of a state or municipality to impose a burden upon telegraph and other companies engaged in interstate commerce for the exercise of their franchises. Leloup v. Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. Rep. 38; Harmon v. City of Chicago, 147 U. S. —, 13 Sup. Ct. Rep. 306; W. U. Tel. Co. v. Alabama State Board of Assessment, 132 U. S. 472, 10 Sup. Ct. Rep. 161; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. Rep. 250.

If this tax be sustainable at all, it must be upon the theory adopted by the court that *106 the municipality has the right to tax the company for the use of its streets. While I have no doubt of its right to impose a reasonable tax for such use, the tax must be such as to appear to have been laid bona fide for that purpose. It seems to me, however, that the imposition of a tax of $5 upon every pole erected by the company throughout the entire municipality is so excessive as to indicate that it was imposed with a different object. In the city of St. Louis alone the tax amounts, as above stated, to $7,545. A similar tax in the city of Philadelphia amounted to $16,000, while the facts show that, at the most, only $3,500 per year was required to cover every expenditure the city was obliged to make upon this account. Philadelphia v. W. U. Tel. Co., 40 Fed. Rep. 615. A like tax imposed by every city through which the defendant company carries its wires would result practically in the destruction of its business. While, as stated in the opinion of the court, $5 per pole would not be excessive if laid upon poles in the most thickly-settled business section of the city, the court will take judicial notice of the fact that all the territory within the boundaries of our cities is not densely populated; that such cities include large areas but thinly in-

habited; and that a tax which might be quite reasonable if imposed upon a few poles would be grossly oppressive if imposed upon every pole within the city. In my opinion the tax in question is unreasonable and excessive upon its face, and should not be upheld. The fact that it was nominally imposed for the privilege of using the streets is not conclusive as to the actual intent of the legislative body. As was said by this court in the Passenger Cases, 7 How. 283, 458: "It is a just and well-settled doctrine established by this court that a state cannot do that indirectly which she is forbidden by the constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of a vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names."

The tax in question seems to me to indicate upon its face that it was not imposed bona fide for the privilege of using the streets, but was intended either as a tax upon the franchise of the company, or for the purpose of driving its wires beneath the ground. While the latter object may be a perfectly legitimate one, I consider it a misuse of the taxing power to seek to accomplish it in this way. I am therefore constrained to dissent from the opinion of the court.

(148 U. S. 60)

MAY et al. v. TENNEY.

(March 6, 1893.)

No. 99.

FEDERAL COURTS — STATE STATUTES AS RULES OF DECISION — ASSIGNMENTS FOR BENEFIT OF CREDITORS — PREFERENCES.

1. A decision of the highest court of a state as to the construction and effect of a statute of the state regulating assignments for the benefit of creditors is of controlling authority in the courts of the United States; it is immaterial that a similar statute is construed differently in another state. Union Bank of Chicago v. Kansas City Bank, 10 Sup. Ct. Rep. 1013, 136 U. S. 223, followed.

2. The maker of certain notes executed a written instrument, in form a chattel mortgage, to the indorsers of the notes, conveying to them a stock of goods and fixtures described in it, which recited that the notes were all due, and that the indorsers had assumed the payment thereof to the holder, and provided that the indorsers should sell such stock and fixtures, and out of the proceeds pay the amount due on the notes, with interest and costs of sale, rendering any surplus to the maker; and by a clause providing for a defeasance on payment, by the maker to the indorsers, of said amount due and expenses or the balance due thereon, the goods unsold were to be delivered to the maker. *Held*, that the instrument was a chattel mortgage, securing preferred bona fide creditors, valid under the laws of Colorado, and was not a general assignment for the benefit of creditors, within Laws Colo. 1885, p. 43, (Mills' Ann. St. p. 453,) authorizing such assignments of all a debtor's property, but providing (section 3) that no such deed of assignment shall be valid unless in terms for the benefit of all his creditors, and (section 18) that nothing in the act shall invalidate any conveyance or mortgage by the debtor, before the assignment, made in good faith, for a valid and valuable consideration. White v. Cotzhausen, 9 Sup. Ct. Rep. 309, 129 U. S. 329, distinguished.

Appeal from the circuit court of the United States for the district of Colorado.

Suit by Daniel K. Tenney, as trustee for certain creditors of Samuel Rich, against David May and Adolph Hirsch, for an accounting by them for the value of certain property received by them from said Rich. Decree for complainant. Defendants appeal. Reversed.

Statement by Mr. Justice BREWER:

On March 24, 1887, Samuel Rich, a clothing merchant of Leadville, Colo., executed to the appellants, May and Hirsch, an instrument conveying certain personal property, which instrument was called a "chattel mortgage," and was duly acknowledged and recorded. The instrument sets forth, in separate paragraphs, nine notes to the Carbonate Bank of Leadville, the payment of eight of which were indorsed or guarantied by May or Hirsch, severally. On the first note neither May's nor Hirsch's name appears. After this description, which is full and specific as to each note, the instrument goes on further to recite:

"And whereas, said notes are all now due, and, except as hereinbefore stated, unpaid; and whereas, the said Samuel Rich is legally liable to pay the whole amount due on said notes, and is unable to pay the same or any part thereof; and whereas, the said the Carbonate Bank of Leadville, Colorado, threatens to commence suit by attachment against the said Samuel Rich on the note first hereinbefore mentioned, and to attach the property hereinafter mentioned of the said Samuel Rich; and whereas, the said A. Hirsch and David May have assumed the payment of said note, and have become liable and responsible therefor to said bank; and whereas, the said David May and A. Hirsch are legally liable and responsible for the amount due on the residue of said notes, each for a certain portion thereof, and have agreed to take up and pay the same: Now, therefore, in consideration of the premises, and in consideration of the sum of one dollar ($1.00) to the said Samuel Rich in hand paid by the said David May and A. Hirsch, the receipt whereof is hereby acknowledged, the same Samuel Rich has granted, bargained, and sold, and by these presents does grant, bargain, and sell, unto the said David May and A. Hirsch, all that certain stock of men's, boys', and children's clothing, hats, caps, and gents' furnishing goods, being and contained in that certain

storeroom, in the city of Leadville, county of Lake and state of Colorado, known as 'No. 313 Harrison Avenue,' together with all and singular the show cases, counters, shelving, chandeliers, and all other property of every kind in said room pertaining to the business of the said Samuel Rich, which said stock of goods is the property of the said Samuel Rich, and now in his possession in said place; to have and to hold all and singular the said goods and chattels unto the said David May and A. Hirsch, their heirs, administrators, and assigns, forever."

And then, after a covenant of title, it adds:

"The said David May and A. Hirsch shall take the immediate possession of all of said goods and chattels and of the said room in which they are contained as aforesaid, and shall proceed to sell and dispose of the same with reasonable diligence at private or public sale, as they may deem best, and out of the proceeds of such sale of said goods and chattels pay: (1) The amount due on said notes, with the interest thereon, and the costs and expenses of such sale; (2) rendering the surplus, if any, to the said Samuel Rich, his executors, administrators, or assigns: provided, however, that if the said Samuel Rich shall, at any time before a sufficient quantity of said goods and chattels shall be so sold to realize a sum sufficient to pay said amount due and said expenses, pay to the said David May and A. Hirsch, or their assigns, the amount due on said notes or the balance which may be due thereon after deducting the net amount realized from such sale, then these presents shall be void, and the residue of said goods remaining unsold shall be delivered to the said Samuel Rich, and possession thereof restored to him. In witness whereof the said Samuel Rich has hereunto set his hand and seal, this twenty-fourth day of March, A. D. 1887. [Signed] Sam. Rich. [Seal.]"

The grantees in this conveyance took possession of the property, and, after a very brief attempt to sell it at retail, sold it in bulk to one Joseph Shoenberg for $20,100. A portion of this, $2,113, they were compelled to pay in satisfaction of a claim for goods wrongfully taken possession of and sold. The amount of the indebtedness of Rich to the bank, assumed by May and Hirsch, was about $18,400, including interest. It was admitted on the trial that this sum was owing by Rich to them. The appellee, Tenney, is a trustee for several creditors of Samuel Rich, in whose behalf he obtained judgment on April 25, 1887, for the sum of $13,665. Upon a hearing before the circuit court, this instrument was adjudged, in effect, an assignment for the benefit of creditors; and an accounting was ordered before a master as to the value of the property received by May and Hirsch under it, as well as the names of the various creditors of Rich, and the amounts due to them. Upon the report of the master a final decree was entered—

"That the chattel mortgage mentioned in the defendants' answer herein, given by the said Rich to the said May & Hirsch on March 24, 1887, is in legal effect an assignment for the benefit of the creditors of the defendant Rich; that the defendants May & Hirsch took the property conveyed by said mortgage as the assignees or trustees of the said defendant Rich, and as such assignees or trustees of the said Rich shall account to the said creditors for the value of said property as determined and found by the said master in chancery."

And then, after an adjudication of the amounts due to the various creditors of Rich, there followed:

"It is further ordered, adjudged, and decreed that the value of the property transferred, as aforesaid, on March 24, A. D. 1887, by the said Rich to the said May & Hirsch, and for which the said May & Hirsch are answerable and responsible as assignees for the benefit of the creditors of the said Rich by virtue of the said transfer, is the sum of $31,387, which sum of $31,387 the said defendants May & Hirsch are hereby ordered to distribute and pay to the parties in interest herein in the following proportions, to wit."

And the distribution and payment ordered are to the various creditors in proportion to the amounts thus adjudged due to them. From this decree, May and Hirsch have appealed to this court.

C. S. Thomas, for appellants. D. K. Tenney and Chas. H. Aldrich, for appellee.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The principal question in this case is whether the conveyance from Rich to May and Hirsch was, in legal effect, a general assignment or only a chattel mortgage. The circuit court held it to be the former, following in this a series of decisions under the statutes of Missouri, commencing with Martin v. Hausman, 14 Fed. Rep. 160, (in which Judge Krekel ruled that "a debtor in Missouri, under its legislation and adjudications thereon, may, though he be insolvent at the time, prefer one or more of his creditors by securing them; but he cannot do it by an instrument conveying the whole of his property to pay one or more creditors. Instruments of the latter class will be construed as falling within the assignment laws, and as for the benefit of all creditors, whether named in the assignment or not,") and continued in Dahlman v. Jacobs, 16 Fed. Rep. 614; Kellog v. Richardson, 19 Fed. Rep. 70; Clapp v. Dittman, 21 Fed. Rep. 15; Perry v. Corby, Id. 737; Kerbs v. Ewing, 22 Fed. Rep. 693; Freund v. Yaegerman, 26 Fed. Rep. 812, 27

Fed. Rep. 248; State v. Morse, 27 Fed. Rep. 261." Since the decision of this case by the circuit court, and in Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. Rep. 1013, the several cases in Missouri, above referred to, were reviewed and disapproved. That case, however, cannot be cited as decisive of this, for the matter of assignment is one of local law. As was said in the opinion then delivered, and with a view of distinguishing between it and White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. Rep. 309, in which a seemingly different conclusion had been reached under the statutes of Illinois: "The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States. Brashear v. West, 7 Pet. 608, 615; Allen v. Massey, 17 Wall. 351; Loyd v. Fulton, 91 U. S. 479, 485; Sumner v. Hicks, 2 Black, 532, 534; Jaffray v. McGehee, 107 U. S. 361, 365, 2 Sup. Ct. Rep. 367; Peters v. Bain, 133 U. S. 670, 686, 10 Sup. Ct. Rep. 354; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. Rep. 655. The decision in White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. Rep. 309, construing a similar statute of Illinois in accordance with the decisions of the supreme court of that state as understood by this court, has therefore no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different states is immaterial. As observed by Mr. Justice Field, speaking for this court: 'The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different states to a similar local law, that law, in effect, becomes by the interpretation, so far as it is a rule for our action, a different law in one state from what it is in the other.' Christy v. Pridgeon, 4 Wall. 196, 203. See, also, Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. Rep. 1012."

We must, therefore, examine the statutes and decisions of Colorado. Before doing that, it may be well, however, to consider how the instrument would be regarded at common law, and independently of any local statute or decision. And, first, it does not purport to be a transfer of all the grantor's property, but only of a certain described stock of goods, together with the show cases and store fixings used in connection with that stock. On the face, therefore, there is no general assignment or general conveyance, but only a specific conveyance of particular property. Whether the grantor was in fact possessed of other property, and to what extent, may not be certain from the testimony. When the case was first submitted for decision the matter had not been a subject of investigation, and the court said, in its opinion: "The question was not asked directly of any witness put upon the stand, either on the part of complainants or of defendants. Counsel seem to have ignored that as a question in the case." And the interlocutory order which after argument was entered gave to the parties "time to take further testimony before the master of this court, or any notary public, on the question as to whether the chattel mortgage mentioned in the complainant's bill covered all or substantially all of the property of Rich, at the time of the execution of said mortgage." From the testimony taken under this order it would seem probable that he had other property, though of small value,—a few hundred dollars or such a matter.

Again, the form of the instrument is unquestionably that of a mortgage. It is called in the acknowledgment a "chattel mortgage.." The complainant, in his bill, constantly speaks of it as a "mortgage," and the burden of his complaint is that it was void because fraudulently entered into, the facts claimed to show the fraud being specifically stated. It is true there is in the bill a claim that it be adjudged an assignment, but the language of the averments in this respect shows that the claim was only that the legal effect of an assignment should be imputed to that which was in form a chattel mortgage, for after asserting the insolvency of Rich, it alleges—

"That it became and was necessary for him to suspend payment of his indebtedness, being insolvent, and thereupon it was his duty to have made an assignment for the equal benefit of his creditors, and so he proposed to the defendants May and Hirsch, but by reason of their persuasions and promises aforesaid he gave the chattel mortgage aforesaid instead; that said chattel mortgage was a full and complete disposition of all the property of the said defendant Rich in view of the insolvency, which was well known to the mortgagees.

"And your orator claims and insists that the said mortgage constitutes in law an assignment for the benefit of creditors, giving preference to the claims of the mortgagees, and that the same, being preferential, is void as to your orator and all other of the creditors of Samuel Rich."

And in the order of the court, heretofore referred to, the instrument was described as "the chattel mortgage mentioned in the complainant's bill." Obviously it was the understanding and the concession that this was in form a mortgage, and the effort was to prove that it covered all the property of Rich, in order to bring the case within the rule stated by Judge Krekel in Martin v. Hausman, supra.

Not only that, the conveyance is for the sole benefit of the grantees named in it,—May and Hirsch. No other creditor is to receive any benefit therefrom. But an assignment contemplates the intervention of a trustee. "A voluntary assignment for the

benefit of creditors implies a trust, and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of creditors." Burrill, Assignm. (5th Ed.) § 3. "The transfer by a creditor of all his property does not of itself make what is
*49 termed a 'general assignment,' but it must also be conveyed to trustees, to be held by them in trust for other creditors." Id. § 122. Counsel urge that May and Hirsch were in fact trustees, the real creditor being the Carbonate Bank, because, as appears on the face of the paper, May and Hirsch had not at the time paid the bank, and had only assumed Rich's indebtedness to it. But this instrument proceeds upon the assumption that the burden of this indebtedness to the bank was transferred from Rich, the grantor, to May and Hirsch, the grantees, parties who were solvent, and whose assumption of liability was accepted by the bank, and the conveyance was to them, and for their protection and benefit. Out of the proceeds of sales they were to pay these notes and interest, and return the surplus to Rich. No other creditors were in terms interested in this conveyance; and, further, the defeasance clause provided for payment, not to the Carbonate Bank, but to May and Hirsch or their assigns. The conveyance was not for the benefit of the Carbonate Bank, but for that of May and Hirsch, who had assumed Rich's liabilities to that bank. Suppose, the day after this instrument had been executed, May and Hirsch had been paid by Rich the full amount due on these notes to the Carbonate Bank, can it be doubted that all rights under this conveyance would have been discharged? Could the Carbonate Bank have held May and Hirsch responsible for a breach of trust in surrendering the property under those circumstances to Rich? It is suggested by the circuit court, in its opinion, that there was no future day of payment named in the instrument, and that the mortgagees were to take possession and sell at once; but, as the debts for the securing of which this conveyance was made were then due, the naming of a future day of payment was not to be expected, and might have suggested a suspicion as to the bona fides of the transaction, and the duty of immediate sale cast by this instrument upon the grantees was the duty cast upon chattel mortgagees. Within accepted definitions and settled rules of construction, this instrument was, in form at least, that which the parties, the counsel, and the court called it,—a chattel mortgage.

*50 Is there anything in the statutes or decisions of Colorado which transforms the character or denies validity to such an instrument, securing and intended to secure only one of many creditors? In 1881 there was passed by the legislature of Colorado (Laws 1881, p. 35) an act to regulate assignments for the benefit of creditors. It consisted of but a single section, which provided that, "whenever any person or corporation shall hereafter make an assignment of his or its estate for the benefit of creditors," the assignee should be required to pay certain specified debts in full; and then followed this clause: "All the residue of the proceeds of such estate shall be distributed ratably among all other creditors, and any preference of one creditor over another, except as above allowed, shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding." A case under that statute came before the supreme court, (Campbell v. Iron Co., 9 Colo. 60, 10 Pac. Rep. 248,) and it was held that the word "estate" meant all the debtor's property, and hence that the statute was designed to cover general assignments; and in the opinion pronounced by Mr. Justice Helm it was said:

"A fundamental principle underlying this subject is that, so long as the debtor retains dominion over his property, in the absence of statute and fraud, he may do with it as he pleases. He may transfer the whole of his estate in payment or in security of a single bona fide debt. He may assign, mortgage, or otherwise incumber his estate, or a part thereof, in favor of some of his creditors, excluding the rest; or he make an assignment for the benefit of all his creditors, and therein give preferences to a selected few. It is only when, either by a general assignment or otherwise, the debtor has parted with the dominion over his property that, in the absence of statute or fraud, the foregoing privilege is forfeited. To hold that debtors may not give preferences among their bona fide creditors, so long as they control their property, would greatly embarrass the transaction of nearly all kinds of business. Some of the authorities go so far as to say that such a rule would prevent the carrying on of business altogether."

The statute of 1881 was superseded by that
*51 of 1885, which was that in force at the time of these transactions. This statute may be found in the laws of 1885, p. 43, and in the first volume of Mills' Annotated Statutes, p. 453. The only portions of that statute having any bearing on the matters here in controversy are sections 1 and 3 and the last half of section 18, which are as follows:

"Any person may make a general assignment of all his property, for the benefit of his creditors, by deed, duly acknowledged, which, when filed for record in the office of the clerk and recorder of the county where the assignor resides, or, if a nonresident, where his principal place of business is, in this state, shall vest in the assignee the title to all the property, real and personal, of the assignor, in trust, for the use and benefit of such creditors."

"No such deed of general assignment of property by an insolvent, or in contemplation of insolvency for the benefit of creditors,

shall be valid, unless by its terms it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

"* * * But nothing in this act contained shall invalidate any conveyance or mortgage of property, real or personal, by the debtor before the assignment, made in good faith, for a valid and valuable consideration."

This statute, so far as we are advised, has not been before the supreme court of Colorado for construction, at least not for any question involved in this case. The first section, it will be perceived, gives permission to make a general assignment. There is no compulsion. There is neither in terms nor by implication any duty cast upon an insolvent to dispose of his property by a general assignment, or anything which prevents him from paying or securing one creditor in preference to others. On the contrary, the last half of section 18 plainly recognizes the right of a debtor to prefer by payment or security; and, in the light of this statute, the quotation which we have made from the supreme court of Colorado becomes pertinent, which clearly affirms the right of a debtor to do with his property as he pleases, except as in terms restrained by statute; and a statute which simply permits a debtor to make a certain disposition of his property works no destruction of his otherwise unrestrained dominion over it.

And, further, when we look at section 3 we find that, when a conveyance is made which is a general assignment, it is void unless by its terms it is made for the benefit of all creditors. The rule thus declared is not that the preferences fail and the assignment stands, but that the assignment itself fails unless it be in terms free from preferences. So, if this conveyance were in form unquestionably a general assignment, as it contemplated the payment only of May and Hirsch, it was not only not for the benefit of all creditors, but avowedly for the benefit of these two, and it would therefore have to be adjudged a void instrument, and could not be upheld under that rule, which prevails in some jurisdictions, of in such cases upholding the conveyance and avoiding the preferences. So it follows that either this is a chattel mortgage given as security to two creditors for their debts,—a transaction in no manner forbidden by the statutes of Colorado,—or, if it be a general assignment, then it was an assignment with preferences, which preferences by those statutes avoid the conveyance. We think, therefore, the circuit court erred in the conclusions which it reached, so far at least as this aspect of the case is concerned.

As we have heretofore noticed, the burden of the complaint was that this conveyance was fraudulent and void because, as alleged, made in pursuance of a conspiracy between Rich, May, and Hirsch; a conspiracy by which Rich was to go east and buy goods, and, when those goods had been purchased and brought to Leadville, transfer them to May and Hirsch. So far as this charge is concerned, we agree with the circuit court that it is not established by the testimony. Rich evidently would like to convey that idea, and yet he does not directly testify to it; and May and Hirsch clearly deny it. Obviously there was no conspiracy between the parties, and all talk between them was only to the effect that, if Rich should succeed in buying what he talked of buying, May and Hirsch would help him to carry the burden. He largely failed in that; and they, when he became pressed by the bank, simply took measures for their own protection. It being conceded, as it is, that the debts from Rich to May and Hirsch were bona fide, the transaction amounted to this, and this only: that the debtor used his property to prefer certain bona fide creditors. This the laws of Colorado allowed, and therefore it cannot be avoided at the instance of the unpreferred creditors.

The decree of the circuit court is reversed, and the case remanded, with instructions to dismiss the bill.

(147 U. S. 550)

FLEITAS v. RICHARDSON et al.

(March 6, 1893.)

No. 148.

BANKRUPTCY—PROVABLE CLAIMS — WIFE'S CLAIM FOR PARAPHERNAL PROPERTY.

1. A husband's debt to his wife for paraphernal property (created by the Louisiana Code) is provable, under Rev. St. § 5067, against the husband in bankruptcy, and is therefore extinguished by his discharge.

2. A husband, after obtaining a discharge in bankruptcy, acquired lands, and mortgaged them to a third person. Thereafter his wife, though her claim had been extinguished by the discharge, brought suit against her husband in a state court for a separation of property, had a legal mortgage declared upon the lands as of the date of the recording of the marriage contract, and sold the same in satisfaction thereof. The husband did not set up his discharge in bankruptcy as a defense. *Held*, that these proceedings did not affect the title of the mortgagee, who could thereafter foreclose, and could set up the discharge to show that the wife's claim was extinguished.

Appeal from the circuit court of the United States for the eastern district of Louisiana. Affirmed.

J. R. Beckwith, for appellant. Thos. J. Semmes, for appellees.

Mr. Justice GRAY delivered the opinion of the court.

This was a bill in equity, filed December 30, 1887, by Mary Corinne Warren Fleitas, authorized by her husband, Francis B. Fleitas, both citizens of Louisiana, against Gilbert M. Richardson, a citizen of New York, Albert R. Shattuck and Francis B. Hoffman, citizens of Massachusetts, and partners under the name of Shattuck & Hoffman, and others, in the district court of the parish of Orleans, and

state of Louisiana, to remove a cloud on her title to lands in the parish of St. Bernard, in that district, which she claimed under a judgment and sale on execution upon a legal mortgage from her husband, and to restrain the above-named defendants from seizing and selling the lands under a conventional mortgage from him.

The case was duly removed by said defendants into the circuit court of the United States upon the grounds that there was a *351 separable controversy between them and the plaintiff, and that the suit involved a question under the bankrupt law of the United States as to the effect of the husband's discharge in bankruptcy upon the plaintiff's claim and mortgage.

In that court a supplemental bill, answers, (setting up, among other defenses, the husband's discharge in bankruptcy,) and replications were filed, and on May 31, 1889, the case was heard upon pleadings and proofs, by which the material facts appeared to be as follows:

The plaintiff was married to Francis B. Fleitas on February 6, 1868. Before the marriage, and on the same day, they and her parents signed a marriage contract before a notary public, and in the presence of two witnesses, which provided that there should be a community of acquets and gains between the husband and wife, in accordance with the provisions of Rev. Civil Code La.; and by which her parents declared that, in consideration of her intended marriage, they thereby made to her a donation of $20,000 in money; and Fleitas acknowledged that he had received that sum, and declared that "he has taken charge of said amount for account of his said future wife, and for which he holds himself and remains liable to her according to law;" and "by mutual consent it is hereby agreed that all the property of the future wife, now owned by her, or which may be hereafter acquired by her with funds unto her belonging, shall be and remain her paraphernal property." This contract was duly recorded on September 27, 1870, in the parish of St. Bernard.

Francis B. Fleitas, on April 25, 1877, obtained a discharge in bankruptcy in the district court of the United States for the eastern district of Louisiana, under proceedings commenced April 26, 1876, and afterwards, and before 1884, purchased the lands in question, and on January 28, 1884, mortgaged them by notarial act, duly recorded, to secure debts of his to Richardson, and to Shattuck & Hoffman.

On September 3, 1887, the plaintiff filed a petition in the district court of the parish of St. Bernard against her husband for separation of property, and for a recognition of *552 her mortgage on all his lands in that parish, alleging that he was *largely in debt, and that there was danger that his estate would not be sufficient to satisfy her rights and claims. On the same day he filed an answer, denying all her allegations, except the marriage and the marriage contract; and on September 10, 1887, she recovered judgment against him, dissolving the community of acquets and gains, decreeing a separation of property between them, and ordering that the sum of $20,000, held by him as her paraphernal property, be returned to her, and be recognized as secured by legal mortgage on all his lands in that parish, to take rank and effect from September 27, 1870. Execution was issued on this judgment, under which the sheriff levied on the lands in question, and on November 19, 1887, sold and conveyed them to the plaintiff.

On June 29, 1888, Richardson instituted executory proceedings upon the mortgage of January 28, 1884, for the seizure and sale of the lands, as set forth in the next preceding case, the record of which was made part of the record in this case.

In the present case the circuit court dismissed the bill and the supplemental bill upon the ground that the husband's discharge in bankruptcy barred the plaintiff's claim, and defeated any mortgage or lien in her favor. 39 Fed. Rep. 129. The plaintiff appealed to this court.

The law of Louisiana as to the rights of married women, which must have a controlling influence on the decision of this case, differs widely from the common law, and a statement of some of its principal rules cannot well be avoided.

By the law of Louisiana, persons contracting marriage may, by antenuptial contract before a notary public, and in the presence of two witnesses, make such agreements as *553 they *please (not affecting the title and legal order of descents) concerning the title and enjoyment of their property, and of donations made to them by third persons in consideration of the marriage, Rev. Civil Code, arts. 2325, (2305,) 2328, (2308,) 2329, (2309,) 2331, (2311,) and the partnership or community of acquets and gains exists between them by operation of law, unless otherwise stipulated in the contract. Articles 2332, (2312,) 2399, (2369.)

The separate property of the wife is that which she "brings into the marriage, or acquires during the marriage by inheritance or by donation made to her particularly," and "is divided into dotal and extradotal. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called 'paraphernal property,' is that which forms no part of the dowry." Articles 2334, (2314,) 2335, (2315.)

"The wife has a legal mortgage on the property of her husband" for the restitution or reinvestment of the dotal property or dowry, and "for the restitution and reinvestment of her paraphernal property." Article 3319, (3287.) The marriage contract, out of which this mortgage arises, is required to be recorded in the parish where the husband's property is. Article 3349; Rev. St. La. § 2381.

Such a mortgage is not required, like ordinary mortgages, to be reinscribed every 10 years. Rev. Civil Code, art. 3369, (3333.) It attaches to any lands acquired by the husband during coverture, and while his liability to the wife continues to exist. Johnson v. Pilster, 4 Rob. (La.) 71, 76.

As a general rule, contracts of sale between husband and wife are prohibited; but one of the exceptions to this rule is that he may transfer property to her in settlement of claims arising out of her separate property. Rev. Civil Code, art. 2446, (2421.)

The wife has no estate of dower in the lands of her husband, nor any right corresponding or equivalent to dower at common law. The decision in Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. Rep. 58, therefore, has no application to this case.

*554 The liability of the husband to the wife for her separate property received by him under the marriage contract is in the nature of a debt secured by mortgage of his lands, and may be enforced by her by direct suit against him.

Although the wife cannot maintain an action, in relation either to her dotal or to her paraphernal property, against a third person, unless authorized by her husband, or, if he fails to do it, by a judge, yet she may, with the authorization of the court in which she brings the action, sue her husband "for the separation of property, or for the restitution and enjoyment of her paraphernal property." Code Pr. arts. 105–108. The object of the provision requiring the wife to obtain the authorization of the court is to protect the husband against vexatious and unadvised family suits, and the want of such authorization is waived if the husband accepts service without taking the objection. Le Blanc v. Dubroca, 6 La. Ann. 360; Spivey v. Wilson, 31 La. Ann. 653.

The wife may, at any time during the marriage, sue the husband for a separation of property, "when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims." Rev. Civil Code, art. 2425, (2399.) Consequently a transfer of property, or a confession of judgment, by an insolvent husband to his wife, in settlement of her claims, is good against his creditors. Lehman v. Levy, 30 La. Ann. 745, 750; Levi v. Morgan, 33 La. Ann. 532; Thompson v. Freeman, 34 La. Ann. 992.

Besides the power which the wife has to sue her husband for a separation of property when the disorder of his affairs endangers her rights, she has the absolute right, at any time, and at her own discretion, without regard to the condition of the husband's affairs, to resume the sole possession and administration of her paraphernal property, and to maintain a suit against him for that purpose. Rev. Civil Code, arts. 2384, (2361,) 2385, (2362,) 2387, (2364,) 2391, (2368;) Brooks v. Wigginton, 14 La. Ann. 676; Joly v. Weber, 35 La. Ann. 806, 809, and cases cited; Burns v. Thompson, 39 La. Ann. 377, 1 South. Rep. 913.

When there is a community of acquets and gains, the fruits and income of the wife's paraphernal property administered by the husband belong to the conjugal partnership or *555 community. Rev. Civil Code, arts. 2386, (2363,) 2402, (2371.) The husband may appropriate such fruits and income to his own use. Wimbish v. Gray, 10 Rob. (La.) 46; Miltenberger v. Keys, 25 La. Ann. 287. He is not liable to her for neglecting to collect them. Wallace v. McCullough, 20 La. Ann. 301. Nor is he liable for interest on the debt to his wife, except after she has obtained judgment against him. Burns v. Thompson, 39 La. Ann. 377, 1 South. Rep. 913.

The debt of the husband to the wife is so like an ordinary debt that it may be seized and sold on execution against her, (Hawes v. Bryan, 10 La. 136;) and in proceedings in insolvency in invitum against the husband under a statute of the state she may prove and vote upon her paraphernal claim, even if she has not renounced the community of acquets and gains, (Planters' Bank v. Lanusse, 10 Mart. [La.] 690, and 12 Mart. [La.] 157.)

Where, after a wife had recovered a judgment of separation of property, and an execution thereon had been partly satisfied, the husband went into bankruptcy, and obtained a discharge, the supreme court of Louisiana held that her debt was barred, and could not be enforced against property subsequently acquired by him; and said that it must "regard the balance of the debt due by the husband to his wife as extinguished by the discharge in bankruptcy, and that consequently she had no longer a right to issue an execution; that any property acquired by him afterwards was free from any claim on her part; and that, in truth, the community had ceased to exist." Alling v. Egan, 11 Rob. (La.) 244, 245.

Such being the nature of the liability of the husband to the wife for her paraphernal property under the law of Louisiana, it was clearly provable by her against him as a debt under the bankrupt act of the United States. Rev. St. § 5067; In re Bigelow, 3 Ben. 198; In re Blandin, 1 Low. 543; In re Jones, 6 Biss. 68, 78.

It is equally clear that it has none of the elements of a trust, certainly not of such a technical trust as to make it a fiduciary debt, within the meaning of that act; and that consequently it was barred by his discharge *556 in bankruptcy. Rev. St. §§ 5117, 5119; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. Rep. 576; Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. Rep. 313.

The remaining question is whether the appellees can avail themselves of that discharge. The dates bearing upon this question are as follows: The marriage contract, out of which the plaintiff's mortgage arose, was made in 1868, and recorded in 1870. The

husband's discharge in bankruptcy was obtained in 1877 from all debts due at the commencement of proceedings in 1876, including his liability to his wife. She had, as yet, no mortgage on these lands, because they were not his property. After this he purchased the lands, and in 1884 mortgaged them to the appellees. In 1887 the wife sued the husband, and obtained a judgment for a separation of property, declaring a mortgage in her favor as of the date of the recording of the marriage contract; and upon that judgment took out execution, under which the sheriff levied upon the lands, and sold them to her.

Under these circumstances, by the law of Louisiana, the debt of the husband to the wife was extinguished by his discharge in bankruptcy; and thereupon her mortgage, which was but a security for that debt, disappeared with it, and could not attach to these lands upon his subsequently purchasing them; and the appellees, claiming as his creditors under the mortgage from him to them, were entitled to set up his discharge in bankruptcy against any lien claimed by her upon the lands. Rev. Civil Code, arts. 3278. (3245,) 3285, (3252,) 3466, (3429;) Alling v. Egan, 11 Rob. (La.) 244; Upshur v. Briscoe, 37 La. Ann. 138, 153, 138 U. S. 365, 379, 11 Sup. Ct. Rep. 313; Larthet v. Hogan, 1 La. Ann. 330; New Orleans Canal, etc., Co. v. Recorder of Mortgages, 27 La. Ann. 291; Klotz v. Macready, 44 La. Ann. 166, 10 South. Rep. 706.

Neither the omission of the husband to plead his discharge in bankruptcy in his wife's suit against him nor the judgment recovered by her in that suit can affect the title of the appellees (who were not parties to that suit) under the previous mortgage to them.

Judgment affirmed.

Mr. Justice SHIRAS, not having been a member of the court when this case was argued, took no part in its decision.

(148 U. S. 1)

THE J. E. RUMBELL.

(March 6, 1893.)

No. 1,117.

MARITIME LIENS UNDER STATE STATUTES — MORTGAGE OF VESSEL — PRIORITY OF RECORD — FOLLOWING DECISIONS OF STATE COURTS.

1. A claim arising under a mortgage of a vessel is not superior to a lien under Rev. St. Ill. 1874, c. 12, § 1, for supplies and necessaries to the vessel in her home port in the state of Illinois, although they were furnished after the mortgage was recorded in conformity with Rev. St. U. S. § 4192.

2. Upon a question of priority between a mortgage of a vessel and a lien given by a state statute for supplies and repairs in her home port, the determination of which depends upon principles of general jurisprudence and the construction of an act of congress, and which arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution, the supreme court is not controlled by the decisions of the highest courts of the state or of the circuit or district courts of the United States.

On certificate from the United States circuit court of appeals for the seventh circuit.

Statement by Mr. Justice GRAY:

This was a certificate from the circuit court of appeals for the seventh circuit, under the act of March 3, 1891, c. 517, § 6, (26 St. 828,) of a question upon which it desired the instruction of this court in an admiralty appeal. The case, as stated in the certificate, was as follows:

On August 15, 1891, under a writ of venditioni exponas from the district court of the United States for the northern district of Illinois, in admiralty, the propeller J. E. Rumbell was sold by the marshal for the sum of $1,850, and the proceeds were paid into the registry of the court.

On August 21, 1891, F. August Reich and August Reich, partners under the name of F. A. Reich & Son, former owners of the vessel, who had sold and delivered her to Michael C. Hayes on April 23, 1891, filed a petition against those proceeds, claiming the sum of $3,000 and interest, due upon notes given to them by Hayes for the purchase money, and secured by mortgage of the vessel, executed by Hayes to them on the day of the sale, and recorded on the same day in the office of the collector of customs of the port of Chicago, the residence of the owner, and the home port of the vessel, under section 4192 of the Revised Statutes of the United States. In that mortgage it was provided that if at any time there should be any default of payment, or if the mortgagees should deem themselves in danger of losing any part of the debt by delaying its collection until the time limited for its payment, or if the mortgagor should suffer the vessel to run in debt beyond the sum of $150, the mortgagees might immediately take possession of the vessel, and, after 10 days' notice to the mortgagor, sell her to satisfy the mortgage debt. The petition of the mortgagees alleged that each of these contingencies had happened.

On September 16, 1891, George C. Finney and others filed a petition against said proceeds for sums due to the petitioners severally, and amounting in all to $1,108.56, for ship chandler's supplies, engineer's supplies, groceries, provisions, fuel, lumber, and repairs, bought for and furnished to the vessel at the port of Chicago since the recording of the mortgage, and used for the benefit of the vessel, and alleged to have been reasonable and proper to be furnished and done; and also for the sum of $220, due to Patrick Bowe, one of these petitioners, for services as master of the vessel since the recording of the mortgage; "for which supplies, repairs, and services" (the certificate stated) "there was a lien upon the said vessel under the laws of the state of Illinois."

The district court found and adjudged that the sums claimed in each petition were due to the petitioners respectively; that in the distribution of the proceeds the claim of the mortgagees, Reich & Son, should have priority over that of the other petitioners, Finney and others; and that the entire proceeds of the sale of the vessel, amounting (after payment of seamen's wages and preferred claims for towage and salvage) to $1,105.59, should be paid to the mortgagees.

Finney and others appealed to the circuit court of appeals, which certified to this court the following question: "Whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the state of Illinois subsequently to the date of the recording of the mortgage."

C. E. Kremer, for Finney and others. Chas. E. Pope, for Reich and others.

*Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

By the admiralty law, maritime liens or privileges for necessary advances made or supplies furnished to keep a vessel fit for sea take precedence of all prior claims upon her, unless for seamen's wages or salvage. It is upon this ground, that such advances or supplies, made or furnished in good faith to the master in a foreign port, are preferred to a prior mortgage, or to a forfeiture to the United States for a precedent violation of the navigation laws. The St. Jago de Cuba, 9 Wheat. 409, 416; The Emily Souder, 17 Wall. 666, 672.

In The St. Jago de Cuba, Mr. Justice Johnson, in delivering judgment, and speaking of the lien of material men and other implied liens under maritime contracts, said: "The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to" the vessel "to get back for the benefit of all concerned; that is, to complete her voyage." "In every case the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it, and an abandonment to a salvor will supersede every prior claim. The vessel must get on. This is the consideration which controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity." 9 Wheat. 416.

In the Yankee Blade, 19 How. 82, 89, 90, Mr. Justice Grier, speaking for this court, said: "The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a jus in re, without actual possession, or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed 'proceedings in rem,' are evidently not within the category." "These principles will be found stated, and fully vindicated by authority, in the cases of The Young Mechanic, 2 Curt. 404, and The Kiersage, Id. 421."

Both the decisions of Mr. Justice Curtis, thus referred to, depended on a statute of Maine, giving in general terms a lien upon a vessel for labor performed or materials furnished in her construction or repair, without undertaking to fix the comparative precedence of such liens.

In The Young Mechanic, after elaborate discussion of the nature of such a lien, it was held to be a jus in re,—a right of property in the thing itself,—existing independently of possession; "an appropriation made by the law of a particular thing as security for a debt or claim; the law creating an incumbrance thereon, and vesting in the creditor what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser." "Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing, as the right of a pledgee, or the lien of a bailee for work," and is not "only a privilege to arrest the vessel for the debt, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment." 2 Curt. 406, 410, 412.

In The Kiersage, Mr. Justice Curtis held that the lien for labor and materials in the home port had precedence over a prior mortgage; and, after observing that, as he had held in The Young Mechanic, this lien "was, in substance, a tacit hypothecation of the vessel, as security for the debt," "a jus in re, constituting an incumbrance on the property by operation of law," he added: "And there can be no doubt that it takes effect wholly irrespective of the state of the title to the vessel. Whether the vessel belongs to one or more persons,—whether the title has been so divided that one is a special and another a general owner,—and however it may be incumbered, the law gives the lien on the thing. The mortgagees can have no claim to be preferred over the lienholder because of their priority in time, for their interest in the vessel is as much subject to the statute lien as the interest of any other party. It is not in the power of the owner by his voluntary act to withdraw any part of the title from the operation of the lien. If he could, he might altogether defeat it." 2 Curt. 422, 423.

It was assumed in each of those cases that a lien given by the local law for building a ship stood on the same ground as a lien under the same law for repairing her. It has

since been decided, and is now settled, that a contract for building a ship, being a contract made on land and to be performed on land, is not a maritime contract, and that a lien to secure it, given by local statute, is not a maritime lien, and cannot, therefore, be enforced in admiralty. The Jefferson, 20 How. 393; The Capitol, 22 How. 129; Edwards v. Elliott, 21 Wall. 532. That fact, however, does not affect the strength of the reasoning or the justness of the conclusions of Mr. Justice Curtis as regards liens for repairs and supplies, and, in relation to such liens, his view has been generally accepted in the admiralty courts of the United States.

"A maritime lien, unlike a lien at common law, may," said Mr. Justice Field, speaking for this court, "exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim for damages." "The only object of the proceedings in rem is to make this right, where it exists, available,—to carry it into effect. It subserves no other purpose." The Rock Island Bridge, 6 Wall. 213, 215. And in The Lottawanna, Mr. Justice Bradley, speaking of a lien given by a statute of Louisiana for repairs and supplies, said: "A lien is a right of property, and not a mere matter of procedure." 21 Wall. 558, 579.

In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful:

First. For necessary repairs or supplies furnished to a vessel in a foreign port a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. The General Smith, 4 Wheat. 438, 443; The St. Jago de Cuba, 9 Wheat. 409, 417; The Virgin, 8 Pet. 538, 550; The Laura, 19 How. 22; The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Kalorama, Id. 204.

Second. For repairs or supplies in the home port of the vessel no lien exists or can be enforced in admiralty, under the general law, independently of local statute. The General Smith, and The St. Jago de Cuba, above cited; The Lottawanna, 21 Wall. 558; The Edith, 94 U. S. 518.

Third. Whenever the statute of a state gives a lien, to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. The Planter, 7 Pet. 324; The St. Lawrence, 1 Black, 522; The Lottawanna, 21 Wall. 558, 579, 580; rule 12 in admiralty, as amended in 1872, 13 Wall. xiv.

Fourth. This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States sitting in admiralty. The Moses Taylor, 4 Wall. 411; The Hine, Id. 555; The Belfast, 7 Wall. 624; The Lottawanna, 21 Wall. 558, 580; Johnson v. Elevator Co., 119 U. S. 388, 397, 7 Sup. Ct. Rep. 254.

The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure. See, in addition to the cases above cited, The Orleans, 11 Pet. 175, 184; Ex parte McNiel, 13 Wall. 236, 243; The Corsair, 145 U. S. 335, 347, 12 Sup. Ct. Rep. 949.

The settled rules of jurisdiction and practice on this subject were stated by Mr. Justice Bradley in The Lottawanna as follows: "So long as congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts, so as to enable them to proceed in rem for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the district courts of the United States, having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws." 21 Wall. 580.

By the Revised Statutes of Illinois of 1874, (chapter 12, § 1,) every sailing vessel, steamboat, or other water craft of above five tons burden, used or intended to be used in navigating the waters of the state, or used in trade and commerce between ports and places within the state, or having her home port in the state, "shall be subject to a lien thereon" for all debts contracted by her owner or master on account of supplies and provisions furnished for her use, or of work done or services rendered on board of her "by any seaman, master, or other employe thereof," or "of work done or materials furnished by mechanics, tradesmen, or others in or about the building, repairing, fitting, furnishing, or equipping such

craft," and also for sums due for wharfage, towage, or the like, or upon contracts of affreightment, and damages for injuries to persons or property. By sections 3, 4, the lien may be enforced by a petition filed in a court of record in the county where the vessel is found, within five years, but cannot be enforced "as against or to the prejudice of any other creditor or subsequent incumbrancer or bona fide purchaser," unless the petition is filed within nine months after the debt accrues or becomes due. By sections 5-8, upon the filing of the petition and of a bond from the petitioner to the owner of the vessel to prosecute the suit with effect, or, in case of failure to do so, to pay all costs and damages caused to the owner or other persons interested in the vessel by the wrongful suing out of the attachment, a writ of attachment is to issue to the sheriff to seize and keep the vessel. By sections 10, 11, notice is to be given to the owners in person, and by publication to all other persons interested, and they may intervene to protect their interests. By sections 15-17 the vessel may be delivered up to the owner, or to any other person interested, upon his giving bond, or making a deposit of money. By section 19 the owner and other claimants are to file answers. By sections 21-27, upon judgment for the petitioner, the vessel, if remaining in custody, is to be sold by the sheriff, and the proceeds (deducting certain costs) are to be applied, first, to the wages due to seamen, including the master, for certain periods, and then to all other claims, filed before the distribution, on which judgment has been rendered in favor of the claimant, and to any balance due to seamen; and any remnant is to be applied—First, to all other liens enforceable under the statute before distribution; second, to all mortgages or other incumbrances of the vessel by the owner, "in proportion to the interest they cover and priority;" third, to judgments at law or decrees in chancery against the owner; and any surplus to the owner.

It thus appears that for all supplies or provisions furnished for the use of a vessel, or for work done and materials furnished in repairing her, in her home port, the statute gives a lien upon the vessel, to be enforced by proceedings in rem, analogous to such proceedings in admiralty.

In the present case, the district court has found and adjudged that the sums claimed by the appellants for supplies, repairs, and services were due to them; and the circuit court of appeals has stated in its certificate that for these supplies, repairs, and services there was a lien upon the vessel under the laws of the state of Illinois, and has certified to this court the single question "whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the state of Illinois subsequently to the date of the recording of the mortgage."

It must be assumed, therefore, for the purpose of deciding this question, that all the claims of the appellants for supplies and repairs were contracted under such circumstances that a lien upon the vessel for their payment existed under the statute of Illinois, and should be enforced in admiralty by the courts of the United States against the proceeds of the vessel, unless the mortgagees are entitled to priority in the distribution.

An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it. The John Jay, 17 How. 399; The Eclipse, 135 U. S. 599, 608, 10 Sup. Ct. Rep. 873. But it has jurisdiction, after a vessel has been sold by its order, and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the material men in this case. The Globe, 3 How. 568, 573; The Angelique, 19 How. 239; The Lottawanna, 21 Wall. 558, 582, 583; rule 43 in admiralty.

The appellees rely on section 4192 of the Revised Statutes of the United States, which substantially re-enacts the act of July 29, 1850, c. 27, § 1, (9 St. 440,) and is as follows: "No bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute a voyage shall not, however, lose its priority, or be in any way affected by the provisions of this section."

The appellees contend that no lien created by the legislature of a state can override a prior mortgage recorded under this act of congress.

But that enactment is a mere registry act, intended to prevent mortgages and other conveyances of vessels from having any effect (which they might have had before) against persons other than the grantor or mortgagor, and those claiming under him, or having actual notice thereof, unless recorded as therein provided. Bank v. Smith, 7 Wall. 646; Aldrich v. Aetna Co., 8 Wall 491. It manifests no intention to confer upon the mortgagee any new right, or to make the mortgage a maritime contract, or the lien created thereby a maritime lien, or in any way to interfere with maritime contracts or liens, or

with the jurisdiction and procedure in admiralty. The only mention of any other lien on the vessel is of a bottomry bond, in the latter part of the section, originally inserted in the form of a proviso, and with the obvious purpose of precluding the possibility of construing such a bond to be an hypothecation, within the meaning of the previous clause, and therefore required to be recorded. And, as was well observed in The William T. Graves, 14 Blatchf. 189, 195, by Judge Johnson: "If this proviso be construed to mean that such a lien only is out of the purview of the statute, and that all other liens are postponed to that of a mortgagee, then the claims of salvors, and all those having other strictly maritime liens, would be thus postponed, to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best-settled and most salutary principles of the maritime law. Indeed, any principle upon which this statute can be expounded to give such a priority to a recorded mortgage would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of maritime law upon the subject of maritime liens."

*217 In The Lottawanna, the mortgage was preferred to the *claim of the material men in the home port only because the latter had not recorded their lien as required by the law of the state to make it valid; and it was clearly implied in the opinion of the court, delivered by Mr. Justice Bradley, as well as distinctly asserted in the dissenting opinion of Mr. Justice Clifford, that their lien, if valid, would take precedence of the mortgage. 21 Wall. 578, 579, 582, 608. And, as already stated at the outset of this opinion, the same rule was laid down in the opinion of Mr. Justice Curtis in The Kiersage, 2 Curt. 421, approved by this court in The Yankee Blade, 19 How. 82.

The appellees rely on a line of cases in the courts of the United States held in Illinois, beginning with a decision of Judge Drummond in 1869, and upon similar cases in the supreme court of the state, as establishing, as a rule of property, that a mortgage takes precedence of a lien for supplies afterwards furnished to a vessel in her home port under the statute of Illinois. The Grace Greenwood, (1869,) 2 Biss. 131; The Skylark, (1870,) Id. 251; The Kate Hinchman, (1875,) 6 Biss. 367, and (1876,) 7 Biss. 238; The Great West No. 2 v. Oberndorf, (1870,) 57 Ill. 168; The Hilton v. Miller, (1871,) 62 Ill. 230.

But the question in controversy depends upon principles of general jurisprudence, and upon the true construction of an act of congress, and arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution. Upon such a question, neither the decisions of the highest court of a state, nor those of the circuit and district courts of the United States, can relieve this court from the duty of exercising its own judgment. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. Rep. 469; Andrews v. Hovey, 124 U. S. 694, 717, 8 Sup. Ct. Rep. 676

Moreover, the rule preferring the lien for repairs or supplies in a home port to a prior mortgage was recognized, even in the seventh circuit, by Judge Dyer, in the district court of the United States for the eastern district of Wisconsin, in 1874, in The J. A. Travis, 7 Chi. Leg. N. 275; and it appears to prevail in every other judicial circuit of the United States.

*218 *It has been upheld in the first circuit, by Mr. Justice Curtis, in The Kiersage, (1855,) 2 Curt. 421, already cited, and by Judge Lowell in The Island City, (1869,) 1 Low. 375, 379; in the second circuit, by Judge Wallace, and by Judge Johnson on appeal, in The William T. Graves, (1876,) 8 Ben. 568, and (1877,) 14 Blatchf. 189; in the third circuit, by Judge McCandless, and by Mr. Justice Grier on appeal, in The Collier, (1861,) 2 Pittsb. R. 304, 318, 320, and by Judge Acheson in The Venture, (1885,) 26 Fed. Rep. 285; and in the fourth circuit, by Judge Hughes, in The Raleigh, (1876,) 2 Hughes, 44, and by Judge Seymour in Clyde v. Transportation Co., (1888,) 36 Fed. Rep. 501. In The Marcella Ann, (1887,) 34 Fed. Rep. 142, Judge Bond gave priority to the mortgage, because the statute of Maryland expressly so provided.

In the fifth circuit, Mr. Justice Woods, then circuit judge, while admitting that the lien of a mortgage duly recorded was inferior to all strictly maritime liens, yet held that it was superior to any subsequent lien for supplies in the home port, given by the legislation of a state. The John T. Moore, (1877,) 3 Woods, 61; The Bradish Johnson, (1878,) Id. 582. His ruling was followed by Judge Hill, who had previously decided otherwise in The Emma, (1876,) 3 Cent. Law J. 285; and, with much doubt of its soundness, by Judge Pardee. The Josephine Spangler, (1881,) 9 Fed. Rep. 773, and 11 Fed. Rep. 440; The De Smet, (1881,) 10 Fed. Rep. 483. But in a very recent case, Mr. Justice Lamar, upon full consideration, and with the concurrence of Judge Pardee, overruled those decisions in a clear and convincing opinion. The Madrid, (1889,) 40 Fed. Rep. 677.

In the sixth circuit, Judge Sherman, sitting in bankruptcy, held that a mortgage must be preferred to a subsequent lien for supplies under a state statute. Scott's Case, (1869,) 1 Abb. (U. S.) 336. But the opposite rule has since been recognized as clearly established in admiralty in that circuit by decisions of Judge Withey in The St. Joseph, (1869,) Brown, Adm. 202, and The Alice Getty, (1877,) 2 Flip. 18; of Judge Hammond in The Illinois, (1879,) 2 Flip. 383, 433; of Mr. *219 *Justice Brown, then district judge, in The City of Tawas, (1880,) 3 Fed. Rep. 170; of Judge Swing in The Guiding Star, (1881,) 9 Fed.

Rep. 521, and of Mr. Justice Matthews and Judge Baxter in the same case on appeal, (1883,) 18 Fed. Rep. 263, 269.

The decisions in the eighth circuit, by Judge Thayer in The Wyoming, (1888,) 35 Fed. Rep. 548, and in the ninth circuit, by Judge Hoffman in The Harrison, (1870,) 1 Sawy. 353, and The Hiawatha, (1878,) 5 Sawy. 160, and by Judge Deady in The Canada, (1881,) 7 Sawy. 173, are to the same effect.

According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a state for repairs or supplies furnished to a vessel in her home port has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship on the credit of the ship herself, to preserve her existence and secure her usefulness for the benefit of all having any title or interest in her. Each creates a jus in re, a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied.

It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law.

*As was forcibly said by Mr. Justice Matthews in The Guiding Star, above cited: "In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity, when they apply it. Everything required by the statute as a condition on which the lien arises and vests must, of course, be regarded by courts of admiralty, for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles." 18 Fed. Rep. 268.

It is unnecessary, however, in this case, to dwell upon that consideration, inasmuch as the lien in question is given precedence over mortgages by the express terms of the statute of Illinois, as well as by the principles of the maritime law and the practice in admiralty.

The decisions in the privy council of England in The Two Ellens, L. R. 4 P. C. 161, and The Rio Tinto, L. R. 9 App. Cas. 356, cited by the appellees, in which the claims of prior mortgagees were preferred to claims of material men in the home port, cannot affect our conclusion. Those decisions proceeded upon the ground that the material men had no jus in re, because there was, by the law of England, no maritime lien for supplies, and because the acts of parliament were construed as having given no lien for them until the arrest of the ship by admiralty process. The essential difference, in its very nature, between the right of material men in a court of admiralty under the law and statutes of England as judicially declared and expounded, and their right, by virtue of a local statute giving a maritime lien and a jus in re, as recognized in our own jurisprudence, is yet more clearly brought out in a later case, in which the court of appeal and the house of *lords held *21 that, even for supplies furnished in an English port to a foreign vessel, there was no lien, but a mere right to seize her upon process in admiralty. The Heinrich Bjorn, 10 Prob. Div. 44, and L. R. 11 App. Cas. 270.

No question as to the lien of the master, or as to the comparative rank of various maritime liens inter sese, is presented by this case, in which the only question certified by the circuit court of appeals, or within our jurisdiction to consider, as the case stands, is whether a claim arising under a mortgage of the vessel is to be preferred to the claim for supplies and necessaries furnished in her home port in the state of Illinois since the mortgage was recorded. This question must, for the reasons above stated, be answered in the negative.

(147 U. S. 557)

HAYES v. PRATT et al.

(March 6, 1893.)

No. 19.

WILLS — CHARITABLE TRUSTS — EXECUTORS AND TRUSTEES — FOREIGN EXECUTORS — CONSTITUTIONAL LAW.

1. A testator provided in his will that all the residue of his property, after paying legacies and debts, should be used "for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and a home for disabled or aged and infirm and deserving American mechanics." *Held*, that the validity of the trust was undoubted, notwithstanding that the trustees might appropriate the fund

to an institution established after the testator's death.

2. Where executors are required to found a charitable institution, and to appropriate the income of the trust property to maintain the same, and are authorized to sell and convey and invest the proceeds of the trust property, the trust cannot pass to an administrator with the will annexed of one of the executors, at least while any of the original executors are living, and have not declined the trust.

3. An executor appointed in another state may, by the express terms of the New Jersey statute, (Acts 1879, p. 28,) sue as such in that state, without obtaining an appointment there, upon filing the record of his appointment as required by said statute.

4. An executor charged with the administration of a charitable trust brought suit, together with the beneficiary, a corporation of which he was treasurer, to recover money due the trust estate. *Held*, that he should have sued alone, but, as no objection was made in the court below, the judgment might be amended so as to allow him to recover as executor, instead of as treasurer of the beneficiary corporation.

5. A testator, leaving property in Pennsylvania, New Jersey, and elsewhere, directed the application thereof to a charitable purpose, and charged his executors, one of whom lived in New Jersey, with the execution of the trust. The other executor founded a charitable institution in Philadelphia, with the rest of testator's property, but the New Jersey executor took no steps to apply the New Jersey property to the trust. After his death an administrator with the will annexed, appointed in New Jersey, sold testator's New Jersey lands, and, although the surviving executor claimed the proceeds, he turned them over to a charitable institution in that state, taking an indemnity bond. *Held*, that such administrator was not authorized to execute the trust, that the sale was without authority, and that he was liable to account for the proceeds to the surviving executor.

6. No state has the power to pass a statute which will impair the general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person, within its jurisdiction.

7. It is the duty of each trustee, and of the court, to carry out the trust, and a trustee cannot relieve himself of this duty by agreement with his cotrustee to only look after certain parts of trust property.

Appeal from the circuit court of the United States for the district of New Jersey.

Bill in equity by Dundas T. Pratt, executor of George Hayes, deceased, and the Hayes Mechanics' Home, against Henry Hayes, administrator with the will annexed of George Hayes, deceased, for an account of the property of the deceased received by him, and for payment thereof. Judgment for plaintiffs. Defendant appeals. Amended and affirmed.

*559 *Statement by Mr. Justice GRAY:

This was a bill in equity filed August 11, 1884, in the court of chancery of the state of New Jersey, by Dundas T. Pratt, a citizen of Pennsylvania, describing himself as "succeeding executor of the last will and testament of George Hayes, late of the city and county of Philadelphia, in the state of Pennsylvania, deceased," and by the Hayes Mechanics' Home, a corporation organized under the laws of Pennsylvania, and established at Philadelphia, against Henry Hayes, a citizen of New Jersey, administrator of George Hayes, for an account of property of the deceased received by him, amounting to more than $5,000, and for payment thereof to either of the plaintiffs, as the court might direct.

The case was duly removed, upon the defendant's petition, into the circuit court of the United States for the district of New Jersey, and was there, after an answer and a general replication had been filed, heard upon pleadings and proofs, by which it appeared to be as follows:

George Hayes was a jeweler, was born in Newark, in the state of New Jersey, in 1815, and there lived until 1847, when he removed to Philadelphia, and became interested in, and identified with, the mechanics of that city, and resided and did business there until June 1, 1857, when he died, leaving a dwelling house and personal estate in Philadelphia, real estate in Michigan, and an interest in real estate in Newark, (on which he had lived and carried on his business before his removal to Philadelphia,) and a will, dated June 16, 1855, duly executed and published according to the laws of Pennsylvania and of New Jersey, by which, after payment of debts and legacies, he provided as follows:

"Item. As to the rest, residue, and remainder of my estate, both real and personal, and of every nature and kind whatsoever, I give, devise, and bequeath the same to my executors hereinafter named, their heirs, executors, and administrators forever in trust to realize the same in the manner deemed by them the most advisable, and keep the same invested in such manner as they, in their discretion, may deem most advantageous, and to appropriate and use the income or principal thereof for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics.

"Item. To better enable my said executors to carry out and perfect my intentions as expressed in the last foregoing item, I authorize and empower them to sell all or any of my real estate, either at public or private sale, either for cash or part cash, and reserving ground rent or taking mortgage for the purchase money, as the case may be, without any liability of the purchaser or purchasers thereof as to the application or misapplication of the purchase or consideration moneys.

"Lastly, I nominate, constitute, and appoint my brother, Jabez W. Hayes, and my friend, Dr. Lewis E. Wells, (and, in the event of the death of either or both of them, then I appoint, first, Dundas Pratt, and, next, my brother-in-law, Horace H. Nichols, to supply vacancy,) to be the executors of this, my will."

Dundas Pratt, named in the will, was

Dundas T. Pratt, one of the original plaintiffs and present appellees. It does not appear that Nichols ever did anything in regard to this trust.

Lewis E. Wells resided in Philadelphia, and proved the will, and was appointed and qualified as executor thereof in the orphans' court of Philadelphia, on June 20, 1857, and, with the knowledge of Jabez W. Hayes, took care of the property in Pennsylvania and in Michigan.

Jabez W. Hayes resided in Newark, and proved the will, and was appointed and qualified as executor thereof in the orphans' court of Essex county, in New Jersey, on August 4, 1857, and, with the knowledge of Wells, took care of the property in New Jersey.

On June 21, 1858, Wells and Pratt, together with Ferdinand J. Dreer, the former partner of the testator, and other citizens of Pennsylvania, were duly incorporated, under the general laws of Pennsylvania, as the Hayes Mechanics' Home, with the object of "the founding and providing of a retreat and home for disabled, aged, or infirm and deserving American mechanics." Dreer was president, and Pratt secretary, of the corporation, from the beginning, and Wells was treasurer of the corporation from its organization until 1873, when he was removed, and another treasurer chosen, and Pratt afterwards became treasurer.

On March 16, 1861, the legislature of Pennsylvania, at the instance of Wells, as acting executor, passed an act reciting that the Hayes Mechanics' Home had been incorporated, as aforesaid, "for the purpose of founding a home for disabled, aged, or infirm and deserving American mechanics, and with the intention of carrying into effect the charitable objects provided for by the last will and testament of George Hayes, deceased, late of the city of Philadelphia," ratifying and confirming its charter, and empowering it to take and hold the property devised and bequeathed by George Hayes, as aforesaid. Laws Pa. 1861, No. 117, p. 132.

Wells paid all the testator's debts and legacies, and in 1864 settled in the orphans' court of Philadelphia the account of his administration of the property in Pennsylvania, and paid to the Hayes Mechanics' Home the balance of the personal estate in his hands, amounting to $13,789, and also, in obedience to an order of that court, (upon the petition of the corporation, stating that settlement and payment, the provision of the will, the charter of the corporation, and the act of the legislature,) conveyed to that corporation the land in Pennsylvania, valued by an examiner of that court at $12,000, and the land in Michigan, valued at $17,000. The property so received, and the proceeds of sales thereof, were afterwards invested so that, besides paying $10,000 in 1859 for a tract of 16 acres of land as a site for a building, they amounted in May, 1884, (including $11,500 received from other persons,) to $92,000. The building was actually begun a few months after the filing of this bill.

Wells died in 1876, never having done anything about the real estate in New Jersey, although he knew of its existence.

There was in the city of Newark an institution called the "Hospital of St. Barnabas," incorporated by an act of the legislature of New Jersey of February 13, 1867, c. 32, which provided that the object of the corporation should be "the care, nurture, and maintenance of sick, infirm, aged, and indigent persons, and of orphan, half orphan, and destitute children, the providing for their temporal and spiritual welfare, and the procuring or erecting a suitable building or buildings," and that its members and trustees should be members of the Protestant Episcopal Church, and the moral and religious instruction of the inmates should be in conformity with the doctrine, discipline, and worship of that church. N. J. Acts of 1867, p. 51. Its by-laws and rules provided that patients in a condition to be discharged, or whose disease was incurable, should not remain in the hospital, and that all persons able to pay for their maintenance should do so.

Jabez W. Hayes often told his sons that he intended to devote the principal and income of the testator's property in Newark to the support of this hospital, and in 1870, and again in 1876, obtained the opinion of counsel that under the provisions of the will of George Hayes the executors would be authorized, in their discretion, to provide a permanent bed in this hospital for disabled or aged and infirm and deserving American mechanics. But he took no other steps in that direction, and died in January, 1882, without having rendered any account of his administration.

On December 12, 1882, the orphans' court of the county of Essex and state of New Jersey passed an order reciting the probate of the will of George Hayes in that court, and that "Jabez W. Hayes, after having taken upon himself the execution of said will in this state, has departed this life, that due notice has been given of this application to Dundas Pratt, the only other surviving executor named in the will, and to all other parties in interest;" and appointing "Henry Hayes administrator of, all and singular, the goods, chattels, and credits of the said George Hayes, deceased, in the state of New Jersey, left unadministered by Jabez W. Hayes, deceased, who is duly authorized to administer the same agreeably to said will."

Before this appointment, and after Pratt had received notice of the application therefor, a correspondence took place between him and Henry Hayes, in which Pratt, while acquiescing in the appointment, insisted that the testator's interest in the land in New Jersey (the existence of which had become known to him only since the death of Jabez

W. Hayes) should go to the Hayes Mechanics' Home, and Henry Hayes expressed a wish that it should be applied, as his father had hoped, to a bed for mechanics in the hospital at Newark. On June 25, 1883, Henry Hayes, in answer to a letter from Pratt about the sale of this interest of the testator, wrote to him that he would not, of course, make any disposition of the money but a legal one, and that he would not dispose of it in any way without giving Pratt an opportunity to show that the Hayes Mechanics' Home was the only institution entitled to it.

Henry Hayes soon afterwards sold this property, and received money from the sale, and from previous income thereof; and in October, 1884, made an offer to the Hospital of St. Barnabas, which that corporation accepted, to appropriate to its use the greater part of this money, and on January 8, 1884, settled his account in said orphans' court, showing a balance in his hands of $5,153.27, and declined to pay it to Pratt, as executor of George Hayes, or as treasurer of the Hayes Mechanics' Home, and in March, 1884, without any order of court, and without Pratt's knowledge or consent, paid this balance to the Hospital of St. Barnabas, informing it of Pratt's claim, and taking from it a bond of indemnity, secured by a mortgage on real estate; and the board of trustees of that corporation, on March 17, 1884, "resolved that the Hospital of St. Barnabas consents to receive said fund, and it hereby agrees to use such fund solely for the purpose of furnishing a retreat and home for disabled or aged and infirm and deserving American mechanics, in accordance with the will of the late George Hayes," and, on July 1, 1885, having meanwhile completed a new hospital building, "resolved that a suitable part of the building be fitted up with two beds, to be devoted especially to the purposes mentioned by the testator, and that a tablet be placed upon the walls as an indication of these uses, and a memorial of the donor of the fund."

*503 *On May 10, 1884, in the orphans' court of Philadelphia, (as appeared by an exemplified copy of the record of the appointment, filed with the bill in this case,) "Jabez W. Hayes and Lewis E. Wells, two of the executors named in said will, being dead, letters testamentary were duly granted unto Dundas T. Pratt, surviving executor;" and Pratt was duly qualified "as the succeeding executor of the foregoing last will and testament of George Hayes, deceased." At that time there was no estate of the testator which had not been duly administered, except so far as the property in New Jersey could be so considered; and Pratt testified that his only object in being appointed was to sue for and recover that property; that he supposed that the Hayes Mechanics' Home could itself pursue that fund, but was advised that he, as executor, should claim it.

The circuit court "ordered, adjudged, and decreed that the respondent, Henry Hayes, administrator of the estate of George Hayes in the state of New Jersey, pay to the complainant Dundas T. Pratt, treasurer of the Hayes Mechanics' Home, a corporation of the state of Pennsylvania, and for and in behalf of said corporation, the sum of $5,153.27, with interest from January 10, 1884, being the balance in his hands, as administrator aforesaid, on settlement of his account in the orphans' court of Essex county, N. J." with costs.

A. Q. Keasbey, for appellant. John R. Emery, for appellees.

*504 *Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

George Hayes, by his will, devised and bequeathed the residue of his estate, real and personal, to his executors, in trust to sell and invest at their discretion, "and to appropriate and use the principal or income thereof for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics."

The primary, if not the only, intention of the testator, evidently, was that his bounty should go to a single institution, "a retreat and home for disabled or aged and infirm and deserving American mechanics," either by founding, as well as supporting, a new institution, or by aiding in the support of one founded by others. The validity of the charitable trust is undoubted, notwithstanding that the trustees might appropriate the fund to an institution established after the testator's death. Jones v. Habersham, 107 U. S. 174, 191, 2 Sup. Ct. Rep. 336; Curran's Appeal, 4 Penny. 331; Taylor v. College, 34 N. J. Eq. 101.

The execution of this trust was committed by the testator to the executors named in the will,—first, to Jabez W. Hayes and Lewis E. Wells, and, next, in the event of the death of either or both of these, to Dundas Pratt and Horace H. Nichols, successively. So long as any one of the four is living, and has not declined the office of executor, or been shown to be unsuitable, no other person can execute the trust. And it is doubtful, to say the least, whether the trust is not such a personal confidence reposed by the testator in the persons named that it would in no event pass to an administrator with the will annexed, but must, if all those named in the will should die before full performance of the trust, be executed by a trustee specially appointed for the purpose. Ingle v. Jones, 9 Wall. 486, 497, 498.

Of the two executors first named, Jabez W. Hayes, being a citizen of New Jersey, and Lewis E. Wells, a citizen of Pennsylvania, each proved the will, and took out letters tes-

tamentary in his own state, and assumed the care and management of the property in that state, and Wells also took control of the property in Michigan. But such an arrangement, however convenient, cannot affect the duty of either or both of the executors, or of the court, to see that the trust is carried out according to the testator's intention.

*The testator was born, and for many years lived in New Jersey, but his domicile at the time of his death and for 10 years before, was in Pennsylvania. A small part only of his property was in New Jersey, and the greater part was in Pennsylvania and Michigan. The Hayes Mechanics' Home was incorporated within 13 months after his death by his partner, by Wells, his Pennsylvania executor, by Pratt, now his executor, and by other citizens of Pennsylvania, under the laws of that state, for the purpose of founding and supporting "a retreat and home for disabled, aged, or infirm and deserving American mechanics," as contemplated in his will. Wells settled his account as executor in the proper court of Pennsylvania, and paid over the balance of personal property in his hands to the Hayes Mechanics' Home, and also, by order of that court, conveyed to that corporation the lands in Pennsylvania and in Michigan; and the validity of the payment and conveyance has not been impugned. In short, the whole of the residue of the testator's property, real and personal, except the comparatively small amount now in controversy, has been appropriated, with the approval of the legislature and of the courts of his domicile, in a manner to carry out his charitable intent in accordance with the letter and spirit of his will.

Jabez W. Hayes, the executor appointed in New Jersey, died in January, 1882, having done nothing towards carrying out the charitable intent of the testator, beyond obtaining the advice of counsel that the executors (not that he alone) might lawfully appropriate the property in New Jersey to the support of the Hospital of St. Barnabas, in Newark.

After his death, Henry Hayes was appointed by the orphans' court in New Jersey to be administrator of the unadministered "goods, chattels, and credits" of George Hayes in New Jersey. As already indicated, it is difficult to see how this appointment could give him any title in or power over the real estate devised to the executors in trust. But, if it can be treated as vesting in him the title to the real estate in New Jersey, it certainly did not authorize him to undertake the performance of the charitable trust created by the will, so long as Pratt, one of the alternative executors and trustees therein named, was still alive, had never declined the trust, and had not even known, until recently, of the existence of any estate of the testator not already disposed of according to his will. Moreover, to apply the fund received by the defendant from the sale of the real estate in New Jersey to the maintenance of a free bed in the Hospital of St. Barnabas, under the charter and rules of that institution, would be much less in accord with the intention of the testator, as expressed in his will, than to add this fund to his other property already devoted to the foundation and support of the Hayes Mechanics' Home.

Both the original executors being dead, and Pratt, the successor next named in the will, having been appointed sole executor in their stead, he is the only person authorized to execute the charitable trust of the testator, so far as anything remains to be done with regard to it.

It was objected that Pratt, as executor appointed in Pennsylvania, could not sue in New Jersey without taking out letters testamentary in that state. But this objection is answered by the statute of New Jersey of 1879, c. 16, which enacts that "any executor or administrator, by virtue of letters obtained in another state, may prosecute any action in any court of this state without first taking out letters in this state: provided, such executor or administrator shall, upon commencing suit, file in the office of the clerk of the court in which such suit shall be brought an exemplified copy of the record of his or their appointment."—which has been done in this case. Acts N. J. 1879, p. 28; Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. Rep. 440.

It was further objected that since the orphans' court had been vested by the statute of New Jersey of 1872, c. 340, with the power, upon allowing the accounts of executors, or of administrators with the will annexed, to order distribution of the residue in accordance with the will, application should have been made to that court. Acts N. J. 1872, p. 47. But the statutes of the state conferring jurisdiction upon *the orphans' court* do not even affect the jurisdiction of the court of chancery of New Jersey over the settlement of estates. Frey v. Demarest, 16 N. J. Eq. 236; Coddington v. Bispham, 36 N. J. Eq. 224, 574; Houston v. Levy's Ex'r, 44 N. J. Eq. 6, 13 Atl. Rep. 671. Certainly, no such statutes can defeat or impair the general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction. Green's Adm'x v. Creighton, 23 How. 90; Payne v. Hook, 7 Wall. 425; Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. Rep. 440.

The defendant, as administrator with the will annexed of George Hayes, having received money from the income and sale of his real estate, and settled his account therefor in the court which appointed him, and having, without any order of court, and without right, and with notice of Pratt's claim, paid the money to the Hospital of St. Barnabas, taking from that corporation a bond of indemnity, was rightly held liable to ac-

count for it, with interest from the date when he so settled his account, after having determined so to pay it.

There being no one in New Jersey having any right to or claim upon this fund, and no special reason being shown for administering it in New Jersey, it should, upon familiar principles, be transmitted to the executor appointed at the testator's domicile, for distribution. Wilkins v. Ellett, 9 Wall. 740, 742; Harvey v. Richards, 1 Mason, 381, 412, 413; Normand's Adm'r v. Grognard, 17 N. J. Eq. 425, 428.

Pratt, being the executor appointed in the state of the testator's domicile, and the trustee charged with the administration of the charitable trust, is the only person entitled to maintain this suit. The joinder of the Hayes Mechanics' Home as a plaintiff was unnecessary, and perhaps improper; but not having been objected to, by demurrer or otherwise, in the court below, it affords no ground for refusing relief. The decree of the circuit court is irregular, in that it directs
*571 payment to be made to Pratt as treasurer *of the Hayes *Mechanics' Home, instead of to him as executor, and is therefore to be amended in that particular, and, so amended, affirmed.

Mr. Justice SHIRAS, not having been a member of the court when this case was argued, took no part in its decision.

(148 U. S. 172)

MARX v. HANTHORN.

(March 6, 1893.)

No. 123

TAX SALES — NOTICE — VALIDITY — IMPAIRMENT OF VESTED RIGHTS.

1. Notice to the owner of the sale of property for delinquent taxes is essential to the validity of the proceedings, and the legislature has no power to declare the tax deed conclusive evidence of such notice; and hence Act Or. Feb. 21, 1887, (2 Hill's Ann. Laws, p. 1309,) which makes such deed only prima facie evidence of the regularity of all proceedings in the matter, cannot be held to impair any vested rights acquired under Gen. Laws. Or. (Ed. 1874,) p. 767, § 90, which precluded attacks on tax deeds for failure to give notice of the sale. 30 Fed. Rep. 579, affirmed.

2. There is a failure to give the notice so required when land belonging to "Ida J. Hanthorn" is placed on the delinquent tax list as the property of "Ida J. Hawthorn," and is sold as the property of "Hawthorn;" for the names are not idem sonans. 30 Fed. Rep. 579, affirmed.

In error to the circuit court of the United States for the district of Oregon.

Ejectment by Emil Marx against Ida J. Hanthorn. The case was tried to the court, without a jury, and judgment was given for de-
*172 fendant. 30 Fed. Rep. 579. Plaintiff brings *error. Affirmed.

*Statement by Mr. Justice SHIRAS:

This action was brought by the plaintiff, a subject of the emperor of Germany, against the defendant, a citizen of Oregon, to recover the possession of lots 3 and 4, in block E, in the town of Portland.

The action was originally brought against B. Campbell, the party in possession, who, having answered that he was in possession as the tenant of Ida J. Hanthorn, the latter was substituted for him as defendant.

It is alleged in the complaint that the plaintiff is the owner of the premises, and that the defendant wrongfully withholds from him the possession thereof.

The answer contains a denial of the allegations of the complaint, and a plea of title in the defendant, with a right to the possession, and the replication denies the plea.

The defendant claims the premises under a deed of August 28, 1878, from W. W. Chapman and Margaret F., his wife, the latter being the patentee of the United States, under the donation act of 1850, of a tract of land including said block E. The plaintiff claims under two deeds, one from ex-Sheriff Sears of July 29, and the other from Sheriff Jordan of July 30, 1886, each purporting to be made in pursuance of a sale of the property for taxes by the former on June 30, 1884.

By a stipulation filed in the cause it is admitted that the defendant was the owner in fee of the premises at the time of the assessment and sale of the same for taxes, and that she is still such owner, unless such sale and the conveyance thereon had the effect to pass the title to the purchaser thereat, and that the property is worth $6,000.

The case was tried by the court without the intervention of a jury, and on the trial the proceedings, constituting the assessment, levy of taxes, and the sale of the property and the conveyance thereon, were received in evidence, subject to objection for want of competency and materiality. From these it appears that on August 27, 1883, the premises were listed by the assessor of Multnomah county, on the assessment roll thereof, for taxation in that year as the property of Ida J. Hanthorn, and valued at $2,200; that on October 17, 1883, the entry on the assessment roll concerning said property was transcribed onto the tax roll of said county by the clerk thereof, and on the same day the taxes for school, state, and county purposes, amounting to $34.32, were levied on said property, and extended on said tax roll by the county court of said county, and the sheriff thereof commanded, by a warrant indorsed thereon, signed by the county clerk, and sealed with the seal of said court, to collect said taxes by demanding payment of the same, and making sale of the goods and chattels of the persons charged therewith; that the sheriff, George C. Sears, to whom said warrant was directed, having returned that the tax levied on said property was unpaid and delinquent, the latter was, on April 22, 1884, entered on the delinquent tax roll of said county by the clerk thereof as the property of Ida J. Hawthorn, and a warrant

indorsed thereon, signed by said clerk, and sealed with the seal of said county, commanding said sheriff to levy on the goods of the delinquent taxpayer, and, in default thereof, on the real property mentioned in said tax list, or sufficient thereof to satisfy said taxes, charges, and expenses; that afterwards said sheriff returned that he received said delinquent tax list and warrant on April 22, 1884, and in pursuance thereof, and in default of personal property, he levied on said lots 3 and 4, and advertised and sold the same on June 18, 1884, as the property of Ida J. Hawthorn, to J. E. Bennett, for $37.51, the amount of said delinquent tax, and costs and expenses thereon; that on July 29, 1886, George C. Sears, as ex-sheriff of said Multnomah county, executed and delivered to said Bennett a deed for the premises, in which the proceedings concerning the *175 assessment of said property,* the levy of the taxes thereon, the nonpayment and delinquency of the same, and the sale of the property therefor, were substantially recited, except that it does not thereby appear that the premises were entered on the delinquent tax list or advertised or sold as the property of Ida J. Hawthorn, but as that of Ida F. Hanthorn; and that on July 30, 1886, Thomas A. Jordan, as sheriff of said Multnomah county, by A. W. Witherell, deputy, executed and delivered to said Bennett a deed of the premises, containing the same recitals as the one from Sears. Each deed was acknowledged on the day of its execution, and afterwards admitted to record. The original Jordan deed was put in evidence, and also a certified copy of the record; but the execution of the original was not otherwise proved, and it is contended that the acknowledgment is not legal, and that therefore it cannot be read in evidence without direct proof of its execution.

On July 31, 1886, Bennett and his wife, Alvira F., in consideration of $500, as recited in the deed, quitclaimed the premises to the plaintiff.

The statute of the state of Oregon in relation to the validity and effect of tax deeds provides as follows:

"Sec. 90. After expiration of two years from the date of such certificate, if no redemption shall have been made, the sheriff shall execute to the purchaser, his heirs or assigns, a deed of conveyance, reciting or stating a description of the property sold, the amount bid, the year in which the tax was levied, that the tax was unpaid at the time of the sale, and that no redemption has been made; and such deed shall operate to convey a legal and equitable title to the purchaser, sold in fee simple to the grantee named in the deed; and, upon the delivery of such deed, all the proceedings required or directed by law, in relation to the levy, assessment, and collection of the taxes, and the sale of the property, shall be presumed regular, and to have been had and done in accordance with law; and such deed shall be prima facie evidence of title in the grantee, and such presumption and such prima facie shall not be disputed or avoided except by proof of either (1) fraud in the assessment *176 or collection of the tax; *(2) payment of the tax before sale or redemption after the sale; (3) that the payment or redemption was prevented by the fraud of the purchaser; (4) that the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed upon the property sold."

"Sec. 93. All sales made for delinquent taxes * * * must be made as is otherwise made in selling real estate upon an execution, at the courthouse door, between the hours of ten o'clock A. M. and four P. M., in the daytime; and notice of such sale shall be given in some public newspaper, published in the county where the property is situated, or, in case no paper is published in the county, then in the paper published nearest the place of sale, and in general circulation in the county, by advertisement for four consecutive weeks before such sale, describing accurately the lots or land to be sold, and that they are to be sold for taxes due thereon." Gen. Laws Or. (Ed. 1874,) p. 767.

On March 23, 1887, the defendant, Ida J. Hanthorn, commenced a suit in equity in the circuit court of the United States against E. Marx, the plaintiff in this suit, for the purpose of determining his claim to the premises, alleging that the tax deed under which the plaintiff claims title to the same was void, for certain reasons, and brought into court and tendered him the sum of $50.60 in payment of what was due him thereon.

On February 21, 1887, after the present case had been submitted to the court below for decision, the legislature of Oregon amended said section 90 of the tax law so as to make a tax deed only prima facie evidence of title in the grantee, and requiring the party claiming to be the owner, as against the holder of the tax title, to tender and pay into court, with his answer, the amount of the taxes for which the land was sold, with interest thereon at the rate of 20 per cent. per annum from the sale to the date of deed, together with any taxes the purchaser may have paid, with interest thereon, for the benefit of the holder of the tax deed, his heirs or assigns, in case the same should be held invalid. *177

*The court below found and adjudged that the alleged tax sale was illegal and void; that the plaintiff was not entitled to recover; that the defendant was the owner of the premises, and entitled to the possession thereof, (30 Fed. Rep. 579;) and from this judgment the plaintiff brought his writ of error to this court.

John H. Mitchell, John M. Gearin, and Jas. Hamilton Lewis, for plaintiff in error.
Jos. N. Dolph, for defendant in error.

*180 *Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

As there must be express statutory authority for selling lands for taxes, and as such sale is in the nature of an ex parte proceeding, there must be, in order to make out a valid title, a substantial compliance with the provisions of the law authorizing the sale. A statutory power, to be validly executed, must be executed according to the statutory directions. It is no doubt true that there may be provisions in tax laws that are made in the interest of the public, and which do not concern the taxpayer; and a failure to punctiliously observe them may furnish him with no just ground of complaint. But the well-established rule is, as above stated, that observance of every safeguard to the owner created by the statute is imperatively necessary. So, too, it is the rule, when not modified by statute, that the burthen of proof is on the holder of a tax deed to maintain his title by affirmatively showing that the provisions of the law have been complied with.

We do not perceive that these general rules have been materially modified by the statutes of Oregon, to which our attention has been called. It is true that, as to certain preliminary and directory conditions of tax sales, the Oregon statute, dated December 18, 1865, and cited as section 90 of the general laws, declares that, upon delivery of a tax deed, "all the proceedings required or directed by law in relation to the levy, assessment, and collection of the taxes, and the sale of the property, shall be presumed regular, and to have been had and done in accordance with law; and such deed shall be prima facie evidence of title in the grantee, and such presumption and such prima facie shall not be disputed or avoided, except by proof of either (1) fraud in the assessment or collection of the tax; (2) payment of the tax before sale, or redemption after sale; (3) that the payment or redemption was prevented by the fraud of the purchaser; (4) that the property was sold for taxes for which the owner of the property at the time of the *181 sale was not liable, and that no part of the tax was levied or assessed upon the property sold." But by the amendatory act of February 21, 1887, (2 Hill's Ann. Laws, Ed. 1892, p. 1309,) the provision respecting the evidential effect of the deed was changed so as to read as follows: "Upon the delivery of such deed, all the proceedings required or directed by law in relation to the levy, assessment, and collection of the taxes, and the sale of the property, shall be presumed regular, and such deed shall be prima facie evidence of title in the grantee."

At the trial the plaintiff, the holder of the tax deed, was given the benefit of this legislation, as his deed was treated as making out a prima facie right to recover, and the evidence upon which the questions in the case arose was put in by the defendant.

It was, indeed, contended by the plaintiff in the court below, and likewise in this court, that the irregularities or disregard of law which, in the opinion of that court, invalidated the tax sale, had to do with proceedings which the act of 1865 protected from inquiry, and in respect to which it made the tax deed absolute evidence; and that, therefore, the subsequent legislation declaring the effect of the tax deed, as evidence, to be merely prima facie, was unconstitutional and ineffective so far as the plaintiff was concerned, he having received his deed before the enactment of the latter law.

Courts of high authority have held that mere rules of evidence do not form part of contracts entered into while they are in force, and that it is competent for the legislature to, from time to time, change the rules of evidence, and to make such change applicable to existing causes of action. Rich v. Flanders, 39 N. H. 304; Howard v. Moot, 64 N. Y. 262; Kendall v. Inhabitants of Kingston, 5 Mass. 524; Com. v. Williams, 6 Gray, 1; Goshen v. Richmond, 4 Allen, 458.

"It must be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens, and generally, in legal contemplation, they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden." Cooley, Const. Lim. (Ed. 1878) 457.

But as the court below held that, if and so far as the legislature had the power to and did make the tax deed conclusive evidence of title, the legislature had no power, as against a purchaser under that law, to make the deed, by a subsequent enactment, prima facie only, it is not necessary for this court to consider whether we can adopt that view of the question.

The court held that, even if the act of 1887 could not constitutionally avail, as against the plaintiff, to change the evidential effect of the tax deed, yet that the act of 1865 could not operate to prevent the defendant from showing that she had no notice, actual or constructive, of the tax sale. Forster v. Forster, 129 Mass. 559.

The view of the court was that notice of

the sale was an essential part of the proceedings; that the legislature did not have the power to make the tax deed conclusive evidence of the fact; that there must be an opportunity given for investigation and trial; and that the legislature cannot, under the pretense of prescribing rules of evidence, preclude a party from making proof of his right by arbitrarily and unreasonably declaring that, on some particular circumstance being shown by the other party, the controversy is closed by a conclusive presumption in favor of the latter.

Without going at length into the discussion of a subject so often considered, we think the conclusion reached by the courts generally may be stated as follows: "It is competent for the legislature to declare that a tax deed shall be prima facie evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity; and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land."

183 Mr. Cooley sums up his examination of the cases on this subject in the following statement: "That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful. The attempt is a plain violation of the great principle of Magna Charta, which has been incorporated in our bill of rights, and, if successful, would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law or of justice. It is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the possible jurisdictional facts which would make out title. But the legislature might doubtless make the deed conclusive evidence of * * * everything except the essentials." Cooley, Tax'n, (Ed. 1886,) 521.

This brings us to a consideration of the matters put in evidence by the defendant, going to overthrow the prima facie presumptions created by the tax deed. There were two. The land in question was admitted to belong to Ida J. Hanthorn, and that fact was found by the court below; but on the delinquent tax roll the property is alleged to belong to Ida J. Hawthorn, and it further appears by the return of the sheriff that the property was advertised and sold as the property of Ida J. Hawthorn.

It was the opinion of the court below that due and reasonable notice of the sale of property for a delinquent tax is necessary for the validity of such sale, and that the fair meaning of the Oregon statutes regulating judicial sales and sales for taxes is that the name of the owner of the lands to be sold shall appear in the notice of sale; and the court was further of the opinion that to give notice that the property of Ida J. Hawthorn was to be sold was not only not notice that the property of Ida J. Hanthorn was to be sold, but was actually misleading, and that such want of notice or misleading notice vitiated the sale.

It is contended, on behalf of the plaintiff, that the statute does not require that the notice should name the owner or name him correctly; that it is sufficient to correctly describe the property which is to be sold; and 184 that, at any rate, the notice in the present case was sufficient within the meaning of the rule of idem sonans.

We agree with the court below in thinking that the reasonable meaning of the statutes regulating notices and sales of property for taxes is that such notice and advertisement should give the correct names of those whose property is to be sold. While the statutes do not in terms say that the names of the owners should be published, yet such would seem to be the fair presumption, and the present case shows that such was the construction adopted by the officials, as they did name, though incorrectly, an owner in the notice.

These questions have been determined, so far as the laws and constitution of Oregon are concerned, by a recent decision of the supreme court of that state in the case of Strode v. Washer, 17 Or. 50, 16 Pac. Rep. 926. In that case it is held that, in an action to determine the title to land claimed under a tax deed, evidence can be received to show that the assessment claimed to have been made was void, in that the property in dispute had been assessed with other property not owned by the defendants, and the value of all fixed at a gross sum, and that it was error to exclude such evidence, even under a statute making a tax deed evidence of the regularity of an assessment; and it was further held that the amendment of 1887, changing that feature of the act of 1865 which made a tax deed conclusive evidence of the regularity of the levy, assessment, collection of taxes, and sale of the property, did not impair the obligation of contracts as to purchases made prior to the amendment, but simply changed the rule of evidence.

This decision was not made till after the trial of the present case in the circuit court of the United States; but, in the absence of any previous decision by the supreme court of Oregon to the contrary, we regard it as a conclusive construction of the meaning and effect of the state statutes in question. We also concur with the court below in thinking that, by no reasonable application of the rule of idem sonans, can the name of Ida J. Hawthorn be deemed equivalent to that of Ida J. Hanthorn.

*185

*Another particular in which it is claimed on behalf of the defendant there was a disregard of law invalidating the sale is found in the assessment of the two lots 3 and 4, in block E, as one parcel. The statute prescribes that the assessor shall set down in the assessment, in separate columns, "a description of each tract or parcel of land to be taxed, specifying, under separate heads, the township, etc., or, if divided into lots and blocks, then the number of the lot and block;" and the contention is that grouping the lots and fixing the valuation in a gross sum was not a valid assessment. Such a question was considered by the supreme court of Oregon in the case of Strode v. Washer, heretofore cited. There an assessment was held to be a nullity, which included several lots of land belonging to different owners in one valuation; and the court said: "What the effect would be where the lots so assessed all belong to the same party, we express no opinion."

The effect of this irregularity does not seem to have been considered by the court below, and in view of the expression of the supreme court of the state just quoted, withholding any opinion as to the effect of this defective mode of assessment, we do not feel disposed to base our decision upon it.

As, however, we think that the court below did not err in permitting the defendant to impugn the tax title by showing that the name of the owner was wrongly given in the delinquent tax roll, and in the notice and publication, and in holding that the sale was thereby invalidated, it follows that its judgment should be affirmed.

Mr. Justice BREWER did not sit in this case, nor take any part in its decision.

(147 U. S. 486)

In re HAWKINS.

(January 30, 1893.)

SUPREME COURT—JURISDICTION—MANDAMUS TO CIRCUIT COURT OF APPEALS.

The supreme court of the United States has no jurisdiction to issue a writ of mandamus to the circuit court of appeals to compel it to receive and consider new proofs in an admiralty appeal in a cause which is within the legitimate jurisdiction of that court.

Application in behalf of John P. Hawkins for leave to file a petition for a writ of mandamus to the circuit court of appeals for the second circuit, and the judges thereof, commanding them to receive and duly consider certain depositions or further proofs taken by petitioner on appeal in the case of John P. Hawkins, libelant and appellee, against the yacht Lurline, (William B. Whetmore, claimant and appellant.) The depositions in question were stricken out on the motion of the appellant, the circuit court delivering the following per curiam opinion:

"Motion granted for the reason that the testimony taken on deposition in this court was available to libelant on the trial in the district court, witness and books being both present there; that it does not appear that he was prevented from presenting such testimony except by his own choice; that he was as well informed as to its materiality under the issues when he closed his case as he is now, and was expressly notified by respondent's motion to dismiss that the latter contended libelant's proof as to the amount of labor performed was insufficient."

Geo. A. Black, for petitioner, (brief originally filed in the circuit court of appeals in opposition to motion to suppress further proofs, and now attached to the petition.)

This motion is based upon the statement that the libelant was examined as a witness in the district court, and his counsel, the other witness, was present at the trial in the district court. The transcript of record shows that the district judge ordered the counsel to examine the books of the libelant out of court, or at least out of the presence of the district judge. The further proofs show that this was done, and with what result. Counsel for the libelant does not base his right to take these further proofs alone on this circumstance. He claims an absolute and unqualified right to examine any witnesses on this appeal, and without any leave of any court; and, in order that the libelant's position may be fully understood, a review is here presented of the laws governing admiralty trials on appeal.

By the judiciary act of 1789, c. 20, § 30, (1 St. at Large, p. 89,) it was provided: "And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court, and, if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment they are unable to travel and appear at court; but not otherwise."

It is clear from the above extract that in an appeal in admiralty the personal attendance of all the witnesses in the circuit court was required, and was not excused except under very special circumstances. Pursuant to the provisions of this statute, the supreme court made the rule now known

as "Rule 50" of its admiralty rules at December term, 1851, (see 13 How. vi.,) which reads as follows:

"When oral evidence shall be taken down by the clerk of the district court pursuant to the above-mentioned section of the act of congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the deposition of the same witnesses, or either of them, if he should so elect."

The apparent conflict between this rule and the above act, which excused the attendance of the witnesses in the circuit court on an appeal in admiralty only under the very special circumstances mentioned, is reconciled by reference to the provisions of chapter 188 of the act of the 23d of August, 1842, § 6, (5 St. at Large, p. 518,) which conferred upon the supreme court power "to prescribe and regulate and alter the forms of writs and other processes to be used in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings in suits at common law or in admiralty and equity pending in the said courts, and also the forms and modes of taking and obtaining evidence," etc. Under this authority the supreme court, at December term, 1844, promulgated 46 admiralty rules, (see 3 How. iii.,) and rules 47 and 48, (originally 48 and 49,) at December term, 1850, (see 10 How. v.,) and rules 49 and 50, (originally 50 and 51,) at December term, 1851, (see 13 How. vi.) So the law and rule remained until the enactment of the United States Revised Statutes in 1872, when by section 861 it was provided:

"The mode of proof in trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," (i. e. having reference to examinations on commissions or de bene esse.)

Section 862: "The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein specially provided," (i. e. proof by deposition or on commission.)

In the case of Blease v. Garlington, 92 U. S. 1, the supreme court held that the act of 1789, in relation to the oral examination of witnesses in open court under section 30, c. 20, was not expressly repealed until the adoption of the Revised Statutes, § 862. Such being the condition of the law, the supreme court, in December term, 1870, passed upon the case of The Mabey, 10 Wall. 419, in which Judge Nelson said:

"No excuse is shown in the papers on which the motion is founded why the witnesses named and proposed to be examined were not examined in some one of the courts below before the hearing there. * * * Page 420. Instead of taking proofs in the cause in the courts below, and there thoroughly trying it, much of the evidence could safely be omitted, relying on the new evidence in this court. There is no hardship upon the parties in guarding against the abuse with great care and strictness, as they have two opportunities to procure the attendance and examination of the witnesses before they come here on appeal: First, before the district court, and again before the circuit."

The Mabey was again before the supreme court on an application for a commission to take the testimony of certain witnesses named, (13 Wall. 739;) and at page 741 Clifford, J., said: "Commissions for such a purpose cannot be allowed, as of course, under the twelfth rule, as it would afford an inducement to parties to keep back their testimony in the subordinate courts, and the effect would be to convert this court into a court of original jurisdiction. Admonished to that effect by the prior decision of this court, the parties have filed with the present application an affidavit as a compliance with that requirement. Unsettled as the practice was prior to that decision, the parties are right in supposing that this court would entertain a second application in the same case." The court thereupon shows that the party asking for the commission agreed that they would not introduce any testimony in the case, and that they did not introduce any in the district court, and did not appeal from the decree, and the motion was therefore denied.

AN ADMIRALTY APPEAL IS A NEW TRIAL.

The Charles Morgan, 115 U. S. 75, 5 Sup. Ct. Rep. 1172: "In The Lucille, 19 Wall. 74, it was decided that an appeal in admiralty from the district to the circuit court has the effect to supersede and vacate the decree from which it was taken. A new trial completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated; a trial in which the judgment of the court below is regarded as though it had never been rendered." The Hesper, 122 U. S., 226, 7 Sup. Ct. Rep. 1177; Id., 18 Fed. Rep. 696. And so this court construed the jurisdiction given to it by the act of March 3, 1891, c. 517, (Supp. to Rev. St. 501.) Pettie v. Tow-Boat Co., 49 Fed. Rep. 468, 1 C. C. A. 314; The Havilah, 48 Fed. Rep. 684, 1 C. C. A. 77. See, also, The State of California, 49 Fed. Rep. 172, 1 C. C. A. 224.

In The Morning Star, 14 Fed. Rep. 866, Judge Drummond says: "The general rule is that when an appeal is taken from a decree in admiralty it suspends the decree of the district court, and the case proceeds de novo in the circuit court. The libelant is, as he was in the district court, the actor in the case. He still has the affirmative, and must make out the allegations of his libel. * * * It is also a matter of every-day

practice for additional evidence to be taken on both sides in the circuit courts, and that testimony may entirely change the case as it stood before the district court. It is true that one of the circuit judges of this circuit, in the case of The Saunders, 23 Fed. Rep. 303, suppressed the evidence of witnesses who had been examined in the district court, but it is obvious that in doing so he overlooked the provisions of the statutes above quoted, and of rule 50 of the admiralty rules of the supreme court.

In the case of The Stonington, 25 Fed. Rep. 622, Blatchford, J., (then a judge of the supreme court,) said: "As to those two, [i. e. two witnesses examined in the district court,] the ruling in The Saunders must be applied so long as it stands unreversed by the supreme court."

HOW AN ADMIRALTY SUIT IS TO BE TRIED.

By what is called the "Short Practice Act," chapter 21, 1789, (1 St. at Large, p. 93,) it was provided, (section 2:) "And the forms and modes of proceedings in courts of equity and of admiralty and maritime jurisdiction shall be according to the course of the civil law." By chapter 36 of 1792 (1 St. at Large, p. 276) it was provided, (section 2:) "That the forms of writs, executions, and other process, except their style, and the forms and modes of proceedings in suits, * * * in those of equity and in those of admiralty and maritime jurisdiction [shall be] according to the principles, rules, and usages which belong to courts of equity and admiralty, respectively, as contradistinguished from courts of common law, subject, however, to such alterations and additions as the said courts, respectively, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same."

This provision has been incorporated into section 913 of the Revised Statutes in this form: "The forms of mesne processes, and the forms and modes of proceedings in suits of equity and admiralty and maritime jurisdiction in the circuit and district court, shall be according to the principles, rules, and usages which belong to courts of equity and admiralty, respectively, except when it is otherwise provided by statute."

In The Francis Wright, 105 U. S. 384, the court was considering the constitutionality of the act of 1875, limiting the review in the supreme court to the law, and said: "Undoubtedly, if congress should give an appeal in admiralty cases, and say no more, the facts, as well as the law, would be subject to review and retrial. * * * The constitution prohibits a retrial of facts in suits at common law where one trial has been had by a jury, (Amend. art. 7;) but in suits in equity or in admiralty congress is left free to make such exceptions and regulations in respect to retrials as on the whole may seem best."

Has the act of March 3, 1891, which creates this court, repealed any of the provisions of the Revised Statutes, or given this court power to repeal them, or to change the practice in respect to the competency of witnesses and modes of giving evidence on admiralty appeals?

It is self-evident that a very substantial right has been taken from the suitor in an admiralty court (and for the purposes of the appeal in admiralty this court of appeals is an admiralty court) if he has been deprived of his right to examine his witnesses, and to have a trial de novo, completely de novo, on his appeal, because, as to certain of the witnesses whom he wishes to examine, they may happen to have been called by him, and examined as to some matters in the district court, or called by his adversary, and examined as to some matters in the district court.

By its ruling and decision in Insurance Co. v. The Venezuela, 52 Fed. Rep. 873, this court suppressed the depositions of Mr. Dallas, a witness called by the libelant Merritt in a suit brought by him against the Venezuela, to which suit the Insurance Company of North America was not, in any sense, a party, because the district judge had seen fit, in his discretion, to order those two suits to be tried together. The practice adopted turns an admiralty appeal into a motion for a new trial, and destroys the distinction between common law and admiralty, so pointedly made by the statute and recognized and enforced by the decisions of the supreme court, (The Charles Morgan, 115 U. S. 75, 5 Sup. Ct. Rep. 1172,) and which is followed in all the other circuits, and which has existed since the act of 1789, and was then only a declaration of the law existing for ages. If this court should say that no colored person should be examined as a witness in an admiralty appeal, or that no person who had any interest in the event of the suit should be qualified as a witness, it would repeal section 858 of the Revised Statutes, and it would have just as much right to do so as to say that the libelant should not re-examine any witness he saw fit to on his appeal. It will be remembered that there is no provision of law for the taking down of testimony given orally in the district court, unless, under rule 50 of the supreme court rules, it shall be taken down by the clerk, for the reason stated in section 30, c. 20, of 1789. It will be remembered that an exception to the exclusion of evidence by the district judge is unavailing on an admiralty appeal, which is a new trial, and not a review of what the district judge did or ruled. Unless authority can be found in the act creating this court for doing so, it had no authority to make the admiralty

rules promulgated by it to take effect July 1, 1892; and the only color of authority which can be found is section 2 of that act, in the words: "Such courts shall prescribe the form and style of its seal, and the form of writs and other process and procedure, as may be conformable to the exercise of its jurisdiction as shall be conferred by law. * * * The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law." Section 11: "And all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals."

Unless in the words "'procedure' as may be conformable to the exercise of its jurisdiction" there lies hidden away a gift of power, this court is powerless to do what it has done, and before examining what is intended by the word "procedure" it may be well to suggest that a repeal by implication is never favored and never admitted when the former can stand with the new act. Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. Rep. 255; Chicago, M. & St. P. Ry. Co. v. U. S., 127 U. S. 406, 8 Sup. Ct. Rep. 1194.

What is included in the term "procedure," as used in the act of 1891?

In section 914 of the Revised Statutes, in which the practice, etc., in circuit and district courts in common-law actions is made to conform to the practice in the state courts, the words used are, "the practice, pleadings, and forms and modes of proceeding." The words "practice" and "forms and modes of proceeding," as here used, would seem to be synonymous with "procedure" as used in the act of 1891.

In Nudd v. Burrows, 91 U. S. 426, the reasons for and object of the provisions of section 914 are described as follows: "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the federal and state courts of the same locality." The United States judge below commented on the evidence, and it was claimed that, as the state practice prohibited this, it was error to do so. The court said, (page 442:) "The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding, within the meaning of those terms as found in the context."

In Beardsley v. Littell, 14 Blatchf. 102, Judge Blatchford decided that in an action at law in the federal court a defendant cannot before trial be examined as a witness for plaintiff out of court, although such examination is provided for by the statute of New York in suits in the courts of that state. He says at page 105: "It may well be doubted whether there is anything in section 914 which applies to the subject of evidence of witnesses, either as to its character or competency or the mode of taking it. The expression, 'practice, pleadings, and forms and modes of proceeding,' is well satisfied without including in it the subject of evidence. At all events, it cannot be regarded as covering matters connected with the subject of the evidence of witnesses, which are regulated by specific provisions of law found in the same title of the same statute."

In Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724, the supreme court held that, where the action had been commenced in the state court, and an order had been granted for examination before trial, and the examination commenced, pending which the suit was removed to the circuit court, the latter tribunal had no power to continue the examination. Mr. Justice Miller says, (page 720, 113 U. S., and page 727, 5 Sup. Ct. Rep.:) "The case before us is eminently one of evidence and procedure. The object of the order is to procure evidence to be used on the trial of the case, and this object is effected by a proceeding peculiar to the courts of New York, resting alone on a statute of that state;" and the court reversed the order of the circuit court, which allowed the examination as justified by section 914,—as a "mode of procedure."

In Railroad Co. v. Horst, 93 U. S. 291, the court, reaffirming Nudd v. Burrows, held that the provisions of a state law requiring the jury to answer special interrogatories, in addition to their general verdict, are not within the intent and meaning of section 914, and also that a motion for a new trial is not a mere matter of proceeding or practice, and therefore not within the meaning of the section.

In re Chateaugay Ore & Iron Co., 128 U. S. 544, 553, 9 Sup. Ct. Rep. 150: "We are of opinion that the practice and rules of the state court do not apply to proceedings in the circuit court, taken for the purpose of reviewing in this court a judgment of the circuit court, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions are not within the 'practice, pleadings, and forms and modes of proceeding' in the circuit court, which are required by section 914 of the Revised Statutes to conform." Page 554, 128 U. S., and page 153, 9 Sup. Ct. Rep. "The object of section 914 was to assimilate the form and manner in which the parties should present their claims and defense in the preparation for the trial of suits in the federal courts to those prevailing in the courts of the state."

Sage v. Tauszky, (U. S. Cir. Ct. Dist. Ohio, Dec. 1877,) 6 Cent. Law J. 7, held that section 914 has no application to the manner of taking depositions in federal courts. It was claimed that section 914 modified or repealed sections 863–865. Swing, J.: "It is

a settled rule of law that a more ancient statute will not be repealed by a more modern one unless the latter expressly negatives the former, or unless the provisions of the two statutes are manifestly repugnant." "It will be observed that this latter act does not, in terms, repeal the former acts upon this subject, nor does it in terms provide when, or the mode in which, a deposition shall be taken. It is only, therefore, by the construction which shall be given to the general terms 'practice, pleadings, and forms and modes of proceeding' that we are to determine whether, when, and how a deposition may be taken, as provided for by this latter statute." "The supreme court of the United States, in Nudd v. Burrows, 91 U. S. 426, held that these terms did not include the manner in which the judge, in the trial of a cause, should instruct the jury, or what papers should go to the jury; and the decision was reaffirmed in Railroad Co. v. Horst, 93 U. S. 291. In the recent case of Beardsley v. Littell, 4 Cent. Law J. 270, 14 Blatchf. 102, decided in the United States circuit court, southern district of New York, by Judges Johnson and Blatchford, it is said by the court: 'It may well be doubted whether there is anything in this act which applies to the subject of the evidence of witnesses, either as to its character, competency, or the method of taking it.' And in our own administration of the law we have always held that it did not embrace the mode of examination of witnesses upon the stand, and have ruled in accordance with the doctrine of Railroad Co. v. Stimpson, 14 Pet. 461, and Houghton v. Jones, 1 Wall. 702, that the cross-examination of a witness must be confined to the facts and circumstances stated in his direct examination, which is in direct opposition to the doctrine of the supreme court of this state as announced in Legg v. Drake, 1 Ohio St. 286."

References to English authorities on admiralty procedure are always misleading unless the jealousy which prevented the expansion of the admiralty court, and strangled its jurisdiction and stunted its growth, and gave the common-law courts such complete power over it in England, is constantly borne in mind. Whatever may have been their practice in regard to examination of witnesses on appeal can have little bearing in determining what should be done in this country, where from 1798 to 1842 the right and necessity of calling the witnesses in a trial of an appeal in the circuit court was regulated by statute, and remained unaltered until rules 49 and 50 were adopted by the supreme court in 1851, and remains unaltered to-day, unless section 862 of the Revised Statutes and the rules of the supreme court are deemed repealed.

Lastly. Inasmuch as the appeal in the present case was taken in April, 1892, and the admiralty rules of this court were not promulgated until July, 1892, and this court had decided (Insurance Co. v. Venezuela) that such rules did not apply to appeals taken before they were promulgated, they have no application to the present case, and the motion should be denied.

Geo. A. Black, for petitioner, (in support of application in addition to brief annexed to petition.)

Mandamus is the proper remedy. The circuit court of appeals suppressed depositions taken as "further proofs" on an admiralty appeal. Their right to do so is denied. If they had no legal power to do it, and have exceeded their jurisdiction, the remedy by mandamus is proper, and the only one the petitioner can invoke.

In re Washington & G. R. Co., 140 U. S. 95, 11 Sup. Ct. Rep. 673, Blatchford, J.: "The amount was, therefore, too small to be the subject of a writ of error from this court. The only relief which the railroad company could obtain in the premises was, therefore, by a writ of mandamus. A mandamus will lie to correct such an error [an entry of a decree, on a mandate of the supreme court, including interest where no interest had been given] where there is no other adequate remedy, and where there is no discretion to be exercised by the inferior court."

This remedy was given to compel the allowance of an appeal in Ex parte Jordan, 94 U. S. 248; Ex parte Railroad Co., 95 U. S. 221.

In Virginia v. Rives, 100 U. S. 323, the court said: "Section 688 of the Revised Statutes provides that the supreme court shall have power to issue * * * writs of mandamus in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States. * * * Its use has been very much extended in modern times. Now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. * * * One of its peculiar and more common uses is to restrain inferior courts, and to keep them within their lawful bounds."

If the circuit court of appeals had refused to receive the depositions of the witnesses named because they were persons of color, the writ of mandamus would be the proper remedy to compel them to do so, and if the statute and the admiralty rules of this court, which are referred to in the printed brief annexed to the petition herein, have given the right to take further proofs in an admiralty appeal of any witnesses, the circuit court of appeals had no right to suppress such testimony because such witnesses had been examined in the district court. As pointed out in that brief, there is no statutory method of recording the testimony of witnesses examined in the district court; and although in the southern district of New York the proctors usually agree to the employment of a ste-

nographer and the taxation of the expense thereof, there is no power to compel them to do so.

When Judge Blatchford said in the case of The Stonington, 25 Fed. Rep. 622, (extracted from at page 5 of the brief submitted by the petitioner to the circuit court of appeals annexed to his petition,) that the ruling in The Saunders must be applied "so long as it stands unreversed by the supreme court," he gave a clear intimation to the circuit judges that such ruling was not proper, and a full opportunity to the circuit court of appeals was presented in this case to correct the errors of The Saunders.

With this brief is submitted a brief of the members of the admiralty bar practicing in the southern district of New York, and who, as amici curiae, favor a consideration of the matter involved in this petition, by this court.

The action of the circuit court of appeals seems to have been based on the theory that the trial of an appeal in admiralty is not a "new" trial in the fullest sense of that word, but is some sort of a new trial, which is not a new trial for some purposes of the case. Such conclusion is in direct conflict with the decisions of this court in The Charles Morgan, 115 U. S. 75, 5 Sup. Ct. Rep. 1172, where, in interpreting the decision of the court in The Lucille, 19 Wall. 74, it said: "In The Lucille it was decided that an appeal in admiralty is a new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, a trial in which the decision of the district court is regarded as though it had never been rendered." Although in Pettie v. Towboat Co., 49 Fed. Rep. 468, 1 C. C. A. 314, in speaking of the trial of an admiralty appeal, the circuit court of appeals for the second circuit says: "We are not reviewing, as an appellate court, a question of discretion, but are hearing an appeal which is a new trial,"—yet they have shown their tendency and disposition to treat the admiralty appeal as a motion for a new trial, and have given weight and virtue to the views of the district judge on the trial in the district court as if they were reviewing, and not retrying, the case, especially so in the consideration they have given to the opinion the district judge has expressed as to the credibility of the witnesses who happened to appear before him.

In The Express, (not yet officially reported, decided by the United States circuit court of appeals for the second circuit on the 4th day of October, 1892,) 52 Fed. Rep. 890, Wallace, J., says: "Nevertheless, the learned district judge before whom the cause was tried in the court below found in substance," etc. His conclusions in these particulars cannot safely be disturbed by this court, as they involve doubtful questions of fact upon which the testimony is quite conflicting, and depending upon the credibility of the witnesses who were examined in his presence."

This court, in The Ariadne, 13 Wall. 479, (while it exercised a full appellate jurisdiction in admiralty appeals, and there was a retrial of the case before it,) reversed both the district and circuit courts on the facts, and said: "The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought, and judgment. Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect."

The circuit court judges have followed a line of authorities originating in, and confined, with a single exception, (The Gov. F. T. Nicholls, 44 Fed. Rep. 303,) to, the second circuit; and, before referring to them, counsel desires to state this proposition: In the state of New York, by statute, a second trial in an action of ejectment is a matter of right. Code Proc. N. Y. § 1525. On appeal from a justice's judgment a new trial is also a matter of right. Code, § 3068. If witnesses who were examined on the first trial happen to be dead, their testimony is competent on the second trial. N. Y. Code Proc. § 830.

Would it be sound law for a judge trying an ejectment suit for the second time, or an appeal from a justice's judgment, to allow proof of what the verdict was on the first trial, and then to instruct the jury that, the first jury having seen the witnesses, and believed or disbelieved those who are dead, whose testimony is read to the second jury, they must, as matter of law, or may, as matter of discretion, give weight to that circumstance in finding their verdict on the second trial? If such proposition of law is sound, then the circuit court of appeals and the circuit judges of the second circuit have administered sound law. If it is not, plainly they have erred; and, in considering this question, the circumstances that while the law gives the right of an admiralty appeal, and (down to the adoption of rule 49 of the admiralty rule of this court in 1851) required the production of all the witnesses in court on the trial of such appeal, that rule which deprived the parties of the privilege of producing their witnesses before the appellate court, and required their depositions to be taken instead, does not add any such penalty as has been imposed by the circuit judges. The origin of the position taken by the circuit judges seems to have been the case of Morse v. Coal Co., 36 Fed. Rep. 832. This was a decision made by Hon. E. Henry Lacombe very shortly after his appointment to the circuit bench, (to which he came from the position of corporation counsel of the city of New York, without any experience in admiralty practice,) and was followed by the decision of the same judge in the case of The William H. Vanderbilt, 37 Fed. Rep. 117, a doctrine again followed in the case of The Thomas Melville, Id. 272, by the same judge, and again adopted by him in the case of The

Sammie, Id. 908, and same doctrine was again followed by the same judge in The Excelsior, 40 Fed. Rep. 271. In The Saratoga, 40 Fed. Rep. 509, Judge Wallace also adopted the same principle. In the case of The Ludvig Holberg, 43 Fed. Rep. 117, Judge Lacombe went to the extreme length of saying that because some of the witnesses had been seen by the district judge, he would affirm his decree. He says: "Some of the witnesses who testified on this branch of the case were examined by the district judge. His decision, therefore, is affirmed."

It is apparent that the circuit court of appeals in the second circuit is straying far away from the principles of the admiralty and maritime jurisdiction in reference to the trial of admiralty appeals, and the present case presents a favorable opportunity for this court to correct their errors.

BRIEF OF AMICI CURIAE ON PETITION FOR MANDAMUS.

The undersigned, advocates in admiralty, practicing as such in the second circuit, appear as amici curiae in the above proceeding, and respectfully show to this court:

That from the foundation of the judicial system of the United States until within a few years back, under the practice on appeal in admiralty cases from the district to the circuit courts, the appellant had the right to take new testimony to be used on his appeal, when he had in his petition of appeal stated that he desired to have his appeal heard on new evidence. That such right to take new testimony on appeal was according to the ancient practice of the admiralty, and was recognized by the supreme court, which made rules regulating the mode in which such new testimony should be taken, which rules have never been repealed by the supreme court. That the statute creating the new circuit court of appeals merely provided for a review of decrees of the district court by appeal, which, of course, in admiralty cases, must be an admiralty appeal, which has always been held to be a new trial.

That the circuit court of appeals in the second circuit soon after its organization appointed a committee of the bar to propose rules for the practice of the court in admiralty cases; and that the said committee recommended the court for adoption, among others, rules governing the practice to be followed in taking such new testimony, which rules were as follows:

Rule 1: "If the appellant desires to make new pleadings or take new evidence on the appeal, his notice of appeal must so state. If the notice does not so state, the appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court on motion otherwise order."

(This rule is, in substance, rule 119 of the circuit court rules of said district. See The Montana, 22 Fed. Rep. 732.)

Rule 9: "The appellee may move this court, if he have cause therefor, that new allegations or proofs should not be offered or new relief prayed on the appeal. But such motion must be made within ten days after the service of the pleadings in this court or after notice of the new proofs proposed."

(This rule was, in substance, rule 130 of the circuit court rules of this district.)

Rule 10: "Additional testimony on appeal may be taken by the appellant at any time within thirty days after the apostles are filed, and the appellee may take his proof within twenty days after the appellant's new proofs are so taken. This period may be extended by consent of parties, or by a judge of the court upon motion."

That the said circuit court of appeals did not adopt the rules so recommended, but instead thereof adopted the following rules:

"Rule 1. The appeal shall be heard on the pleadings and evidence in the district court unless the appellate court on motion otherwise order."

"Rule 7. Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defense or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party.

"Rule 8. If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing."

That the effect of these rules is that the right to take new testimony on appeal, which the parties to an admiralty suit have always had, has been taken away, and for it has been substituted a right to apply to a judge of the circuit court of appeals for permission to take new testimony, which he may grant or refuse, at his discretion.

That in the case of Hawkins v. The Lurline the circuit court of appeals has ordered certain depositions which had been taken to be used on the trial of the appeal to be suppressed.

That the undersigned have read the brief of the advocate for the appellee in answer to the motion made to suppress such depositions, and that said brief seems to them to show that the right of the benefit of new testimony on the trial of an appeal in admiralty has been given by statute and the rules of the supreme court.

That, if such statutory right existed, it does not seem to be within the proper scope of the power of the circuit court of appeals to take it away by a rule governing its own practice.

We therefore request that the supreme court will examine into the question, and will determine whether, in admiralty ap-

peals, the parties have the right to offer upon the trial of the appeal such evidence (whether new evidence or evidence taken in the district court) as they shall see fit, or whether the taking of new evidence is a mere privilege, to be granted or not by the judge of the circuit court of appeals, in his discretion.

And that the supreme court, if it shall determine that the parties have such a right, may take such measures, by a mandamus or otherwise, as shall secure such right.

Respectfully submitted,
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Wm. Allen Butler,
of Butler, Stillman & Hubbard.

John Murray Mitchell, for respondent.

The order made by the judges of the circuit court of appeals, suppressing the further proofs, was a judicial act within the scope of their jurisdiction and discretion, and a mandamus is not the proper remedy to review their decision.

Ex parte Whitney, 13 Pet. 404, was a case where a bill in equity was pending in the circuit court of Louisiana, and the judge of such court had disregarded the rules of the circuit court of the United States in cases in chancery prescribed and ordered by the supreme court of the United States, and had ordered the proceedings to be in conformity with the rules of the courts of Louisiana. By such determination of said judge the proceeding on the bill in equity was suspended and prevented. The complainant then made this application for a mandamus to the circuit court to compel the court to proceed in the cause according to the rules of practice prescribed to the courts of equity of the United States, etc. Mr. Justice Story, rendering the opinion, said, at page 408: "That it is the duty of the circuit court to proceed in this suit according to the rules prescribed by the supreme court for proceedings in equity causes * * * can admit of no doubt. That the proceedings of the district judge, and the orders made by him in the cause which are complained of, are not in conformity with those rules and with chancery practice, can admit of as little doubt. But the question before us is not as to the regularity and propriety of those proceedings, but whether the case before us is one in which a mandamus ought to issue; and we are of the opinion that it is not such a case. The district judge is proceeding in the cause, however irregular that proceeding may be deemed; and the appropriate redress, if any, is to be obtained by an appeal after the final decree shall be had in the cause. A writ of mandamus is not the proper remedy for any orders which may be made in a cause by a judge in the exercise of his authority, although they may seem to bear harshly or oppressively upon the party."

In Ex parte Burtis, 103 U. S. 238, Mr. Chief Justice Waite, in rendering the opinion of the court, said: "This is a petition for a mandamus requiring the district judge for the eastern district of New York to compel one Eliza M. Shepherd to obey the command of a subpoena duces tecum. * * * From the petition it appears that the judge has already acted on the identical showing made to us, and for reasons assigned in writing denied a motion for an attachment against the person named for refusing to obey the subpoena. A writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, (Ex parte Railway Co., 101 U. S. 711,) nor reverse its decisions when made, (Ex parte Flippen, 94 U. S. 348.) Both these rules are elementary, and are fatal to this application. The district judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of

the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism; but we cannot by mandamus compel him to undo what he has thus done in the exercise of his legitimate jurisdiction. He was asked to punish a person for contempt in disobeying the process of the court. He decided not to do so. This action of his is beyond the reach of a writ of mandamus."

Ex parte Schwab, 98 U. S. 240, was a case where the circuit court, after due notice, had granted a preliminary injunction from prosecuting an action pending in a state court, and an application was made for an order to show cause why a mandamus should not issue, commanding and enjoining the district court for the eastern district of Michigan to vacate and set aside such injunction. Mr. Chief Justice Waite, in rendering the opinion, said, at page 241: "Mandamus cannot be issued to perform the office of an appeal or writ of error. Ex parte Loring, 94 U. S. 418; Ex parte Flippen, Id. 350. The circuit court had jurisdiction of the action and of the parties for the purpose of trying the title of the assignee to the goods. The injunction was granted in the course of the administration of the cause. * * * When the application was made for the allowance of the injunction it became the duty of the court to determine whether the case was one in which that power could be exercised. The question arose in the regular progress of the cause, and, if decided wrong, an error was committed, which, like other errors, may be corrected on appeal after final decree below. * * * Being satisfied by the petitioner's own showing that the error, if any, in the court below cannot be corrected by mandamus, we deny the motion for an order to show cause." Ex parte Taylor, 14 How. 3; Ex parte Many, Id. 24; U. S. v. Lawrence, 3 Dall. 42; Insurance Co. v. Wilson's Heirs, 8 Pet. 291; Ex parte Hoyt, 13 Pet. 279; Ex parte Whitney, Id. 404; Ex parte Newman, 14 Wall. 152.

Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. Rep. 825, was a case where the plaintiff in the suit below, believing that the judgment as recorded did not conform to the findings, moved the court to amend it in that particular. The court heard and denied the motion. An application for a mandamus was then made to require the judges of the court to amend the judgment so as to conform to the complaint in said cause and to the findings or verdict of the court rendered upon the trial of said cause. Mr. Chief Justice Waite, in rendering the opinion, said at page 175, 114 U. S., and page 825, 5 Sup. Ct. Rep.: "It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control the decision. Ex parte Flippen, 94 U. S. 350, Ex parte Railway Co., 101 U. S. 720; Ex parte Burtis, 103 U. S. 238. Here a judgment has been rendered and entered of record by the circuit court in a suit within its jurisdiction. The judgment is the act of the court. It is recorded ordinarily by the clerk as the ministerial officer of the court, but his recording is in legal effect the act of the court, and subject to its judicial control. The clerk records the judgments of the court, but does not thereby render the judgments. If there is error in the judgment as rendered, it cannot be corrected by mandamus, but resort must be had to a writ of error or an appeal. Ex parte Loring, 94 U. S. 418; Ex parte Perry, 102 U. S. 183. * * * Here the plaintiffs, believing that the judgment as recorded did not conform to the finding, moved the court to amend it in that particular. This motion the court entertained, but, being of the opinion that the judgment had been correctly recorded, refused the amendment which was asked. In this the court acted judicially, and its judgment on the motion can no more be reviewed by mandamus than that which was originally entered in the cause." See, also, Ex parte Parker, 120 U. S. 737, 7 Sup. Ct. Rep. 767; In re Sherman, 124 U. S. 364, 8 Sup. Ct. Rep. 505; In re Burdett, 127 U. S. 771, 8 Sup. Ct. Rep. 1394; Ex parte Secombe, 19 How. 9; In re Washington & G. R. Co., 140 U. S. 91, 11 Sup. Ct. Rep. 673; High, Extr. Rem. § 156; Shortt, Inform. § 295, wherein are cited: Ex parte Smyth, 3 Adol. & E. 722; Ex parte Morgan, 2 Chit. 250; Rex v. Monmouthshire, 7 Dowl. & R. 334, 4 Barn. & C. 844; Rex v. West Riding, 1 Adol. & E. 563; cf. Reg. v. Manor of Old Hall, 10 Adol. & E. 248; cf. Rex v. West Riding, 7 Term R. 467. See, also, Reg. v. Lords Commissioners of the Treasury, 10 Adol. & E. 179, 374; Reg. v. Manor of Old Hall, Id. 248.

The further proofs or depositions of the witnesses taken by the appellee were properly suppressed.

It appears by the affidavits in opposition to this motion for a mandamus that no further proof was or has been taken on behalf of the appellant to be used on his appeal. It also appears by the record and affidavits submitted herewith that one of the parties whose deposition was taken as further proofs on appeal herein was the libelant in the action brought in the district court, and that he was examined at length at the trial, and cross-examined, and that he was also recalled and examined again on his own behalf. It also appears that the claimant made motions to dismiss the libel at the close of the trial on the ground that there was no competent proof of the amount of the services rendered and materials furnished as claimed in the libel. That during the trial the claimant made the same objections thereto, and that the libelant was fully advised at the trial of the action of the position which

claimant took. It also appears that the learned counsel for the petitioner in this application, who was also proctor and counsel for the libelant at the trial in the district court, was present at such trial, and his deposition, which was taken as further proofs herein, was simply for the purpose of changing the printed record as made to circuit court of appeals. It also appears by the second and opposing affidavit that this testimony should have and could have been offered below as to all the matters which were attempted to be introduced in such further proofs, and nothing but gross carelessness or ignorance could have caused the omission of such. It will also appear that an attempt was made by claimant to dismiss the appellant's appeal on the ground of nonprinting of papers, and after the cause had been ordered on the calendar upon such motion, and set down for argument, and also after the printed record of appeal had been served upon the libelant's counsel, and after the brief of claimant's counsel had been served upon him. That it was not until after all this was done that an attempt was made on petitioner's behalf to take further proofs. In view of these facts, we most respectfully submit that the learned judges of the circuit court of appeals most properly granted the application to suppress the testimony.

We think it hardly necessary to cite any authorities upon this case beyond the very able and elaborate opinion of Mr. Justice Wallace in the case of Insurance Co. v. The Venezuela, 52 Fed. Rep. 873. The following are to the same effect:

The Saunders, (Cir. Ct. S. D. N. Y. 1885, opinion per Wallace, J.,) 23 Fed. Rep. 303, was a case where the appellee moved to suppress the depositions of witnesses taken by appellant in the circuit (appellate) court on the ground that the witnesses were present at the hearing below at the instance of appellant, but were not then examined. It was insisted that the party should not be allowed to produce upon appeal testimony which he had deliberately withheld in the court below. Wallace, J., says: "Although appellate courts in admiralty treat an appeal as a new trial, and exercise great liberality in permitting new proofs and new pleadings in furtherance of justice, they are not constrained by any arbitrary rules which require them to receive testimony which ought to have been produced, but was not produced, in the court of original jurisdiction." Citing The Mabey, 10 Wall. 419; Id., 13 Wall. 738; The Boston, 1 Sumn. 331; Coffin v. Jenkins, 3 Story, 120; Taylor v. Harwood, 1 Taney, 438; Farrell v. Campbell, 7 Blatchf. 158.

The Stonington and The Wm. H. Payne, (Cir. Ct. E. D. N. Y. 1885, per Blatchford, J.,) 25 Fed. Rep. 621, was a case where at the trial libelant produced two witnesses. The claimants put in no testimony. Decree for libelant. Claimants appeal from decree, their petition stating that they seek a new decision on proofs formerly offered, and on other proofs to be introduced in the circuit court, etc. Each claimant had the deposition of certain witnesses taken on the appeal. Before their examination was begun the libelant entered on the record an objection to the taking of any testimony on the part of claimants, on the ground that they had taken no testimony in the court below, although these same witnesses were then present or procurable. It appeared from the record that two of these witnesses had been present at the trial in the district court. Their depositions were excluded, on the authority of The Saunders, 23 Fed. Rep. 303. Nothing was shown as to whether the other witnesses examined had been present at the trial or not. The depositions of these witnesses were admitted.

In The Mabey, 10 Wall. 419, claimant appealed from decree for libelant, and moved before the supreme court for a commission to take further evidence to be used in the court on the hearing. His moving affidavits set forth that certain witnesses were material and necessary ones, without whom the appellant could not safely proceed to trial, as he was advised by counsel, etc. The court denied the motion, saying that some satisfactory excuse should have been shown for failure to examine witnesses in the court below; such as that the evidence was discovered when too late to procure their examination, or that the witnesses had been subpoenaed and failed to appear, and could not be reached by attachment, etc. See, also, 13 Wall. 738.

Singlehurst v. La Compagnie Generale Transatlantique, 50 Fed. Rep. 104, 1 C. C. A. 487, is the latest decision on this subject by the circuit court of appeals, having been decided January 18, 1892. Mr. Justice Lacombe, writing the opinion, says: "This is a motion to suppress certain testimony taken in this court by the libelant and appellants in an admiralty suit, after appeal from the district court under the forty-ninth rule in admiralty. All of the witnesses whose testimony is the subject of this motion were accessible to the appellants, and could have been called by them, at the trial in the district court. They are the counsel for the appellee; two of the clerks in the office of the appellee; two persons in the employ of appellants, who were present at the trial; the agent of the appellant, who was also present at the trial; and the chief engineer of the appellee's steamer, who was examined at the trial. Another item of testimony is a protest made by the master of the said steamer, a copy of which was in the hands of proctor and counsel of the libelant before the trial in the district court. It is conceded that up to the time this motion was argued no reason was shown, or attempted to be shown, either on the record or other-

wise, why these supposed matters of evidence were not produced at the trial in the court below. No new allegations or amendments have been made in the pleadings. Appellate courts in admiralty treat an appeal as a new trial, in which new pleadings and new proofs are permitted in furtherance of justice. But it is not a matter of course to allow parties who have withheld evidence available to them in the district court to present such evidence on appeal. Such was declared to be the law of this circuit in The Saunders, 23 Fed. Rep. 303, and The Stonington and The Wm. H. Payne, 25 Fed. Rep. 621. It is unnecessary to add anything to the discussion of this question in the case of The Saunders. The decision therein seems to be in entire accord with the authorities, and, when objection is raised, the party offering the new evidence should show some good reason, if any, why it was not produced before."

It was within the proper scope of the power of the circuit court of appeals to make the rules promulgated to take effect July 1, 1892, so far as they affect the procedure in taking new proofs on appeal in admiralty cases.

The learned counsel for the petitioner, as will appear by his brief, in support of petition for mandamus, on page 5, has thought it necessary to criticise the judicial decision and determination of one of the learned judges of the circuit court of appeals, a lawyer who has occupied one of the most important legal positions in the city of New York, and who, as a lawyer and as corporation counsel, and as a judge of the circuit court and of the circuit court of appeals of the United States, has always sustained the highest respect, esteem, and approval of the whole bar of the city of New York. Though the application is primarily made for a mandamus to reverse a certain order suppressing testimony, and which, of course, would only affect the respondent in this case, the learned counsel for petitioner has gone intentionally out of his way in this application, not only to assail the rules passed by the circuit court of appeals, but to assail personally the honorable judges or a judge thereof. It is for this reason that we have entered into a discussion of this point, and for this reason alone, as we believe that the consideration of the legality of the rules of the circuit court of appeals are not involved in this application. This last fact is admitted by the learned counsel for the libelant in this motion, as he claims such rules have no application to this case.

Section 917 of the Revised Statutes of the United States provides as follows: "The supreme court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writ and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discoveries, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit and district courts."

Section 918 of the Revised Statutes of the United States provides as follows: "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice, and the prevention of delays in proceedings."

Section 862 of the Revised Statutes of the United States provides as follows: "The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein specially provided."

The petitioner, and also the learned amici curae, who have thought fit to submit the brief on the petitioner's application herein in regard to the rules which the circuit court of appeals for the second circuit have adopted, (though these rules are not in any wise involved in the application before this court,) have taken the position that the taking of further proof or testimony on an appeal from the district court to the circuit court, or from the district court to the circuit court of appeals, as is now provided in admiralty cases, was a right to which they were entitled as a matter of course, and that the testimony of any witnesses, and of whatever nature, might be taken, and that, having been so taken, it must be received and accepted in evidence by the court on such appeal, and that there was no discretionary power in the appellate court as to what the nature of this further testimony should be, or what witnesses should be examined.

The learned counsel for the petitioner herein virtually admits that a long line of decisions of the circuit court and of the circuit court of appeals since it has been organized and of the supreme court of the United States, (upon whose rules the circuit court of appeals are modeled,) have been entirely erroneous, and that the judges of such courts have erred from the mysterious and somewhat undefined rule of practice or procedure in the admiralty courts, and have somewhat revolutionized them, and conformed them to the present age and progress of civilization. Though the learned counsel has submitted a brief in which the leading members of the

admiralty bar of the second circuit have joined, any authority or law showing that the right to take further proof or testimony on an appeal from the district court to the circuit court, or from the district court to the circuit court of appeals, is a matter of right in any and all cases. The right to take such further proof or testimony on such an appeal is not granted by the Revised Statutes of the United States; neither is it granted by the supreme court in the rules prescribed by it for admiralty cases.

Section 913 of the Revised Statutes of the United States prescribes as follows: "The form of mesne process, and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit court and district courts, shall be according to the principles, rules, and usages which belongs to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute, or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

Section 698 of the Revised Statutes of the United States provides, upon appeals to the supreme court, that in admiralty and prize cases new evidence may be received.

Subdivision 2 of rule 12 of the supreme court provides as follows, (3 Sup. Ct. Rep. ix.:) "In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence or testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within 20 days from the service of such notice: provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible."

Rule 49 of the rules of practice for the courts of the United States in admiralty and maritime jurisdiction on the instance side of the court in pursuance of the act of the 23d of August, 1842, c. 188, provides as follows: "Further proof taken in a circuit court upon an admiralty appeal shall be by deposition taken before some commissioner appointed by a circuit court, pursuant to the acts of congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles travel: provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required."

By a careful reading of the foregoing citations it will appear that the only statutory authority for allowing new evidence to be received on appeal as a matter of right is that conferred by section 698 of the Revised Statutes, which refers only to the supreme court of the United States. Rule 12 of the supreme court simply applies to that court, and provides that in all cases of admiralty jurisdiction, where new evidence shall be admissible, it shall be taken in the manner prescribed by such rule. Rule 49 of the admiralty rules of the supreme court simply provides that further proofs taken in the circuit court upon an admiralty appeal shall be taken in the manner therein prescribed; that is to say, such further proofs as shall be admissible. By reference to section 913 of the Revised Statutes of the United States it appears that a provision is made for proceedings in admiralty where other provision is not made by statutes or by rule of court, and that by such section it is provided that the principal (rules) and usages which belong to courts of admiralty shall govern where no other provision is made.

It thus appears that the only authority for taking this further proof on appeal from the district court to the circuit court or to the circuit court of appeals is based upon the former principles, rules, and usages of admiralty. Mr. Justice Story in the case of The Boston, in 1 Sumn. p. 328, says, at page 331: "For it is the well-known usage of admiralty courts, even after an appeal, in fit cases, in their discretion, to allow either party to file new allegations and proofs; 'non allegata allegare et non probata probare.' There is a restriction too often forgotten in practice, —'modo non obstet publicatio testium,'—the effect of which is to exclude new testimony to the old articles, where any has been already offered, and to confine it to the new articles, or to those of which no proof was formerly given. This restriction is founded upon the same principles as the chancery practice not to admit, after the publication

of the testimony, any new proofs, and was probably derived from a common source,—the civil law." Citing 1 Browne, Civ. & Adm. Law, p. 449; 2 Browne, Civ. & Adm. Law, p. 436.

In 1 Browne, Civ. & Adm. Law, the following appears: "It remains to be observed that the proceedings in causes of appeals from grievances are similar to those in appeals from definitive sentence, as to contestation of suit, conclusion, and other judiciary and ordinary acts, and, if the principal or original cause be plenary or summary, so will also be the cause of appeal, save only that all the proceedings before the court of delegates are summary. There is, however, one remarkable exception to this similarity of proceedings in appeals from gravamina and from definitive sentence, which is that in the former the party is not allowed 'non allegata allegare' and 'non probata probare.' This rule is the converse of that followed on appeals to the house of lords, and Mr. Justice Blackstone has observed that it is a practice unknown to our law, (though constantly followed in the spiritual courts,) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence never produced below. This remarkable rule that in appeals from definitive sentence either party may, 'non allegata allegare' and 'non probata probare,' is found in the Code, lib. 7, tit. 63, 4, and in the Clementines, lib. 2, tit. 8, c. 2. It is in both places restrained to new articles, 'novi articuli ex veteribus pendentes,' and 'ex illis orientes,' and 'ad causam pertinentes.' On the same article exhibited below, to which proof was adduced, or their direct contraries, no new evidence can be produced; but on those exhibited below, but not proved, there may; and so to new articles which may be exhibited, if they are not upon perfectly new matter, arise from the former, and spring out of them, and are related to the cause. The rule of 'non allegata allegandi, non probata probandi,' hath also this tack to it: 'modo non obstet publicatio testium.' The new allegation or proof, therefore, must be something which should be suggested or occasioned by the evidence already published, though it should spring out of the proceedings below."

In 2 Browne, Civ. & Adm. Law, 436, the following appears: "Another remarkable distinction between appeals from grievance and those from definitive sentence is that in the former the appellant is allowed to produce new evidence, under certain restrictions, 'non allegata allegare' and 'non probata probare,' 'modo non obstet publicatio testium;' and the proofs are confined 'novis articulis ex veteribus pendentibus, ad causam pertinentibus,' whereas the appeal from a grievance must be supported by showing the proceedings of the court, and from the very acts of the judge."

It thus appears that even under the former principles, rules, and usages of admiralty the taking of further proof on appeal was not a matter of right, but was simply a practice which had grown up by common usage from the court allowing the respective parties to take such proofs, in fit cases, as the court should deem advisable. It was occasioned by reason of the peculiar circumstances surrounding the witnesses in causes pending in such courts; it being almost impossible to have present at the trial the various witnesses who might be material and necessary for the respective parties, owing to the witnesses being seafaring men, sailing at different times from port to port, and seldom remaining long in the place where the trial usually took place. By reference to section 30, 1 U. S. St. at Large, at page 88, it will appear that this reasoning is substantiated by provisions made in such section. By such it was provided that witnesses who might not be able to be present in the appellate court in cases when an appeal could be taken might have their testimony taken by the modes provided in such section. This, of course, gave the parties appealing a full knowledge of what testimony their adversaries possessed, and was an essential element in determining whether an appeal should be taken by either.

If, then, the taking of these further proofs on appeal in admiralty court is not one of absolute right, but is one which the judges of the appellate court have a discretionary power to allow or refuse, the appellate courts necessarily have the power to provide rules for the procedure, or in what cases such testimony may be taken. The act of March 3, 1891, by which the United States court of appeals was established, by section 2 of such act, gave such court the following power: "Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. * * * The court shall have power to establish all rules and regulations for the conducting of the courts within its jurisdiction, as conferred by law."

The rule of which the petitioner here complains is rule 7 of the rules of said court, promulgated by the United States circuit court of appeals for the second circuit on July 1, 1892, which provides as follows: "Upon sufficient information shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within 15 days after the filing of the apostles, and upon at least four days' notice to the adverse parties."

Prior to this rule, a rule in force in the

circuit court of the same division was as follows: "Rule 130 of rules of appeals of the rules of the circuit court of the United States for the southern district of New York: If the appellee shall have any cause to show why new allegations or proofs should not be offered or new relief prayed on the appeal, he shall give four days' notice thereof, and serve a copy of the affidavit containing the cause intended to be shown, and such cause shall be shown within the two first days of the term; otherwise the appeal shall be allowed according to its term."

As to the right of the court to make such last above mentioned rule we have never heard any question. In fact the rule which the petitioner claims in his brief at page 2 of the brief of the amici curiae was recommended by the committee of the bar for adoption as a rule for practice of the circuit court of appeals in the second circuit was almost identically the same. That rule and the rule last above mentioned are simply a converse of the rule now in force by the circuit court of appeals. In other words, the old rule throws the initiative and the burden of proof upon the party who objected to the taking of further proofs by the other party, and compelled him to satisfy the court why such further proofs should not be taken; and then it was in the discretion of the court to refuse or allow such depositions to be taken.

The new rule as promulgated by the circuit court of appeals, on the other hand, throws the initiative and the burden of proof upon the party who desires to take such testimony to satisfy the court that it is a proper case, and then it is in the discretion of the court to grant or refuse such motion. The difference between these two rules in their result seems to us to be practically nothing. By the present rules the circuit court of appeals have adopted a practice which is more speedy and less expensive than the old practice of moving to suppress. Before any labor or expense is incurred in procuring the testimony, the court must, in its discretion, determine whether such proof can be offered.

In the present case before us it will appear that under the old rules, under which this testimony was taken, the petitioner was entitled to take this testimony, as far as the mere taking of it was concerned, and that he did take it, though the taking of the same was objected to specifically by the respondent at the time such testimony was taken; that the petitioner was obliged to incur the expense of a stenographer, and to have such proofs printed; and that then the respondent was compelled to make a motion to suppress the testimony to bring the matter properly before the court. Then it became the duty of the court, in its judicial discretion, to say whether, although this testimony had been taken, the petitioner should have taken it, and whether it should be admitted in evidence. See rule 21 of the circuit court of the northern, southern, and eastern districts, promulgated May, 1885; also rule 25, to same effect; rule 130 of rules 1884.

We think that no other conclusion can be arrived at than that the new rule which has been adopted by the circuit court of appeals for the second circuit is most beneficial in all respects, and a vast improvement over the old proceeding in matters of this character. In fact it is almost identical with that of the supreme court, (rule 12.) The learned counsel for the petitioner, in his brief on this motion for the suppression of the testimony, entered into a long discussion as to the meaning of the word "procedure" as used in the act of 1891, and argued that the term "procedure," as used in the act of 1891, is to be taken as synonymous with the phrases, "practice," "pleadings," and "forms," and "mode of proceeding," as used in section 914 of the Revised Statutes of the United States, and endeavors to show on the authority of certain cases cited by him that the phrase used in section 914 of the Revised Statutes excludes rules of evidence and rules as to the modes of taking evidence, and he concludes that the circuit court of appeals has no power to make rules as to the mode of taking evidence such as the seventh rule adopted by the said circuit court of appeals.

The word "procedure" has been defined by Anderson, in his Dictionary of Law as follows: "Procedure. The body of rules, whether of practice or pleadings, whereby rights are effectuated through the successful application of proper remedies. Opposed to the sum of the legal principles which constitute the substance of the law, and also distinguished from the law of evidence. The term is so broad that it is seldom employed as a word of art; it including whatever is embraced by the three technical terms, 'pleadings,' 'evidence,' and 'practice;' 'practice' here meaning those legal rules which direct the course of proceeding to bring parties into court, and the course of the court after they are brought in; and 'evidence' meaning those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

The cases cited by counsel for petitioner do not bear him out, even assuming that the phrase used in section 914, and the terms used in the act of March 3, 1891, are synonymous. None of them really hold that the phrase "practice, pleadings, and forms and modes of proceeding" in section 914, Rev. St. U. S., excludes rules as to the methods of taking evidence and similar matters. It is also to be borne in mind in examining these cases that in the main the subjects of evidence and of the modes of taking evidence were covered by United States statutes already in force in 1872, when the provision found in

section 914 of the Revised Statutes took effect, and that for that reason section 914 could seldom apply to these subjects. Moreover, section 914 prescribes conformity to state procedural law only "as near as may be," and United States courts have regarded this phrase as widening their discretion to hold that certain matters that might commonly be understood to fall under the terms "practice" and "procedure" would nevertheless not fall within the terms of section 914.

In Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724, section 914 is held to be inapplicable, on the ground that as to the particular point in question provision is made by United States statutes, and that the state statute is thus overridden. The court appear to consider the point in question (whether a party might be examined as a witness by his adversary before trial) as falling within the language of section 914, (see page 720, 113 U. S., and page 727, 5 Sup. Ct. Rep.,) but go on to point out that such section does not apply, for the reason just mentioned.

The decision in Beardsley v. Littell, 14 Blatchf. 102, rests upon the same ground, that express United States statutes apply to the case, and so prevail over the state practice.

In Nudd v. Burrows, 91 U. S. 426; Railroad Co. v. Horst, 93 U. S. 291; and Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. Rep. 150,—the matters respectively in question are held not to fall within the terms of section 914, not on the ground that they are provisions as to the taking of evidence, but, in the first case, because the provisions of the state law were deemed "to fetter the judge in the personal discharge of his accustomed duties, and in the other cases for somewhat similar reasons; and therefore were not deemed to come within the intention and object of section 914, as conceived by the court. The court say, in the case last mentioned, at page 554, 128 U. S., and page 153, 9 Sup. Ct. Rep.: "The object of section 914 was to assimilate the form and manner in which the parties should present their claims and defense in the preparation for the trial of suits in the federal courts to those prevailing in the courts of the state." Similar views of the object of the statute are expressed in the other cases cited. It is thus seen that the courts have construed the above-quoted phrase in section 914 in a somewhat narrow sense, in view of the special purpose of the statute, and the state of things it was intended to remedy.

The language by which, in the act of March 3, 1891, establishing the United States circuit courts of appeals, these courts are empowered to provide for their own practice, is to be construed with reference to the purposes and intention of the act. The act provides, (section 2:) "Such court shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law." Also, (section 2, end:) "The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

Thus the act employs a variety of terms and expressions, including the general term "procedure;" and the intention appears to be to confer upon the court all that power to regulate its whole practice and procedure, in the broad sense of those terms, that is usually exercised by courts, and (more particularly) all power of this kind that has been exercised by the circuit and district courts of the United States. So much power, at least, must be deemed to be given by the act to the new appellate courts, unless the language of the statute be clear and unmistakable to the contrary.

Section 917 of the Revised Statutes empowers the supreme court to regulate "the whole practice" to be used in equity and admiralty by the circuit and district courts. And by section 918 of the Revised Statutes, and also by admiralty rule 46 the circuit and district courts are authorized generally to regulate their own "practice," (subject to United States statutes and to the rules prescribed by the supreme court under section 917.) As to what was intended by the language of these sections and of rule 46, and particularly by the term "practice," used therein, the practical construction which has always been given to them by the courts acting under them should have great weight. It will be seen by reference to the admiralty rules, and also to the rules of the separate circuit and district courts, that various provisions as to the methods of taking evidence and similar points were made thereby. That a long and uninterrupted practice under a statute is regarded as good evidence of its construction is a familiar doctrine. McKeen v. Delancy's Lessee, 5 Cranch, 22. Rules as to the method of taking evidence and the time when evidence shall be taken are not so much rules of evidence as of practice. It is not to be supposed that congress, by the act of March 3, 1891, intended to confer upon the new appellate courts less power in the making of rules than has always been deemed under statutes employing language substantially similar to belong to the inferior courts.

In Bryant v. Leyland, (Cir. Ct. D. Mass. 1881, per Lowell, C. J.,) 6 Fed. Rep. 125, which was an action at law, a motion was made that defendants be required to answer certain interrogatories filed in the clerk's office, in accordance with the practice of the state. The court says: "Speaking generally, the method of obtaining evidence to be used at a trial would be a part of the practice and modes of proceeding of the courts. It is so understood by congress, which gives the supreme court power to prescribe such modes of obtaining evidence and discovery as it may see fit, not inconsistent with any statute. Rev. St. § 917. This provision seems to me

to weaken very much the argument so ably presented by Judge Dyer in Easton v. Hodges, 7 Biss. 324, that the legislation of congress is intended to cover the whole subject of evidence, and to exclude it from the domain of practice altogether. * * * The practice act of 1872, § 5, (17 St. p.197,) provided that nothing in that act should alter the rules of evidence under the laws of the United States. In re-enacting this section, this proviso has been dropped, and is not to be found anywhere in the Revised Statutes. The reason for omitting it may be assumed to be that the rules of evidence are no part of the practice or forms or modes of proceeding, as they certainly are not in general, though the mode of obtaining evidence is."

But besides the question whether this is a question of practice or procedure, the authority vested in the circuit and district courts in cases of admiralty, by section 913 of the Revised Statutes, was based upon the principles, rules, and usages which belonged to the admiralty court, except as where otherwise prescribed by the rules of the supreme court; and, as we have previously shown, the supreme court has not prescribed, nor has the statute prescribed, in what cases this testimony shall be taken, and therefore the determination of the right to take this testimony, and in what cases it shall be taken, lies within the discretion of the judge of that court, according to the principles, rules, and usages of the admiralty courts.

There can be no question that there may be written rules and oral rules, and that rules may be established by a long line of decisions and practice to the same force and effect as if they were formally promulgated by the court; and the court having the power to determine by principles, rules, and usages of admiralty in what cases this testimony shall be taken, must surely have the power to promulgate it by written rules. Moreover, under the act creating the present circuit court of appeals, in cases of admiralty they become appellate courts of final jurisdiction. From such courts there is no right of appeal or writ of error or review by the supreme court. In this way they differ from the former jurisdiction of the circuit courts. The circuit courts, though of appellate jurisdiction, were merely intermediate courts, and an appeal might be taken to the supreme court. It therefore must impress itself upon this most honorable court most strongly that it is contrary to all justice and equity to hold that these circuit courts of appeals, whose decisions within their jurisdiction are final, should still be treated, in the contemplation of the act of March 3, 1891, as simply intermediate courts of appellate jurisdiction. It would be simply holding that the circuit court of appeals assumes original jurisdiction in admiralty cases, and that the appeal therein is to be tried de novo, as if there had been no trial below. It would thus be resolving those courts into courts of original jurisdiction, from which no appeal could lie. On this point we therefore most respectfully submit to this honorable court that the circuit court of appeals for the second circuit was fully empowered to make rule 7, and the subsequent ones relating thereto.

It is the well-established rule of law that on an appeal in admiralty to the circuit court involving questions of fact depending upon conflicting testimony, the decision of the district judge, who has had the opportunity of seeing the witnesses and judging from their appearance, should not be reversed, unless it clearly appears that the decision was against the weight of evidence. The Ludvig Holberg, 43 Fed. Rep. 117; The Excelsior, 40 Fed. Rep. 271; The Saratoga, Id. 509; William H. Vanderbilt, 37 Fed. Rep. 116, 118; Duncan v. The Gov. F. T. Nicholls, (Cir. Ct. E. D. La., decided in 1890,) 44 Fed. Rep. 302; Mentz v. The Sammy, 44 Fed. Rep. 624; Levy v. The Thomas Melville, 37 Fed. Rep. 271, 272; The Sammie, 37 Fed. Rep. 907, 908; Morse v. Coal Co., 36 Fed. Rep. 831, 832; Guimarais' Appeal, (Cir. Ct. E. D. Pa., 1886,) 28 Fed. Rep. 528; The Sampson, (S. D. N. Y. 1857,) 4 Blatchf. 28; The Florida, 4 Blatchf. 470, 471; The Sunswick, 5 Blatchf. 280, 281; The Grafton, (Cir. Ct. S. D. N. Y., Oct. 1846,) 1 Blatchf. 173, 178.

*490 *THE CHIEF JUSTICE. This is an application on behalf of John P. Hawkins for leave to file a petition for a writ of mandamus to the circuit court of appeals for the second circuit and to the judges thereof, commanding them to receive and duly consider certain depositions or further proofs taken by petitioner on appeal in an action pending in that court, wherein he is the libelant and appellee. The depositions in question were suppressed by the court on motion and for reasons given.

We cannot, by mandamus, review the judicial action thus had in the exercise of legitimate jurisdiction. In re Morrison, 147 U. S. 14, 13 Sup. Ct. Rep. 246; Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. Rep. 825; Ex parte Burtis, 103 U. S. 238; Ex parte Schwab, 98 U. S. 240.

Leave to file the petition is denied.

(147 U. S. 525)

In re HABERMAN MANUF'G CO.

(February 6, 1893.)

APPEAL — SUPERSEDEAS — CIRCUIT COURT OF APPEALS — MANDAMUS.

1. Upon an appeal to the circuit court of appeals under section 7 of the judiciary act of March 3, 1891, from an interlocutory decree granting or continuing an injunction, defendant is not entitled to a supersedeas as a matter of right, and it is within the discretion of the circuit court to grant or refuse the same. Lalance & Grosjean Manuf'g Co. v. Habermann Manuf'g Co., 53 Fed. Rep. 375, approved. Societe v. Blount, 51 Fed. Rep. 610, disapproved.

2. The supreme court of the United States has no jurisdiction to control by mandamus the discretion of the circuit court in granting or refusing a supersedeas upon an appeal to the circuit court of appeals from an interlocutory order granting or continuing an injunction.

Application by the Haberman Manufacturing Company for leave to file a petition for a writ of mandamus to the judges of the circuit court of the United States for the southern district of New York, commanding them to allow a supersedeas on an appeal from an interlocutory decree for an injunction against the infringement of a patent, in the case of the Lalance & Grosjean Manufacturing Company against the Habermann Manufacturing Company. See 53 Fed. Rep. 375, and also 53 Fed. Rep. 380; the latter being a report of the decision of the circuit court refusing to grant the supersedeas. Application denied.

W. H. Kenyon and C. E. Mitchell, for petitioner.

Mr. Justice BLATCHFORD delivered the opinion of the court.

On the 5th of January, 1893, an interlocutory decree was made on final hearing in a suit in equity in the circuit court of the United States for the southern district of New York, brought against the Haberman Manufacturing Company for the infringement of a patent for improvements in the manufacture of enameled iron ware. The decree held that the patent was valid, and had been infringed by the defendant, and awarded a recovery of profits and damages, to be ascertained on a reference to a master, and also a perpetual injunction. The defendant perfected an appeal to the circuit court of appeals for the second circuit from such interlocutory decree, and on the 20th of January, 1893, applied to the circuit court for a stay of proceedings in that court pending the appeal, including a stay of the injunction, and for the acceptance and approval of a supersedeas bond for that purpose, which bond, in any amount satisfactory to the court, it offered to file. But the court denied the application. The defendant now applies to this court for leave to file a petition that a writ of mandamus issue to the judges of the circuit court commanding them to approve and direct the filing of a supersedeas bond in such amount as that court shall fix, to supersede the injunction, and to enter an order vacating, suspending, or superseding the injunction, which was issued on January 5, 1893, and subsequently served.

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*It is contended for the petitioner that it is entitled, as a matter of right, to a supersedeas of the injunction pending the appeal, and that the circuit court had no discretion to refuse it. As authority for this alleged right, reference is made to section 7 of the act of March 3, 1891, c. 517, (26 St. p. 828,) which provides "that where, upon a hearing in equity in a district court or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of said appeal."

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*It is clear that this is a case in which the appeal was properly taken, and within the time limited; and it is contended for the petitioner that under section 7 it has an absolute right to a supersedeas of the injunction pending the appeal on the filing of a bond satisfactory to the circuit court. Reference is made to the case of Societe v. Blount, 51 Fed. Rep. 610, in the circuit court for the southern district of Ohio, where, a supersedeas having been allowed, on granting a like appeal a motion to vacate the supersedeas was denied, the court (Jackson, J.) saying that under section 7 there was no discretion in the court or judge allowing the same to deny or refuse the appellant a supersedeas.

The argument made is that the use, in section 7, of the words "in other respects," implies that there must be a stay as to the operation of an injunction, while the only discretion given is as to ordering a stay "in other respects" than as to the injunction. But there is no express provision that the operation of the injunction must be stayed. The matter is rested wholly on implication. The defendant is sought to be protected by requiring him to take an appeal within 30 days, and by giving precedence to the case in the appellate court; and discretion is given to the circuit court to proceed or not on the interlocutory decree pending the appeal. Where a plaintiff has an adjudication that he is entitled to an injunction, he has rights which cannot be abridged or stayed by language which is not more clear and unambiguous than that contained in section 7. The matter may be made clear by legislation. As it stands, the circuit court had a discretion to grant or refuse a supersedeas; and its discretion, as we have uniformly held, (Ex parte Hawkins, 13 Sup. Ct. Rep. 512, and cases there cited,) cannot be controlled by a writ of mandamus. Application denied.

(148 U. S. 186)

UNITED STATES v. ALEXANDER et al.

(March 6, 1893.)

No. 552.

EMINENT DOMAIN — CONSTRUCTION OF TUNNEL — DRAINING OF WELLS — DAMAGES.

1. A claim for damages by reason of the draining and destruction of a well located about 500 feet from the right of way, and not embraced in the lands taken, is within Act July 15, 1882, (22 St. p. 168,) § 1, authorizing the construction of a tunnel to supply the city of Washington with water, and providing that any person who by reason of the construction shall be directly injured in any property right may present a claim for damages to the court of claims. Manufacturing Co. v. Attorney General, 8 Sup. Ct. Rep. 631, 124 U. S. 581, 596, followed.

2. The doctrine that the draining and destruction of a well by an adjoining owner of land exercising his right to dig therein is damnum absque injuria, where the well is not supplied by a distinct vein of water, has no application where such draining and destruction is caused by the construction of a tunnel for the water supply of a city, under authority of an act of congress, over land in which a right of way only is acquired, and the act provides a remedy for such an injury.

Appeal from the court of claims.

Petition by Finella M. Alexander and Sophia L. Little to the court of claims for damages against the United States by reason of the construction of the Washington water tunnel, under Act Cong. July, 1882, (22 St. p. 168.) Judgment for petitioners. 25 Ct. Cl. 87, 329. The United States appeal. Affirmed.

Asst. Atty. Gen. Cotton, for the United States. Job Barnard and Geo. A. King, for appellee.

Mr. Justice SHIRAS delivered the opinion of the court.

The facts of this case, as found by the court of claims, (25 Ct. Cl. 87, 329,) are as follows:

Since February 28, 1880, the appellees have been the owners of a tract of land in the District of Columbia, known as lot 11 of original lot 2 of the subdivision made by the heirs of John Little of parts of tracts called "James Parks" and "Mt. Pleasant," and containing about eight acres. On the 21st day of August, 1883, the said ground was improved by a dwelling house and other buildings, and a valuable well of water, necessary to supply water for family use and other purposes, the said property being occupied by the owners as a dwelling.

On that day proceedings were begun by the publication of a notice, under the act of congress of July 15, 1882, to increase the water supply of the city of Washington, (22 St. p. 168,) to condemn a right of way for a tunnel in the neighborhood of this ground, and the government afterwards constructed such tunnel by blasting and digging at a depth of 150 to 170 feet below the surface in the immediate neighborhood of said property, and about 500 feet distant from the said well.

The well had been used for many years before the construction of the tunnel. There was no direct evidence as to the effect of the tunnel on the well, but during the process of construction and blasting, about 150 yards from the premises, the well became dry, and it has so remained. It does not appear that there was any other cause affecting the well. By reason of the construction of the tunnel, as the court of claims finds, the well was drained and destroyed, to the damage of the owners in the sum of $1,500, no portion of which has been paid or tendered by the government.

This well, at the time of its destruction, was 60 feet deep, and it does not appear that it was supplied by a distinct vein of water running into it. The tunnel is impervious to water, and water from the outside does not soak into it. The land on which the well is located is not embraced in the map and survey of lands to be taken under the act of congress.

Upon these facts the court below adjudged that the plaintiffs, the owners of said land, were entitled to recover the sum of $1,500, and judgment was entered for that amount.

Whether, under the constitutional provisions of the United States and of the several states, which declare that private property shall not be taken for public use without just compensation, it is necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of the provision, is a question that has often arisen, and upon which there has not been entire uniformity of decision.

"There may be," said this court, in the case of Pumpelly v. Green Bay Co., 13 Wall. 166, syllabus, "such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the constitution." "The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating."

We do not find it necessary to consider on which side of the line thus suggested the present case would fall, for we agree with the court below in thinking that in the act of congress under which this public work was done are found provisions giving an express remedy for property damaged, though not actually taken. The first section of the act is in the following terms:

"That the secretary of war shall cause to be made a survey and map of the land necessary to extend the Washington aqueduct from its present eastern terminus to the high ground north of Washington near Sixth street extended, and of the land necessary for a reservoir at that point, the capacity of which

shall not be less than three hundred million gallons; and a like survey and map of the land necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's island to and upon the Virginia shore; and when surveys and maps shall have been made the secretary of war and the attorney general of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and the land on which the gatehouse at Great Falls stands by condemnation.

"And in obtaining title to the right of way for the extension of said aqueduct, the secretary of war and attorney general may, in their discretion, secure title to a strip suitable for an avenue over such part of said aqueduct extended as they think proper: provided, that at least one half in value of such right of way shall be donated or dedicated by the owners to that public use: and provided, further, that, if it shall be necessary to resort to condemnation, the proceedings shall be as follows:

"When the map and survey are completed, the attorney general shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the department of justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the attorney general, the chief justice of the supreme court of the District of Columbia shall appoint three persons, not in the employ of the government or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the attorney general a description of any tract or parcel, the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the attorney general, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof; and if the offer be accepted, then, upon the execution of a deed to the United States in form satisfactory to the attorney general, the secretary of war shall pay the amount to such owner or owners from the appropriation made therefor in this act.

"In making the valuation the appraisers shall only consider the present value of the land, without reference to its value for the uses for which it is taken under the provisions of this act.

"The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the attorney general as above provided, file a petition in the court of claims of the United States setting forth his right or title, and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein: provided, that the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

"Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made as hereinbefore authorized, and who shall have declined to accept the same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the attorney general as above directed, be forever barred: provided, that owners or claimants laboring under any of the disabilities defined in the statute of limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

"Upon the publication of the notice as above directed, the secretary of war may take possessions of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon payment beng made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

By a subsequent act, approved February 26, 1885, (23 St. p. 332,) the time for filing petitions in the court of claims was extended for one year from the passage of the act; that is, to February 26, 1886.

It is contended on behalf of the United States that the legislature intended to restrict the right to sue exclusively to the parties holding land within the limits of the sur-

vey, and that hence the court of claims erred in recognizing the claim for damages to lands not embraced in the survey. We are unable to adopt this view of the meaning of the statute.

On the contrary, we think the plain meaning and intent of the legislature were to provide for the case of those whose lands or property rights were directly injured by the construction of the work proposed to be done, as well as for the case of those injured by the taking of their lands. This seems to us so clear as to require no elucidation. This very point, arising under the act in question, was decided by this court in Manufacturing Co. v. Attorney General, 124 U. S. 581, 596, 8 Sup. Ct. Rep. 631, where it was said: "While congress supposed that a survey and map could be made with such accuracy as to embrace all the land necessary, under any circumstances, for the purposes indicated in the act of 1882, and while provision is made whereby the owners of lands, covered by such survey and map, can obtain just compensation, the act also opens the court of claims to every person who, by the construction of the works in question, has been injured in any property right, provided that, within a given time, such person file his petition in that court, setting forth his right or title, and the amount claimed by him as damages."

Again, it is claimed for the government that, even if the statute be read to apply to the case of property not embraced in the survey, yet the case of a destruction of a well is not a "direct injury," within the contemplation of the statute.

It is difficult to see the force of this contention. An adequate supply of water for household and other purposes has always been regarded as an essential incident to a dwelling house. A never-failing well or spring of water adds greatly to the market value as well as to the comfort of such property. How important and indispensable is a supply of water is seen in the very work in question, whose object is, as declared by the statute, to increase the water supply of the city of Washington.

It cannot be denied that a well of water is property recognized by the law, any injury to which is redressible by law. To pollute or foul the water of a well is an actionable injury. Ball v. Nye, 99 Mass. 582.

We see no reason why we should disregard the finding of the court below, that "by reason of the construction of said tunnel the said well of water was drained and destroyed," and we regard such a finding as proof that the owners of the property suffered a direct injury, within the meaning of the remedial provisions of the statute.

We regard the remedial features of this statute as coming within the suggestion of Chief Justice Gibson, in the noted case of O'Connor v. Pittsburgh, 18 Pa. St. 187, 190: "The constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed; but it follows not that the omission may not be supplied by ordinary legislation."

Finally, an argument in favor of the government is based upon the finding of the court below, that it does not appear that the well was supplied "by a distinct vein of water running into it;" and the leading case of Acton v. Blundell, 12 Mees. & W. 324, and cognate cases, are cited.

The doctrine of those cases substantially is that the owner of land may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.

We recognize this as sound doctrine in the ordinary case of a question between adjoining owners of land. But in a case like the present, where the injury complained of is inflicted by the construction of a public work under authority of a statute, over land upon which the public authority has acquired a right of way only, and where the statute itself provides a remedy for such injury, the law has been held to be otherwise in cases whose reasoning demands our assent.

A Massachusetts statute provided that "every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any land or materials." Construing that statute, in the case of Parker v. Railroad Co., 3 Cush. 107, 114, the supreme judicial court said:

"And so in regard to the well. The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is damnum absque injuria. But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

In the quite recent case of Trowbridge v. Inhabitants, 144 Mass. 139,[1] another statute was under consideration by the same court, similar in every respect to the act of congress now under consideration. The case of Parker v. Railroad Co. was fully recognized, and its authority followed. We quote as follows from the opinion:

"The question presented is whether a town which lawfully takes land and constructs a common sewer therein, whereby a well upon land not taken, and not adjoining land taken, is made dry, the well being fed by water

[1] 10 N. E. Rep. 796.

percolating through the soil, may be liable to pay damages therefor to the owner of the land in which the well is situated.

"The respondent is liable for 'damages occasioned by the laying, making, or maintaining the sewer. Pub. St. c. 50, § 3. The provision in the railroad act is similar: 'Damages occasioned by laying out, making, and maintaining its road.' Pub. St. c. 112, § 95. The provision in regard to public ways is: 'If damage is sustained by any persons in their property by the laying out,' etc. Pub. St. c. 49, §§ 14, 68. Section 16, which also applies to sewers, provides that, in estimating the damage, 'regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner.' Under these provisions damages *194 can be recovered for injuring land not taken, and not abutting upon land taken. Dodge v. Commissioners, 3 Metc. (Mass.) 380; Parker v. Railroad Co., 3 Cush. 107; Marsden v. Cambridge, 114 Mass. 490.

"The respondent contends that it had the right of an owner of the land taken to make excavations in it, and thereby drain its neighbor's well; that its act, without the authority and protection of the statute, was lawful, and invaded no right of the petitioner and gave her no right of action; and that, in accordance with the decisions in England, the statute should be construed to intend only damages which, but for the protection of the statute, could be recovered by action. See New River Co. v. Johnson, 2 El. & El. 435; Board v. McCarthy, L. R. 7 H. L. 243. But the respondent does not stand, in this respect, in the position of a purchaser of the land, taking the rights of its grantor. It is not the absolute owner of the land, but it took and holds the right to occupy the land for certain purposes, and to do upon it certain acts authorized by the statute. In exercising its rights, the town acts, not under the title of the owner, but by virtue of the authority given by the statute, and under the obligation imposed by the statute to pay all damages occasioned thereby. The petitioner had a right to collect and keep the water in her well; and depriving her of it, so as to injure her land, was a damage to her. It is no answer that other landowners had the same right in respect to their lands, and that, if the petitioner's damages had been in consequence of the exercise of those rights in his land by a landowner, she could not have recovered damages from him. The respondent's rights in the land, and its authority to do the act which caused the damage, are given by the same statute which gives a remedy to the petitioner to recover the damages.

"The precise question presented here was decided, in regard to a railroad, in Parker v. Railroad Co., ubi supra. In that case, damages were alleged to have been occasioned in the construction of a railroad, to land not within or adjoining the location of the road, by changing the grade of a highway and by draining a well. It is not suggested that either would be a cause of action at common law. Chief Justice Shaw says that the main question in the case is 'whether a party having land with buildings thereon, lying near the track of a railroad, but not crossed by it, can recover compensation for incidental damages caused to his land, by the construction of the railroad and the structures incident to and connected with it.' After discussing the question, he says: 'We are of opinion, therefore, that a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may sue a complaint for compensation for such damage.' In regard to the well he says: 'The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is damnum absque injuria. But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others.'"

In Wheatley v. Baugh, 25 Pa. St. 528, 533, the case of Parker v. Railroad Co. is cited with approval.

We also regard our own case of Manufacturing Co. v. Attorney General, above cited, as, in effect, construing the statute as applicable to a claim like the present one.

Upon the whole, we are of opinion that the judgment of the court of claims is sustainable on principle and authority, and it is accordingly affirmed.

(148 U. S. 190)

UNITED STATES v. TRUESDELL.

(March 6, 1893.)

No. 467.

EMINENT DOMAIN — CONSTRUCTION OF TUNNEL — DRAINAGE OF WELLS — DAMAGES.

The doctrine that the draining and destruction of a well by an adjoining owner of land exercising his right to dig therein is damnum absque injuria, where the well is not supplied by a distinct vein of water, has no application where such draining and destruction is caused by the construction of a tunnel for the water supply of a city, under authority of an act of congress, over land in which a right of way only is acquired, and the act provides a remedy for such an injury.

Appeal from the court of claims.

Petition by George Truesdell to the court of claims for damages against the United States by reason of the construction of the Washington water tunnel, under Act Cong. July 15, 1882, 22 St. p. 168. Judgment for petitioner. The United States appeal. Affirmed.

Asst. Atty. Gen. Cotton, for the United States. Job Barnard and Geo. A. King, for appellee.

Mr. Justice SHIRAS delivered the opinion of the court.

This suit was brought in the court of claims to recover damages for the loss of a well occasioned by the construction of an extension of the Washington aqueduct, and for compensation for a right of way across land of the complainant taken for the purpose of constructing a tunnel, by virtue of an act of congress of July 15, 1882, entitled "An act to increase the water supply of the city of Washington, and for other purposes." 22 St. p. 168.

So far as the recovery of the plaintiff below was based on the claim for compensation for land actually taken, the United States do not, in this appeal, complain. But they contend that the injury caused by the destruction of the well was damnum absque injuria. The liability of the United States, under the statute, by virtue of which the work in question was done and the damages occasioned, has been declared in the opinion of this court in the case, just decided, of U. S. v. Alexander, 13 Sup. Ct. Rep. 529, where the facts were similar, and we do not need to repeat what is therein said.

The judgment of the court below is accordingly affirmed.

(148 U. S. 50)

COMMERCIAL NAT. BANK v. ARMSTRONG.

ARMSTRONG v. COMMERCIAL NAT. BANK.

(March 6, 1893.)

Nos. 76, 77.

BANKS AND BANKING—COLLECTIONS—INSOLVENCY.

A Cincinnati bank wrote to a Philadelphia bank: "Will collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month." The latter accepted this proposition, and thereafter, from time to time, forwarded paper indorsed "For collection." Business was carried on under this arrangement for several months, when the Cincinnati bank failed, having in its hands, or in the hands of its subagent banks, the proceeds of paper thus forwarded. *Held*, that the relation between the banks was that of principal and agent until the collection of the paper and the receipt of the money by the Cincinnati bank, after which time the relation was that of debtor and creditor; and hence that the receiver of the Cincinnati bank could not be charged, as trustee, with any moneys which were collected, and passed into its general funds, before the failure, or which before that time were collected by subagents, and credited to it on a debt which it owed them, but that he could be so charged with moneys collected by a subagent before the failure, and afterwards paid to the receiver. 39 Fed. Rep. 684, affirmed.

Appeals from the circuit court of the United States for the southern district of Ohio. Affirmed.

Statement by Mr. Justice BREWER:

On the 23d of November, 1887, the Commercial National Bank of Pennsylvania filed its bill of complaint in the circuit court of the United States for the southern district of Ohio, against David Armstrong, receiver of the Fidelity National Bank of Cincinnati, the purpose of which bill was to charge the defendant, as trustee of the plaintiff, for $17,460.32, certain funds in his possession. To this bill of complaint the defendant duly appeared and answered. After the taking of testimony, the case was submitted on pleadings and proofs, and on the 8th of June, 1889, a decree was entered in favor of the plaintiff, directing the defendant to pay to it the sum of $7,209.59, which he was adjudged to hold as trustee, and also whatever sums he might thereafter receive from the receiver of the Fifth National Bank of St. Louis, Mo., as dividends upon the sum of $1,577.89, the amount of paper transmitted to that bank for collection. From this decree both parties appealed to this court. The opinion of the circuit court was delivered by Jackson, Circuit Judge, and will be found in 39 Fed. Rep. 684.

The transactions between the two banks originated in the following letter, sent by the Fidelity National Bank to the plaintiff:

"U. S. Depository.
"The Fidelity National Bank.
"Capital, $1,000,000.
"Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benjamin E. Hopkins, ass't cashier.

"Cincinnati, 2, 12, 1887.

"Com'l Nat. B'k, Philada., Pa.—Gentlemen: Enclosed herewith we hand you our last statement, showing us to be the second bank in Ohio, in deposits, in the tenth month of our existence. We should be pleased to serve you, and trust you will find it to your advantage to accept one of the following propositions:

"No. 1. We will collect all items at par, and allow 2½ per cent. interest on daily balances, calculated monthly. We will remit any balance you have above $2,000 in New York draft, as you direct, or ship currency at your cost for expressage.

"No. 2. Will collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month.

"No. 3. We will collect at par Ohio, Indiana, and Kentucky items, and remit balance every Monday by draft on New York.

"We do not charge for exchange on propositions No. 1, 2, and 3.

"No. 4. Will collect Cincinnati items and remit daily at 40 cents per thousand, or 20 cents for $500 or less.

"National banks not in a reserve city can count all they have with us as reserve.

"Your early reply will oblige, respectfully yours, E. L. Harper, V. P."

To this letter the plaintiff replied on February 18th, accepting proposition No. 2; and thereafter, from time to time, forwarded paper for collection. The Fidelity Bank caused to be made and sent to the plaintiff a rubber stamp for use in indorsing paper

thus forwarded. This stamp read as follows:

"Pay Fidelity National Bank of Cincinnati, O., or order, for collection for Commercial Bank of Philadelphia, Pa. E. P. Graham, Cashier."

Business was carried on between the two banks under this arrangement until June 20, 1887, when the Fidelity Bank failed, having in its hands, or in the hands of other banks to which the same had been sent by it for collection, proceeds of paper forwarded by plaintiff after June 4th amounting to $16,851.92. The only correspondence which took place during this time between the parties, which can be considered as throwing any light upon the arrangement between them, was a letter from the plaintiff of May 25th, as follows: "We don't wish to complain, but would like to understand why your remittance to us of May 21 only included items sent you up to May 14, and received by you on the 16th. We have to explain these things to our depositors, and wish to act intelligently on the subject;" and a reply in these words: "We collect at par, and include in our remittances everything collected to date."

*553 *The conclusions of the circuit judge were that the relation between the two banks was that of principal and agent,—a relation which continued, not only while the paper was held by the Fidelity Bank, but after the moneys had been collected thereon; but that, in order to enforce a trust in favor of the plaintiff as to any of the moneys so collected, they must be specifically traceable, and that it was not sufficient to show that by collection they had passed into the general funds of the bank. This paper had substantially all passed into the hands of other banks, to whom it had been sent by the Fidelity Bank, as its subagents, and the circuit judge held that if the Fidelity was indebted to these local banks, subagents, and the collections, when made, were entered in their books as a credit to such indebtedness, they must be considered as reduced to possession, and as having passed into the general funds of the Fidelity; but that, on the other hand, if the Fidelity was not indebted to the subagent banks, and the collections remained in their hands to be subsequently remitted to the Fidelity, and in fact were paid to the receiver after his appointment, they were specifically traceable, and were therefore subject to the trust created by the relationship between the two banks, and payment thereof could be enforced out of the funds in the hands of the receiver.

Edward Colston, Judson Harmon, and George Hoadly, Jr., for Commercial Bank. John W. Herron, for Armstrong.

*556 *Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

We agree with the circuit judge that the relation created between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a subagent of the Fidelity Bank had collected the money due on such paper was not a mingling of those collections with the general funds of the Fidelity, and did not operate to relieve them from the trust obligation created by the agency of the Fidelity, or create any difficulty in specifically tracing them. As to such paper, the transaction may be described thus: The plaintiff handed it to the Fidelity. The Fidelity handed it to a subagent. The subagent collected it, and held the specific money in hand to be delivered to the Fidelity. Then the failure of the Fidelity came, and the specific money was handed to its receiver. That money never became a part of the general funds of the Fidelity. It was not applied by the subagent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. The Fidelity received the paper as agent, and the indorsement "for collection" was notice that its possession was that of agent, and not of owner. In Sweeny v. Easter, 1 Wall. 166, 173, in which there was an indorsement "for collection," Mr. Justice Miller said: "The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, *554 *this was not intended to transfer the ownership of the note or its proceeds." And in White v. Bank, 102 U. S. 658, 661, where the indorsement was "for account," the same justice, speaking of the indorsement, said: "It does not purport to transfer the title of the paper, or the ownership of the money when received." The plaintiff, then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity. Bank v. Hubbell, 117 N. Y. 384, 22 N. E. Rep. 1031; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. Rep. 193; Freeman's Nat. Bank v. National Tube Works, 151 Mass. 413, 24 N. E. Rep. 779; Armstrong v. Bank, (Ky.) 14 S. W. Rep. 411; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561. In those cases the suits were against subagent banks. It is true that in most of them the collection was made by the subagent after the avowed insolvency of the agent, but that fact we cannot think is decisive. If, before the subagent parts with the money, or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belong to a third party, in the hands of that insolvent agent or its

assignee; and, on the other hand, such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to, and mixed with, its general funds in the hands of its assignee for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected. Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same. The Fidelity received this paper as agent. At the time of its insolvency, when its right to continue in business ceased, it had not fully performed its duties as agent and collector. It
*558 had not received the moneys collected by its
*subagent. They were traceable as separate and specific funds, and therefore the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for, when he collected them from these subagents, he was, in fact, collecting them as the agent of the principal. No mere bookkeeping between the Fidelity and its subagents could change the actual status of the parties, or destroy rights which arise out of the real facts of the transaction.

We also agree with the circuit court, in its conclusions as to those moneys collected by subagents to whom the Fidelity was in debt, and which collections had been credited by the subagents upon the debts of the Fidelity to them before its insolvency was disclosed; for there the moneys had practically passed into the hands of the Fidelity. The collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents. It was the same as though the money had actually reached the vaults of the Fidelity. It was a completed transaction between it and its subagents, and nothing was left but the settlement between the Fidelity and the principal,—the plaintiff. The conclusions of the circuit court were based upon the idea that these collections could not be traced, because they had passed into the general fund of the bank. We think, however, a more satisfactory reason is found in the fact that by the terms of the arrangement between the plaintiff and the Fidelity the relation of debtor and creditor was created when the collections were fully made. The agreement was to collect at par, and remit the 1st, 11th, and 21st of each month. Collections intermediate those dates were, by the custom of banks, and the evident understanding of the parties, to be mingled with the general funds of the Fidelity, and used in its business. The fact that the intervals between the dates for remitting were brief is immaterial. The principle is the same as if the Fidelity was to remit only once every six months. It was the contemplation of the parties, and must be so adjudged, according to the ordinary custom of banking, that these collections were not to be placed on special deposit, and held until the day for remitting.
*559 The very fact that collections were to be
* made at par shows that the compensation for the trouble and expense of collection was understood to be the temporary deposit of the funds thus collected, and the temporary use thereof by the Fidelity. The case of Marine Bank v. Fulton Bank, 2 Wall. 252, is in point, though it may be conceded that the facts in that tending to show the relation of debtor and creditor are more significant than those here. In the spring of 1861 the Fulton Bank of New York sent two notes for collection to the Marine Bank of Chicago. There being some trouble about currency, the Fulton Bank requested the Marine Bank to hold the avails of the collection subject to order, and advise amount credited. Afterwards the Marine Bank sought to pay in the currency which it had received on the collection, then largely depreciated, but its claim in this respect was denied; Mr. Justice Miller, speaking for the court, saying: "The truth, undoubtedly, is that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in its business. Thus the defendant was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers, and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation. All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money, and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter."

That reasoning is applicable here. Bearing
*560 in mind the custom of banks, it cannot be
* that the parties understood that the collections made by the Fidelity during the intervals between the days of remitting were to be made special deposits, but, on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank, and be used by it as other funds, and that, when the day for remitting came, the remittance should be made out of such general funds.

The conclusions, therefore, reached by the circuit court, were correct, and the judgment is affirmed.

(148 U. S. 107)

COMMONWEALTH OF VIRGINIA v. PAUL, District Judge.

(March 6, 1893.)

No. 7.

REMOVAL OF PROSECUTIONS AGAINST REVENUE OFFICERS—"COMMENCEMENT" OF PROSECUTION—REQUISITES—MANDAMUS.

1. Under Rev. St. § 643, relating to the removal of prosecutions commenced in the state courts against federal revenue officers, a prosecution is not "commenced," so as to be removable, when the officer is merely held under a warrant of arrest for preliminary examination before a magistrate. Georgia v. Port, 4 Woods, 513; Georgia v. Bolton, 11 Fed. Rep. 217; North Carolina v. Kirkpatrick, 42 Fed. Rep. 689, overruled.

2. In the western district of Virginia, where the federal judge is judge both of the district and circuit court, and both courts are held at the same time and place, and have the same clerk, a deputy United States marshal arrested for murder on a warrant from a justice of the peace, before his preliminary examination before such justice, filed in the district court a petition addressed to the judge of the circuit court, alleging his arrest, that he was then confined in jail "awaiting trial before said justice upon the said charge of murder," and that the killing was done in self-defense, while acting under the revenue laws. The petition prayed a removal into the circuit court, and for a writ of habeas corpus cum causa. The federal judge thereupon made an order entitled in the district court, awarding a writ of habeas corpus in common form. Pending an adjournment of the hearing thereon, the state grand jury for the proper county found an indictment against the petitioner for murder, which was exhibited to the federal court by an amendment to the jailer's return. After the hearing an order was entered in the district court, simply requiring the petitioner to be recognized for his appearance before the federal circuit court "to answer the indictment found against him by a grand jury of the county court of Smyth county, Virginia." *Held*, that these proceedings were not in compliance with Rev. St. § 643, which requires the petition in such a case, to be filed with the clerk of the circuit court, and a writ of certiorari or habeas corpus cum causa issued by him to be served on the state court.

3. The prosecution which was commenced in the state court, after the filing of the petition, by the finding of an indictment, was not removed by the order holding the petitioner to trial in the federal court; for, in cases of removal under this section, the jurisdiction of the federal court depends entirely on the statements made in the verified petition.

4. The removal of a state prosecution against a federal revenue officer under Rev. St. § 643, is not accomplished until the state court receives notice from the clerk of the federal court of the petition filed in his office.

5. When a federal circuit court has unlawfully taken jurisdiction of a prosecution commenced in a state court against a federal revenue officer, the supreme court of the United States will award a writ of mandamus directing the judge of the circuit court to remand the same.

6. The action of a district judge discharging, on habeas corpus, a person held under state process to answer for acts done in pursuance of a law of the United States, though reviewable on appeal, cannot be controlled by mandamus.

Petition for writ of mandamus. Granted.

Statement by Mr. Justice GRAY:

This was a petition by the commonwealth of Virginia to this court for a writ of mandamus to the Honorable John Paul, district judge of the United States for the western district of Virginia, and holding the circuit court of the United States for that district to command him to remand to the county court of Smyth county, in Virginia, an indictment against Joseph H. Carrico for the murder of James M. Nelson, found by the grand jury of the county, and by them returned into the county court, and of which the circuit court of the United States had assumed jurisdiction; and also to command him to restore the body of Carrico to W. D. Wilmore, the jailer of the county, from whose custody he had been taken upon a writ of habeas corpus issued by said judge.

Annexed to the petition was a copy of the record of the district court of the United States in the proceedings for habeas corpus, as well as a copy of the record of the circuit court of the United States in the proceedings concerning the indictment.

The record of the district court set forth the following proceedings: On December 18, 1891, in vacation, Carrico presented to Judge Paul a petition addressed to him as "judge of the United States circuit court," alleging "that on December 12, 1891, one Kirk, a justice of the peace of Smyth county, Va., issued his warrant in the name of the commonwealth of Virginia, addressed to Constable Scott of the said county, commanding him to arrest your petitioner, and bring his body before said justice, for willfully, premeditatedly, and of malice aforethought, killing and murdering one James M. Nelson, in the said county of Smyth, on December 11, 1891; and upon said warrant the said constable Scott did arrest your petitioner, late on Saturday evening, December 12, 1891, and delivered him to W. D. Wilmore, the jailer of Smyth county, Va.; and your petitioner is now confined in the jail of Smyth county, at Marion, awaiting a trial before said justice upon the said charge of murder." The petition further alleged that no murder was committed, but that the killing was done by the petitioner in self-defense, in the performance of his duty as a deputy of the marshal of the district, acting by and under the authority of the internal revenue laws of the United States, and in attempting to arrest Nelson while violating those laws, by having in his possession, and selling, illicit ardent spirits. "In view of these facts, under section 643 of the Revised Statutes of the United States," the petition prayed that "said cause may be removed from the jurisdiction of the said Kirk, justice of the peace of said county of Smyth, and from the county court of said county, to the circuit court of the United States for the western district of Virginia, for trial;" that a writ of habeas corpus cum causa

might be awarded, and a duplicate thereof delivered to the clerk of the county court, and that by virtue thereof the marshal of the district, or one of his deputies, might take the body of the petitioner into his custody, to be dealt with in the cause according to law, and according to the order of the circuit court, or of a judge thereof in vacation; and, "upon the removal of said prosecution, that a copy of the record and proceedings before said justice and by said constable" might be brought into the circuit court. The petition was verified by the oath of the petitioner, taken before a United States commissioner on December 12th; and annexed to it was a certificate of counsel of the same date, in the form required by said section of the statutes.

Upon that petition, and on the same day, Judge Paul made an order entitled "In the district court of the United States for the western district of Virginia, in vacation," and signed by him as district judge, granting a writ of habeas corpus in common form to the jailer, returnable before him on December 23d, at Abingdon.

On December 19th, that petition was filed, and the order granting the writ of habeas corpus recorded, in the clerk's office of the district court, and the writ was issued accordingly, tested by Judge Paul, as judge of the district court, and under its seal.

On December 22d, the writ of habeas corpus, as appeared by the marshal's return thereon, was executed by delivering copies thereof to the jailer and to the clerk of the county court.

On December 23d, at a special term of the district court, held at Abingdon, the jailer brought in the body of Carrico, and returned that the causes of his detention were a warrant of commitment, a copy of which, marked "Exhibit A," was annexed to and made part thereof, "and the proceedings of the county court of Smyth and commonwealth of Virginia, marked 'Exhibit B,' and made part and parcel of this return."

"The only exhibit annexed to the jailer's return was marked "Exhibit A," and was as follows:

"Virginia, Smyth county, to wit: To William Scott, constable of said county, and to the keeper of the jail of said county:

"These are to command you, the said constable, in the name of the commonwealth of Virginia, forthwith to convey and deliver into the custody of the keeper of said jail, together with the warrant, the body of Joseph H. Carrico, charged before me, John J. Kirk, a justice of the said county, on the oath of R. W. Nelson, with a felony by him committed, in this: that the said Joseph H. Carrico, on the 11th day of December, 1891, in the said county, feloniously and of his malice did kill and murder one James M. Nelson; and you, the said keeper of the said jail, are hereby required to receive the said Joseph H. Carrico into your jail and custody, that he may be examined for the said offense by the county court of the said county, and him there safely keep until he shall be discharged by due course of law. Given under my hand and seal this, the 14th day of December, 1891. John J. Kirk, J. P."

The prisoner was thereupon admitted to bail, with sureties for his appearance, on January 8, 1892, and the case was continued to that day, and again to January 9th, when the jailer was permitted by the court to amend his return by adding Exhibit B, therein referred to, which was a transcript of an indictment against Carrico for the murder of Nelson, returned into the county court by a grand jury of the county on December 21st, and of an order made the same day by that court, directing that Carrico, who had been removed to the jail of another county for safekeeping, be conveyed by the sheriff to the jail of Smyth county, that he might be tried in the county court on the indictment. This transcript appeared to have been certified by the county clerk on January 7th, and was indorsed by the clerk of the district court of the United States as filed in that court on May 17, 1892.

The case was continued from January 9th to January 12th, when the district court, held by Judge Paul, made the following order:

"In this cause, the court having heard the testimony introduced on behalf of the petitioner, as well as that introduced on behalf of the respondent, W. D. Wilmore, sheriff of Smyth county, Va., and the arguments of counsel for the petitioner and respondent, and it appearing to the court that the petitioner is in custody for an act done in pursuance of a law of the United States, and is held in custody, contrary to law, by the jailer of Smyth county, Va., and that he has a right to have removed into the circuit court of the United States for the western district of Virginia the prosecution pending against him in the county court of Smyth county, Va., it is therefore ordered that the petitioner be recognized in the sum of one thousand dollars for his appearance before the circuit court for this district on the first day of the next regular term thereof, to answer the indictment found against him by a grand jury of the county court of Smyth county, Va." Thereupon Carrico entered into a recognizance accordingly. The record set forth the testimony introduced at that hearing, as well as the opinion then delivered, and published in 51 Fed. Rep. 196.

On May 14, 1892, the jailer moved the district court to amend its order of January 12th so as to allow him an appeal to this court, and to certify that the question of the jurisdiction of the district court to hear and determine the writ of habeas corpus in the manner it did was alone involved and to be reviewed. The motion was granted upon the grounds that the order of January 12th,

taking the petitioner from the custody of the respondent, and holding him to answer to the indictment in the United States court, was a final order, from which the respondent might appeal to this court, as if it had been an order for the absolute discharge of the prisoner from his custody, and that the writ of habeas corpus was not merely ancillary to the petition for the removal, under section 643 of the Revised Statutes, of the prosecution of Carrico by the state of Virginia, but was a distinct and different proceeding, in a different court, and under a different statute, and *was not issued by the clerk, as provided in that section, but by the district judge, and on December 18, 1891, "whereas," the judge said, "the petition for removal, as shown by record evidence used in the discussion of this motion, was not filed in the clerk's office of the circuit court until December 19, 1891." His opinion on this motion is in the record, and is published in 51 Fed. Rep. 200. The appeal from the order of January 12th does not appear to have been prosecuted.

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The copy of the record of the circuit court of the United States, annexed to the petition for a mandamus, was of the proceedings at the regular May term, 1892, of that court, at Abingdon, held by Judge Paul, in the case entitled "Commonwealth of Virginia vs. Joseph H. Carrico. Indictment for murder from Smyth county court,"—and began, under date of Saturday, May 14th, with the following memorandum:

"Be it remembered that heretofore the said Joseph H. Carrico presented a petition for the removal of the case aforesaid, and herein charging him with the murder of James M. Nelson, from the county court of Smyth county, Va., to the circuit court of the United States for the western district of Virginia, at Abingdon, Va., (and for a writ of habeas corpus,) to the judge of the district court of the United States for the western district of Virginia; and upon return of W. D. Wilmore, jailer of Smyth county, Va., and upon the hearing of the evidence and arguments of counsel, an order was entered in the said district court of the United States for the western district of Virginia on January 12, 1892, removing the said prosecution of the commonwealth of Virginia vs. Joseph H. Carrico into the circuit court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, Va., for further proceedings and trial; and said indictment, with the indorsements thereon, is in the words and figures following, viz."

Then followed a copy of the indictment, with the indorsement "A true bill," by the foreman of the grand jury, and also indorsed as "a transcript from the record," by the clerk of the county court. The record of the circuit court further showed that on May 14th the attorney general of Virginia and the county attorney came in, and that the prisoner appeared, as required by his recognizance, was arraigned upon the indictment, pleaded not guilty, was tried by a jury, and on Monday, May 16th, found guilty of voluntary manslaughter, and that on May 17th the court, upon his motion, set aside the verdict, and granted a new trial, continued the case to the next term, and admitted him to bail upon his own recognizance.

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Upon motion of the commonwealth of Virginia on the first day of this term, and before any further proceedings were had in the circuit court, this court gave leave to file the petition for a mandamus, and granted a rule to Judge Paul to show cause why a writ of mandamus should not issue as prayed for.

The judge, in his return to the rule, referred to the petition for removal and for a writ of habeas corpus, and the proceedings concerning the habeas corpus and those upon the indictment, as appearing in the copies of records annexed to the petition for a mandamus, set forth the grounds of his action, substantially, as in his opinions above mentioned, and specifically stated that the writ of habeas corpus was issued, not under section 643 of the Revised Statutes, but under section 753, which authorizes the writ when a prisoner "is in custody for an act done or omitted in pursuance of a law of the United States."

It was alleged in the petition for a mandamus, and in the brief for the petitioner, and was not denied in the judge's return or in the brief of his counsel that, when the case of the indictment was called for trial in the circuit court of the United States, a motion was made by the commonwealth of Virginia to remand the case to the county court because the circuit court had no jurisdiction over the crime charged in the indictment, and because the removal of the prosecution from the county court was not authorized by law, but was contrary to the constitution and laws of Virginia, and to the constitution and laws of the United States, and that this motion was denied by the circuit court.

R. Taylor Scott, for the Commonwealth. Asst. Atty. Gen. Maury, for respondent.

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*Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The prosecution and punishment of crimes and offenses committed against one of the states of the Union appropriately belong to the courts and authorities of the state, and can be interfered with by the circuit court of the United States so far only as congress, in order to maintain the supremacy of the constitution and laws of the United States, has expressly authorized either a removal of the prosecution into the circuit court of the United States for trial, or a discharge of the prisoner by writ of habeas corpus issued by that court, or by a judge thereof. Tennessee v. Davis, 100 U. S. 257; Virginia v. Rives,

Id. 313; Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. Rep. 636; In re Neagle, 135 U. S. 1, 10 Sup. Ct. Rep. 658; Huntington v. Attrill, 146 U. S. 657, 672, 673, 13 Sup. Ct. Rep. 224.

In the case at bar, Joseph H. Carrico, having been arrested under a warrant from a justice of the peace of the county of Smyth on a charge of murder, was discharged by the district judge, on writ of habeas corpus, from the commitment under state process; and having afterwards been indicted by the grand jury of the county for that offense, and committed by order of the county court for trial upon the indictment, the prosecution against him was assumed to have been removed into the circuit court of the United States for trial, and was there tried.

The state of Virginia, by petition for a writ of mandamus, questions the validity both of the removal and of the discharge, and it will be convenient to consider the two separately, beginning with the removal.

It is contended by the respondent that the prosecution was rightly removed into the circuit court of the United States under section 643 of the Revised Statutes, (the constitutionality of which was affirmed in Tennessee v. Davis and in Davis v. South Carolina, above cited,) authorizing the removal into
*115 the circuit court of the United States for trial of "any*civil suit or criminal prosecution" "commenced in any court of a state against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law."

It is important, therefore, to consider whether the conditions of that section have been complied with.

By that section, it is only when the suit or prosecution has been "commenced in any court of a state," and "at any time before the trial or final hearing thereof," that it "may be removed for trial into the circuit court" "upon the petition of such defendant to said circuit court, and in the following manner:" The petition must set forth the nature of the suit or prosecution, and be verified by affidavit, and supported by certificate of counsel. It "shall be presented to the said circuit court, if in session, or, if it be not, to the clerk thereof, at his office, and shall be filed in said office." "The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court." The clerk of the circuit court is required, when the case is commenced in the state court otherwise than by capias, to issue a writ of certiorari to the state court for the record; and, when it is commenced by capias, to "issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal;" "and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the state court shall be void."

The removal of the case out of the jurisdiction of the state court, and into the exclusive jurisdiction of the circuit court of the United States, takes place, without any order of the circuit court, as soon as the state court, by the service upon it or*upon its clerk of the *116 appropriate process, whether certiorari or habeas corpus cum causa, has notice of the filing of the petition in the circuit court. But it is only after such formal notice has been given that the jurisdiction is transferred from the state court to the national court. The proceedings under this section differ from those under section 641, in which the petition for removal is required to be filed in the state court, and is of itself notice to that court, and therefore, "upon the filing of such petition, all further proceedings in the state court shall cease," and if the petition shows a sufficient ground for removal, the case is, in legal effect, removed. Virginia v. Rives, 100 U. S. 313, 316. But under either section the jurisdiction of the state court is not taken away until it has notice, in one form or other, of the petition for removal,—under section 641, by the petition filed in that court; under section 643, by notice from the clerk of the circuit court of the petition there filed.

The records of the district court and of the circuit court, copies of which are annexed to the petition for a mandamus, present a curious and complicated condition of things, in which some of the confusion may be owing to the facts that not only is the district judge a judge of either court, but that in the western district of Virginia both courts are held at the same times and places, and have the same clerk. Rev. St. §§ 572, 600, 622, 658; Act Sept. 25, 1890, c. 922, (26 St. p. 474.)

The petition for removal, praying also for a writ of habeas corpus cum causa, was evidently framed under section 643 of the Revised Statutes, and was addressed to the district judge as "judge of the United States circuit court;" and it is said in his opinion, delivered on allowing an appeal to this court from his order of January 12th upon the habeas corpus, that "the petition for removal, as shown by record evidence used in the discussion of this motion, was not filed in the clerk's office of the circuit court until December 19, 1891." 51 Fed. Rep. 202.

But that record evidence, all of which is in the record now before us, shows only that *117 the petition was filed in the clerk's*office of the district court on that day, being the same day on which the order granting the writ of

habeas corpus was recorded in, and the writ issued from, that office. Indeed, the very ground assigned by the judge in his opinion, just referred to, for allowing an appeal from his order on the habeas corpus, was that the writ of habeas corpus issued by him was not ancillary to the petition for a removal, nor issued by the clerk of the circuit court, as provided in that section. His return to this petition for a mandamus expressly states that it was not issued under section 643, but under section 753; and the memorandum, inserted at the beginning of the record of the proceedings in the circuit court on the indictment describes that order as an order of the district court, removing the prosecution of the commonwealth of Virginia against Carrico into the circuit court.

The single petition, addressed to Judge Paul as judge of the circuit court, and praying for a removal of the cause into that court, and for a writ of habeas corpus cum causa to complete the removal, (which, so far as appears on the records of either court, was the only petition, either for a removal or for a habeas corpus,) appears to have been treated by the judge as if it had been, or had included, two separate petitions,—the one, a petition for an ordinary writ of habeas corpus, under section 753, which might be granted by the district court or district judge; the other, a petition for a removal of the cause, under section 643, which could only be addressed to and filed in the circuit court.

If the petition for removal had been duly filed in the circuit court of the United States, and a writ of habeas corpus cum causa had been duly issued by the clerk of that court, and served on the clerk of the county court, no order of removal would have been necessary. If the petition was not so filed, and neither such a writ of habeas corpus, nor a writ of certiorari to bring in the record, was so issued and served, no order, even of the circuit court, for the removal of the cause, could have any effect. In any aspect, the district court had no authority to order the prosecution to be removed into the circuit court.

*115 *The inference appears to be inevitable that the only foundation of the exercise of jurisdiction by the circuit court over this indictment was a petition filed in the district court, and orders made and recorded in that court, and that no petition for removal was ever filed in the clerk's office of the circuit court, and no writ of certiorari or habeas corpus cum causa was ever issued by the clerk, as clerk of that court, and served on the state court, as required by section 643 of the Revised Statutes, in order to take away the jurisdiction of the state court.

But there is a more serious objection to the exercise of jurisdiction by the circuit court of the United States over the indictment found in the state court.

By the law of Virginia, murder or other felony must be prosecuted by indictment found in the county court; and a justice of the peace, upon a previous complaint, can do no more than to examine whether there is good cause for believing that the accused is guilty, and to commit him for trial before the court having jurisdiction of the offense. Code Va. 1887, §§ 3990, 3955-3971, 4016.

The petition for removal, which was sworn to on December 12, 1891, alleged that Kirk, a justice of the peace of Smyth county, had that day issued his warrant to a constable to arrest the petitioner, and bring him before the justice, on a charge of the murder of Nelson, and that the petitioner had been arrested by the constable on that warrant, and was now confined in the county jail, as the petition alleged, "awaiting a trial before said justice upon the said charge of murder," which can only mean an examination before the justice with a view to a commitment to await the action of the grand jury, and prayed that "said cause" might be removed from the jurisdiction of the justice and of the county court into the circuit court of the United States for trial, and, "upon the removal of said prosecution, that a copy of the record and proceedings before said justice and by said constable" might be brought into the circuit court.

When that petition was signed and sworn to, there had been no proceedings, except before the justice of the peace and by the constable. There was no case pending in the county court, and the justice had not even committed the prisoner to await the action of that court; and no indictment was found, or other action taken, in the county court, until after the petition had been filed in the federal court.

By the terms of section 643, it is only after "any civil suit or criminal prosecution is commenced in any court of a state," and "before the trial or final hearing thereof," that it can "be removed for trial into the circuit court next to be holden in the district where the same is pending," and "shall proceed as a cause originally commenced in that court."

Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offense which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried, are but preliminary to the prosecution, and are no more a commencement of the prosecution than is an arrest by an officer without a warrant, for a felony committed in his presence.

We are aware that under this section the opposite view has prevailed in some cases in the circuit courts. Georgia v. Port, 4 Woods, 513;[1] Georgia v. Bolton, 11 Fed. Rep. 217; North Carolina v. Kirkpatrick, 42

[1] 3 Fed. Rep. 117.

Fed. Rep. 689. But the only authorities there cited which afford any color for that conclusion were English decisions that the preliminary arrest upon the warrant of a justice of the peace took a case out of the statute of limitations, defining the time after the commission of the offense within which "the prosecution shall be commenced." Rex v. Willace, 1 East, P. C. 186; The Queen v. Brooks, 1 Denison, Cr. Cas. 217, 2 Car. & K. 402. The question whether the government has taken such action as will stop the running of a statute of limitations is quite different from the question when a prosecution can be deemed to be commenced, within the meaning of the acts of congress authorizing removals from the state courts into the courts of the United States for trial.

A grand jury, whether of the state or of the United States, is impaneled and sworn to inquire into and present offenses against that government only under whose authority it is summoned. Story, Const. § 1784. The grand jury summoned and impaneled under the authority of a state is the only appropriate body to inquire into any offense against the state, and to find or to ignore an indictment therefor. The duty of the grand jury attending a court of the United States is limited to inquiring into and presenting offenses against the laws of the United States, and its proper advisers, in matters of law, are the court and the attorney of the United States.

In a criminal case removed from the state court into the circuit court of the United States after indictment found, the circuit court of the United States tries the case upon the accusation presented by a grand jury of the state, and framed with the assistance of the law officers of the state. Tennessee v. Davis, 100 U. S. 257, 271.

But, if a person arrested to await the finding of an indictment may remove the case before an indictment is found, the accusation is not framed and presented by the officers and the grand jury of the state whose criminal law has been violated, but by the officers and grand jury of another government, and the circuit court of the United States has not only to try the defendant, but also to charge its own grand jury as to the accusation against him on behalf of the state; and this, too, in a case in which the very ground of removal into the circuit court is the defendant's suggestion that he needs the protection of the constitution and laws of the United States against the prosecution by the state.

We cannot believe that such was the intention of congress in the statutes enacted to secure a fair and impartial trial between the state, seeking to vindicate its public justice, on the one hand, and a defendant claiming the protection of the constitution and laws of the United States, on the other.

In any case falling within the purview of the acts of congress, the defendant is adequately protected against danger of unlawful oppression from the courts or authorities of the state by the right to remove it into the circuit court of the United States as soon as a prosecution has been commenced against him, and by the right to apply to any court or judge of the United States for a writ of habeas corpus, under sections 751–753, whenever he "is in custody for an act done or omitted in pursuance of a law of the United States."

The true rule on this subject, as it appears to us, was forcibly and accurately expressed by Mr. Justice Grier in a case removed from the court of quarter sessions of Bucks county, in the state of Pennsylvania, before indictment found, into the circuit court of the United States for the eastern district of Pennsylvania under Act Cong. March 3, 1863, c. 81, § 5, (12 St. p. 756,) since incorporated in section 641 of the Revised Statutes, and which, though differing from the statute now in question in requiring the petition for removal to be originally filed in the state court, yet, in substantial accord with this statute, provides that "if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person," for any such act as is therein described, done by virtue or under color of authority of the United States, the defendant may file a petition "for the removal of the cause for trial at the next circuit court of the United States to be holden in the district where the suit is pending." Mr. Justice Grier, after quoting these words, ordered the case to be remanded to the state court, for the following reasons: "The petition of the defendants brings their case fully within the provisions of this section, but the removal is premature. The prosecution has not been commenced in the state court. A warrant has been issued by a justice of the peace, and the defendants have been arrested preparatory to the commencement of a prosecution in the state court, but the attorney for the commonwealth has not sent a bill to the grand jury. We do not know, therefore, whether the commonwealth of Pennsylvania intends to prosecute the defendants for the alleged offense, or whether the grand jury will find a bill, without which the prosecution cannot be said to be 'commenced in the state court.' The act contemplates the removal of a prosecution 'pending,' that a 'trial' may be had in the circuit court. If the attorney of the United States were required to send a bill of indictment before a grand jury of the United States court for a breach of the peace of the state, it would present a truly anomalous proceeding. Yet without it there would be no case to try in the circuit court. If a bill of indictment had been found in the state court, it would have presented such a case, but until this is done there is no case pending in the court of Bucks

county which can be removed to this court for trial." Com. v. Artman, 3 Grant, Cas. 436, 5 Phila. 304.

It appearing upon the face of the petition for removal, as well as by the copies of records laid before this court, that no prosecution had been commenced in the state court, within the meaning of section 643 of the Revised Statutes, when the petition for removal was drawn up and sworn to, nor even when it was filed in the federal court, the prosecution subsequently commenced by the presentment of an indictment in the state court was never lawfully removed into the circuit court of the United States; for, in all cases of removal from the state courts, the jurisdiction of the circuit court of the United States rests and depends upon the statements made in the petition for removal, and verified by the oath of the petitioner. Virginia v. Rives, 100 U. S. 313, 316; Crehore v. Railway Co., 131 U. S. 240, 9 Sup. Ct. Rep. 692; Graves v. Corbin, 132 U. S. 571, 590, 10 Sup. Ct. Rep. 196.

The result is that the circuit court of the United States has, without authority of law, assumed jurisdiction of an indictment found in the courts of the state of Virginia for a crime against the laws of the state, and that the state is entitled to have the prosecution remanded to its courts to be there dealt with according to law. For aught that appears on this record, the state is not bound to commence or to carry on the prosecution in the courts of another government, but is entitled to resume its own rightful jurisdiction and authority, and to try the offender in its own courts. If the case should be allowed to proceed in the circuit court of the United States, and should finally result in an acquittal of the charge, in whole or in part, the state could not have a writ of error to review the judgment. U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. Rep. 609. A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution, and no previous motion to him to remand the case was necessary. The case is governed in every particular by Virginia v. Rives, 100 U. S. 313, 316, 323, 324.

If any delay on the part of the state, in a case of this kind, could justify a denial of the writ of mandamus, no unreasonable delay is here shown. So far as appears by the copies of records submitted to us by both parties, the circuit court of the United States first took jurisdiction of the indictment on Saturday, May 14, 1892. It is alleged by the petitioner, and not denied by the respondent, (although the fact does not appear of record,) that on that day a motion to remand the case to the state court was made by the state, and denied by the circuit court. The accused was found guilty of voluntary manslaughter on Monday, May 16th,—the very day on which October term, 1891, of this court was finally adjourned. On the next day the district judge set aside the verdict, continued the case to October term, 1892, of the circuit court, and admitted the accused to bail on his own recognizance. On the first day of the present term of this court, and before any further proceedings in the circuit court, the state applied to this court for leave to file the petition for a mandamus.

The necessary conclusion is that the state of Virginia is entitled to a writ of mandamus to compel the respondent to remand the indictment and prosecution against Carrico to the county court in which the indictment was found.

The matter of the discharge of the prisoner by the district judge upon the writ of habeas corpus may be more briefly disposed of. If that writ had been a writ of habeas corpus cum causa issued by the clerk of the circuit court as ancillary to a removal of the prosecution into that court, under section 643, the remanding of the cause would carry with it the right to the custody of the prisoner. But being, as appears by the records annexed to the petition for a mandamus, as well as by the return to the rule to show cause, an ordinary writ of habeas corpus, issued by the district judge upon the ground that the prisoner was in custody for an act done in pursuance of a law of the United States, the question whether good cause was shown for his discharge was to be judicially determined by the judge, in the exercise of the jurisdiction vested in him by sections 751–753 of the Revised Statutes. His determination might have been reviewed, on the facts as well as the law, by appeal. Rev. St. §§ 763–766; Acts March 3, 1885, c. 353, (23 St. p. 437;) Acts March 3, 1891, c. 517, §§ 5, 6, (26 St. pp. 827, 828;) In re Neagle, 135 U. S. 1, 10 Sup. Ct. Rep. 658; Horner v. U. S., 143 U. S. 570, 576, 12 Sup. Ct. Rep. 522. But it cannot be reviewed or controlled by writ of mandamus. Ex parte Schwab, 98 U. S. 240; Ex parte Perry, 102 U. S. 183; Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. Rep. 825; In re Morrison, 147 U. S. 14, 26, 13 Sup. Ct. Rep. 246.

It follows that, as to the discharge on the writ of habeas corpus, no order can properly be made upon this petition, but that, for the reasons above stated, there must be a writ of mandamus to remand the indictment and prosecution of the commonwealth of Virginia against Joseph H. Carrico to the county court of Smyth county.

(148 U. S. 197)

PETTIBONE et al. v. UNITED STATES.

(March 6, 1893.)

No. 1,241.

CONSPIRACY—INDICTMENT—OFFENSE AGAINST UNITED STATES—IMPUTED INTENT.

1. An injunction issued out of the United States circuit court, restraining defendants from endeavoring, by force or fraud, to procure a certain master to discharge his servants, or the servants to quit the employment of their

master. Defendants were thereafter indicted, under Rev. St. §§ 5399, 5440, for conspiring to obstruct the administration of justice in the federal courts. The indictment charged that defendants conspired to use force and fraud to break up the relation between the master and servants aforesaid, and did so do, pending the existence of such injunction; and, as a legal conclusion from this allegation, it stated that they conspired to obstruct the administration of justice, by the violation of the injunction. The act charged was an offense against the laws of the state, but not against those of the United States. *Held*, that the indictment was fatally defective, in failing to aver, in terms, that the object of the conspiracy was to obstruct the administration of justice in the federal courts, and to aver that defendants were served with process, or in any manner notified of the issue of the writ. Mr. Justice Brewer and Mr. Justice Brown, dissenting.

2. In such case the rule that ignorance of penal laws is no defense to an indictment for their violation has no application, for the intent to obstruct the administration of justice can only be present when there is knowledge that justice is being administered. Mr. Justice Brewer and Mr. Justice Brown, dissenting.

3. The intent to obstruct the administration of justice could not be imputed from the intent to commit the unlawful act of compelling the master to discharge his servants, and the servants to leave the service of their master, for the unintended wrong was not a natural and probable consequence of the intended wrongful act. The doctrine of imputed intent was especially inapplicable, because the intended wrongful act was not an offense against the United States, but against a separate sovereignty,—the state of Idaho. In re Coy, 8 Sup. Ct. Rep. 1263, 127 U. S. 731, distinguished. Mr. Justice Brewer and Mr. Justice Brown, dissenting.

In error to the district court of the United States for the district of Idaho.

Indictment against George A. Pettibone, John Murphy, Michael L. Devine, and C. Sinclair. Defendants were convicted, and sued out a writ of error. Reversed.

Statement by Mr. Chief Justice FULLER:

Plaintiffs in error were indicted under sections 5399 and 5440 of the Revised Statutes of the United States,—the latter as amended by the act of May 17, 1879, (21 St. p. 4, c. 8,)—which are as follows:

"Sec. 5399. Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

"Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The indictment alleged that on May 28, 1892, suit was commenced in the United States circuit court for the district of Idaho, wherein the Bunker Hill & Sullivan Mining & Concentrating Company was complainant, and the Miners' Union of Wardner and others were defendants; that a writ of injunction was duly and regularly issued therein by the court, directed to plaintiffs in error and many others as defendants, which writ of injunction was set out in full in the indictment, and ordered as follows:

"In the mean time, and until the further order of this court herein, the said defendants, and each of them, their aiders, attorneys, officers, agents, servants, and employes, be, and they are hereby, severally restrained and enjoined from in any manner interfering with the complainant herein in any of its work in and upon or about its said mining claims, to wit, the Bunker Hill, the Sullivan, and the Small Hopes Lode mining claims, mentioned in the complaint herein, or in any part thereof, and from in any manner, by force or threats or otherwise, making any attempts to intimidate any employe of the complainant herein, or from attempting to prevent, by any force or intimidation, any employe of the said complainant from proceeding to work for the said complainant, in a peaceful, quiet, and lawful manner, in and upon any part of the aforesaid mines or mining claims, or in or upon any works of the said complainant therein or thereabouts, or at all, and that they, the said parties aforesaid, be, and they are hereby, further enjoined from intimidating or threatening, or by any force, threats, or any intimidation trying to prevent any employe of the complainant herein from working in or upon the aforesaid mines mentioned in the complaint herein, or at the mills of complainant, or in or upon any mining or other property of complainant, or from preventing any one from entering the service of the complainant herein, or in any unlawful manner interfering with the business of said complainant in employing persons to work upon its said property, or from going upon any part of the said complainant's property without permission from the complainant or its agents or employes so to do, or in any manner entering upon the works of the complainant, or within the buildings of the complainant without its consent or the consent of its managers, agents, or employes, and reference is hereby had to the bill of complaint herein, to which your attention is hereby directed, until the further order of this court, or the judge thereof; and the foregoing restraining order is also directed against the agents, servants, aiders, abettors, members, and associates of the defendants, or either of them."

The indictment thereupon averred that the defendants, on July 11, 1892, and while the writ of injunction was in full force and effect, "at Shoshone county, within the north-

ern division of the district of Idaho aforesaid, did unlawfully, corruptly, fraudulently, and feloniously conspire, combine, confederate, and agree together to commit an offense against the United States as follows, to wit," said defendants did, then and there, "unlawfully, corruptly, fraudulently, and feloniously conspire, combine, confederate, and agree together to intimidate, by force and threats of violence, the employes of the said Bunker Hill & Sullivan Mining & Concentrating Company, then working in and upon the mines of the said company, and within and around the mill and other buildings of the said company in said Shoshone county, said mines, mill, and other buildings of said company being then and there the mines, mill, and other buildings mentioned and described in said writ of injunction, with the intent then and thereby on the part of the said" defendants (naming them) "to compel the employes of the said Bunker Hill & Sullivan Mining & Concentrating Company to abandon their work in and upon the mines, mill, and other buildings of the said mining company last mentioned;" that the defendants *200 "did *then and there further unlawfully, fraudulently, corruptly, and feloniously conspire, combine, confederate, and agree together to intimidate, by force and threats of violence, the officers and agents of the said Bunker Hill & Sullivan Mining & Concentrating Company, with the intent then and there and thereby, by means of said force and threats of violence, to compel the officers and agents of said mining company to discharge and dismiss from the employ of the said mining company all employes (other than such persons as were members of what is called the 'Miners' Union') who were working either upon or within the mines of the said company and in the said company's mill and other buildings, which said last-mentioned mines, mill, and other buildings are the mines, mill, and other buildings mentioned and described in the aforesaid writ of injunction issued out of the said United States circuit court."

The indictment further averred that on July 12, 1892, the defendants, while the writ of injunction was in full force and effect, and the suit in which the writ issued was still pending and undetermined, "in aid of, and in furtherance of, and for the purpose of effecting the object of, the said unlawful and malicious combination and conspiracy, formed and entered into as aforesaid, and for the purpose and object aforesaid, did on the said 12th day of July, 1892, at the county and state aforesaid, unlawfully, fraudulently, corruptly, willfully, and feloniously, by force and violence and threats of violence, intimidate and compel the employes of the said Bunker Hill & Sullivan Mining & Concentrating Company, then and there working, in and upon the mines of the said company, and within and around the mill, property, and other buildings, all the property of said company, to cease and abandon work in and upon the mines, and within and around the mill, property, and other buildings of said company, said mines, mill, and other buildings of said company being then and there the same mines, mill, property, and buildings mentioned and described in said writ of injunction, and said employes being then and there in the employ of said company, and did then and there, unlawfully, corruptly, fraudulently, willfully, and feloniously, compel and force the said employes, by the intimidation and violence and threats of violence aforesaid, to abandon and leave and cease their said employment under said company, and their work in and upon the mines, mill, and other buildings of the said mining company last mentioned." And the defendants did, by intimidation and violence, and threats of force and violence, intimidate and compel the officers and agents of said Bunker Hill Company, against their will and consent, to discharge and dismiss from the service and employment of the company all its employes, other than such persons as were members of what was called the "Miners' Union," who were then working in and upon the property of the company.

"And so the grand jurors aforesaid, upon their oaths aforesaid, do charge and say that the said" defendants (naming them) "at the said Shoshone county, within the said northern division of the district of Idaho, did, on the 11th day of July, 1892, unlawfully, willfully, fraudulently, and feloniously conspire, combine, confederate, and agree together to commit an offense against the United States, to wit, to corruptly, and by force and threats, obstruct and impede the due administration of justice in the aforesaid United States circuit court for the ninth judicial circuit, district of Idaho, and did thereafter, on the 12th day of July, 1892, in pursuance of said unlawful and malicious combination and conspiracy, unlawfully, willfully, and feloniously, in the manner and form aforesaid, corruptly, and by force and threats of violence, obstruct and impede the due administration of justice in the aforesaid United States circuit court. All of which is contrary to the form, force, and effect of the United States statutes in such cases made and provided, and against the peace and dignity of the United States."

Motions to quash and demurrers were filed and overruled, and, after verdict, motions in arrest were made and denied. Plaintiffs in error were convicted and sentenced to imprisonment in the Detroit house of correction,—George A. Pettibone, for 2 years; John Murphy, for 15 months; and M. L. Devine and C. Sinclair, for 18 months each.

This writ of error was thereupon allowed.

Walter H. Smith and P. Reddy, for plaintiffs in error. Atty. Gen. Miller and Chas. W. Russell, Asst. Atty. Gen., for the United States.

*202 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

Under section 5399, any person who corruptly endeavors to influence, intimidate, or impede any witness or officer in any court of the United States in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, is punishable by a fine of not more than $500, or by imprisonment not more than three months, or both; and under section 5440, if two or more persons conspire to commit an offense against, or defraud, the United States, and one or more of them do any act to effect the object of the conspiracy, all the parties are liable to a fine of not more than $10,000, or to imprisonment for not more than two years, or to both. The confederacy to commit the offense is the gist of the criminality under this section, although, to complete it, some act to effect the object of the conspiracy is needed. U. S. v. Hirsch, 100 U. S. 33.

This is a conviction for conspiracy, corruptly, and by threats and force, to obstruct the due administration of justice in the circuit court of the United States for the district of Idaho, and the combination of minds for the unlawful purpose, and the overt act in effectuation of that purpose, must appear charged in the indictment.

The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital. U. S. v. Hess, 124 U. S. 486, 8 Sup. Ct. Rep. 571. And in U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. Rep. 531, it was held, *203 *in an indictment for conspiracy, under section 5440, Rev. St., that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

The courts of the United States have no jurisdiction over offenses not made punishable by the constitution, laws, or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated.

A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in Com. v. Hunt, 4 Metc. (Mass.) 111, that, when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment, while if the criminality of the offense consists in the agreement to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

This indictment does not, in terms, aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the circuit court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct and impede. It had previously averred that the defendants conspired, by intimidation, to compel the officers of the mining company to discharge their employes, and the employes to leave the service of the company,—a conspiracy which was not an offense against the United States, though it was against the state. Rev. St. Idaho, § 6541. The injunction was also set out, and it was alleged that the defendants did intimidate and compel the employes to abandon work; but the indictment nowhere made the direct charge that the purpose of the conspiracy was to violate the injunction, or to interfere with proceedings in the circuit court.

*204 *The combination to commit an offense against the United States was averred to consist in a conspiracy against the state, and the completed act to have been in pursuance of such conspiracy; but the pleader carefully avoided the direct averment that the purpose of the confederation was the interruption of the course of justice in the United States court.

Nor did the indictment charge that the defendants were ever served with process, or otherwise brought into court, or that they were ever in any manner notified of the issue of the writ, or of the pendency of any proceedings in the circuit court.

That this omission was advisedly made is apparent from the statement in the bill of exceptions that there was no evidence given on the trial showing, or tending to show, that the writ of injunction mentioned and set forth in the indictment was served upon the defendants, or either of them, or that they, or either of them, had any notice or knowledge of the issue thereof.

It was said in U. S. v. Carll, 105 U. S. 611, 612, by Mr. Justice Gray, delivering the opinion of the court: "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words, of themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that

intent." That was the case of an indictment for passing a forged obligation of the United States, and it was held that, by omitting the allegation that the defendant knew the instrument which he uttered to be forged, it had failed to charge him with any crime.

The construction that applies to the first branch of section 5399 must be applied to the second, and if it were essential that the person accused should know that the witness or *205 officer was a witness or officer in order to conviction of the charge of influencing, intimidating, or impeding such witness or officer in the discharge of his duty, so it must be necessary for the accused to have knowledge or notice or information of the pendency of proceedings in the United States court, or the progress of the administration of justice therein, before he can be found guilty of obstructing or impeding, or endeavoring to obstruct or impede, the same.

In U. S. v. Bittinger, 15 Am. Law Reg. (N. S.) 49, it was held that a person is a witness, under section 5399 of the Revised Statutes, who is designated as such, either by the issue of a subpoena, or by the indorsement of his name on the complaint, but that, before any one could be said to have endeavored to corruptly influence a witness under that section, he must have known that the witness had been properly designated as such. U. S. v. Kee, 39 Fed. Rep. 603.

In U. S. v. Keen, 5 Mason, 453, it was ruled by Mr. Justice Story and Judge Davis that it was no defense to an indictment for forcibly obstructing or impeding an officer of the customs, in the discharge of his duty, that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duty, if he knew the officer to be so engaged.

In cases of that sort it is the official character that creates the offense, and the scienter is necessary. King v. Osmer, 5 East, 304; King v. Everett, 8 Barn. & C. 114; State v. Carpenter, 54 Vt. 551; State v. Burt, 25 Vt. 373; State v. Maloney, 12 R. I. 251; State v. Downer, 8 Vt. 429; Com. v. Israel, 4 Leigh, 675; Yates v. People, 32 N. Y. 509; Com. v. Kirby, 2 Cush. 577; State v. Hilton, 26 Mo. 199; State v. Smith, 11 Or. 205, 8 Pac. Rep. 343; Horan v. State, 7 Tex. App. 183; Duncan v. State, 7 Humph. 148; State v. Hailey, 2 Strob. 73; State v. Beasom, 40 N. H. 367.

This is so whenever knowledge is an essential ingredient of the offense and not implied in the statement of the act itself. Whart. Crim. Pl. & Pr. § 164.

*206 Under section 5398, every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States, in serving, or attempting to serve or execute, any mesne process or warrant, or any rule of, or order of, any court of the United States, may be imprisoned and fined. It was held in U. S. v. Tinklepaugh, 3 Blatchf. 425, that an indictment under this section must distinctly state and charge that a legal process, warrant, etc., was issued by a court of the United States, and was in the hands of some officer of the United States for service, who had authority to serve the same, and that, after such process was in the hands of the officer for service, some one knowingly and willfully obstructed, resisted, or opposed him in serving, or attempting to execute, the same. And in U. S. v. Stowell, 2 Curt. 153, it was decided that an averment that the warrant resisted was issued by a commissioner was not good, but the facts constituting the due issue must be recited, and the absence of an averment that the commissioner who issued the warrant was thereto authorized could not be aided by referring to the court records. U. S. v. Wilcox, 4 Blatchf. 391.

It seems clear that an indictment against a person for corruptly, or by threats or force, endeavoring to influence, intimidate, or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such; and the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court. Section 5399 is a reproduction of section 2 of the act of congress of March 2, 1831, c. 99, (4 St. p. 487,) "declaratory of the law concerning contempts of court," though proceeding by indictment is not exclusive if the offense of obstructing justice be committed under such circumstances as to bring it within the power of the court, under section 725. Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. Rep. 699. In matters of contempt, persons are not held liable for the breach of a restraining order or injunction unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued or the order entered, or at least that application is to be made; but without service of process, or knowledge or notice or information of the pendency of proceedings, a violation cannot be made out. 2 Daniell, Ch. Pr. (4th Amer. Ed.) 1684; 2 High, Inj. (3d Ed.) §§ 1421, 1452; Winslow v. Nayson, 113 Mass. 411.

Undoubtedly it is a condition of penal laws that ignorance of them constitutes no defense to an indictment for their violation, but that rule has no application here. The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when justice is being administered. Unless that fact exists the statutory offense cannot be committed, and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. It is enough that the thing is done which the

statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise.

It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and, this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability. 1 Bish. Crim. Law, § 335. It is true that, if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the wrong that was intended; but, if the unintended wrong was not a natural and probable consequence of the intended wrongful act, then this artificial character cannot be ascribed to it, as a basis of guilty intent. The element is wanting through which such quality might be imparted.

*In re Coy, 127 U. S. 731, 8 Sup. Ct. Rep. 1263, illustrates this distinction. There the acts of congress and the statutes of Indiana made it a criminal offense for an inspector of elections, or other election officer to whom was committed the safe-keeping and delivery to the board of canvassers of the poll books, tally sheets, and certificates of the votes, to fail to perform this duty of safe-keeping and delivery; and it was held that in an indictment in a United States court for a conspiracy to induce those officers to omit such duty, in order that the documents mentioned might come to the hands of improper persons, who tampered with and falsified the returns at an election which included a member of congress, it was not necessary to allege or prove that it was the intention of the conspirators to affect the election of the member of congress who was voted for at that place, the returns of which were in the same poll books, tally sheets, and certificates with those for state officers, and that the danger which might arise from the exposure of the papers to the chance of falsification or other tampering was not removed because the purpose of the conspirators was to violate the returns as to state officers, and not the returns as to the member of congress.

The general evil intent in tampering with the poll lists, tally sheets, and certificates was included in the charge, and it was held that it was not necessary to show that that intent was specifically aimed at the returns of the vote for congressman. This was supported by the analogy of the example that where a man is charged with a homicide committed by maliciously shooting into a crowd for the purpose of killing some person against whom he bore malice, and with no intent to injure or kill the individual who was actually struck by the shot, he cannot be held excused because he did not intend to kill that particular person, and had no malice against him. There the result naturally followed from the act done, and it must be presumed to have been in the contemplation of the party. And so, as the persons accused in Coy's Case desired and intended to interfere with the election returns, and purposed to falsify them, the felonious intent, which exposed and subjected the evidences concerning the votes for congressman to the opportunity for their falsification, or to the danger of such changes or forgeries as might affect that election, dispensed with the necessity of an averment or proof that there was a specific intent or design to influence the congressional election.

Nor is this all. The unlawful act which the defendants are charged with conspiring to commit was not an offense against the United States, so that, if the defendants were held guilty of a conspiracy to violate the injunction, or interfere with proceedings about which they knew nothing, such conviction would have to rest upon a conspiracy to commit an act unlawful in another jurisdiction, and in itself a separate and distinct offense therein.

While offenses exclusively against the states are exclusively cognizable in the state courts, and offenses exclusively against the United States are exclusively cognizable in the federal courts, it is also settled that the same act or series of acts may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government. Cross v. North Carolina, 132 U. S. 131, 139, 10 Sup. Ct. Rep. 47. But here we have two offenses, in the character of which there is no identity; and, to convict defendants of a conspiracy to obstruct and impede the due administration of justice in a United States court because they were guilty of a conspiracy to commit an act unlawful as against the state, the evil intent presumed to exist in the latter case must be imputed to them, although ignorance in fact of the pendency of the proceedings would have otherwise constituted a defense, and the intent related to a crime against the state.

The power of the United States court was not invoked to prohibit or to punish the perpetration of a crime against the state. The injunction rested on the jurisdiction to restrain the infliction of injury upon the complainant. The criminal character of the interference may have contributed to strengthen the grounds of the application, but could not and did not form its basis.

The defendants could neither be indicted nor convicted of a crime against the state in the circuit court, but their offense against the United States consisted entirely in the violation of the statute of the United States

by corruptly, or by threats or force, impeding or obstructing the due administration of justice. If they were not guilty of that, they could not be convicted; and neither the indictment nor the case can be helped out by reference to the alleged crime against the state, and the defendants be punished for the latter under the guise of a proceeding to punish them for an offense which they did not commit.

The judgment is reversed, and the cause remanded, with instructions to quash the indictment and discharge the defendants.

Mr. Justice BREWER, dissenting.

I dissent from the opinion and judgment in this case. The burden of the decision is, as I understand it, that the indictment is fatally defective because it does not allege that the defendants knew of the injunction, and, also, that the conspiracy was to obstruct the administration of justice in the federal court. In other words, the defendants cannot be convicted of obstructing the administration of justice in the federal court because they did not know that justice was being there administered, and that, as they did not combine with the intent of obstructing the administration of justice, no such intent can, in law, be imputed to them. I insist that the true rule is that, where parties combine in an unlawful undertaking,—and by that I mean an undertaking unlawful in and of itself, and not one simply forbidden by statute; one which is malum in se, as distinguished from malum prohibitum,—they are amenable to the bar of criminal justice for every violation of law they in fact commit, whether such violation is intended or not.

Take the familiar illustration: Parties combine to break into a house and commit burglary. While engaged in the commission of that offense, resistance being made, one of the party kills the owner of the house. Can *211 there be a doubt that they are all guilty of murder, although murder was not the purpose of the combination, and was not in the thought of any but the single wrongdoer? In other words, they who did not intend murder, who did not know that murder was in fact being committed, are ruled to be chargeable with the intent to commit murder, and to be guilty of that offense, because they were engaged at the time in an unlawful undertaking, and the murder was committed in carrying that undertaking into execution. In 1 Hale, P. C. 441, it is said, quoting from Dalton, (page 241:) "If divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them, in doing thereof, kill a man, this shall be adjudged murder in them all that are present of that party abetting him, and consenting to the act, or ready to aid him, although they did but look on." Also, in 1 East, P. C. 257: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers, or going to beat a man or rob a park, or standing in opposition to the sheriff's posse, * * * they must, at their peril, abide the event of their actions." In Weston v. Com. 111 Pa. St. 251, 2 Atl. Rep. 191, it was held that if several persons are, with firearms, holding a forcible possession of lands claimed by others, all are guilty of a murder committed by any one of them therein. In Williams v. State, 81 Ala. 1, 1 South. Rep. 179, it appeared that several persons conspired to invade a man's household, and went to it with deadly arms to attack and beat him, and in carrying out this purpose one of the party got into a difficulty with the owner, and killed him, and the others were held guilty of murder, although they did not mean it. So, in State v. McCahill, 72 Iowa, 111, 30 N. W. Rep. 553, and 33 N. W. Rep. 599,—a case in some respects like this,—it appeared that certain persons combined to drive employes from premises, and in carrying out this conspiracy committed a murder, and it was held that the rest, who did not intend it, were guilty. In that case, on page 117, 72 Iowa, and page 555, 30 N. W. Rep., the court thus stated the law: "But where there is a conspiracy to accomplish an unlawful purpose, [as the forcible driving out of the new miners was,] and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged." See, also, Hamilton v. People, 113 Ill. 34; Stephens v. State, 42 Ohio St. 150; State v. Allen, 47 Conn. 121.

Applying these authorities to this case, if, while these defendants were thus forcibly driving the employes of the mining companies away from their work, one of them had shot and killed a resisting employe, would not all be guilty of murder, although only the single party had a thought of murder in his heart? Of course, I do not mean to claim that if a number are engaged in a single unlawful undertaking, and one of them steps aside and commits an entirely independent crime, all are responsible for that; but I do insist that if all are engaged in an unlawful undertaking, and while so engaged, and in carrying out that undertaking, one commits an additional offense, not within the actual thought and intent of his co-conspirators, all are guilty of that additional offense. And, in like manner, where parties conspire and combine to do an unlawful act, and in carrying that unlawful purpose into execution they do in fact violate a statute, of whose terms they may be ignorant, and therefore one which they did not intend to violate, they are, in law, guilty of its violation, and may

be punished accordingly. The law, under those circumstances, imputes to the wrongdoer the intent to violate every law which he does in fact violate. So, as these parties are guilty of this most unlawful act, this gross breach of the peace, this act which in and of itself was a flagrant wrong against the rights of individuals, both employers and employes, they should be chargeable with the intent to commit every violation of law which they did in fact commit. And, when parties stop injunctive process, they impede the administration of justice.

But it is said that this breach of the peace was a disturbance of only the peace of the state of Idaho, and that this unlawful aggression was simply a violation of the statutes of that state, and involved, in and of itself, no infraction of federal law; that, before a conviction can be sustained, it must be alleged and proved that there was an intent to violate the federal law; and that an intent of wrong against one sovereignty cannot be imputed to one who commits a wrong against another sovereignty. The converse of that has already been settled by this court in the case of In re Coy, 127 U. S. 731, 8 Sup. Ct. Rep. 1263. That was an indictment for a conspiracy, and the conspiracy charged was to induce, aid, counsel, procure, and advise certain election officers of the state of Indiana to unlawfully neglect and omit to perform the duties of the election laws of that state. The indictment, it is true, described the election as one at which a congressman was to be elected, but did not charge any intent or conspiracy to do anything affecting the election of such congressman; and the point—and the main point—presented was that the indictment contained no averment of an intent and purpose of the defendants to affect in any manner the election of a member of congress, or to influence the returns relating to that office, but this court held that the objection was not well taken. Mr. Justice Field alone dissented from the opinion in that case, holding that, as it is insisted here, there should be a specific charge of a conspiracy to do something affecting the election of the federal officer. I quote this from his opinion: "The indictment in this case charges a conspiracy to induce certain election officers appointed under the laws of Indiana to commit a crime against the United States, the crime being the alleged omission by them to perform certain duties imposed by the laws of that state respecting elections. But it contains no allegation that the alleged conspiracy was to affect the election of a member of congress, which, as said above, appears to me to be essential to bring the offense within the jurisdiction of the court. If the conspiracy was to affect the election of a state officer, no offense was committed, cognizable in the district court of the United States. If it had any other object than to affect the election of a member of congress, it was a matter exclusively for the cognizance of the state courts." It seems to me that in this opinion the court indorses the views expressed by Mr. Justice Field in that dissent, and then repudiated by a majority of the court.

I am authorized to say that Mr. Justice BROWN agrees with me in this dissent.

(147 U. S. 640)

TAYLOR et al. v. BROWN et al.

(March 6, 1893.)

No. 112.

INDIANS — HOMESTEAD LAWS — RESTRICTION ON ALIENATION—COMPUTATION OF TIME.

1. The act of March 3, 1875, § 15, allows Indians born in the United States, and abandoning their tribal relations, to have the benefit of the homestead act, provided that the title to lands acquired by any Indian shall be and remain inalienable for five years from the date of the patent. *Held*, that the computation of time should include the day of the issue of the patent. 40 N. W. Rep. 525, 5 Dak. 335, affirmed.

2. The limitation upon the Indian's power of alienation is valid; for, while the power of alienation is incident to an estate in fee simple, a restriction for a reasonable time is valid, especially when the grant is to a member of a race which is in a state of pupilage.

Appeal from the supreme court of the territory of Dakota. Affirmed.

Statement by Mr. Chief Justice FULLER:

This was an action commenced by Taylor and Bidwell against Brown and Young, impleaded with others, in the district court of the fourth judicial district of the territory of Dakota, within and for the county of Moody, July 17, 1885, and in which an amended complaint was served March 1, 1886. The prayer of the complaint was that certain deeds should be adjudged and declared clouds on the plaintiffs' alleged title to 160 acres of land therein described, and be decreed null and void, and of no effect, and that the plaintiffs should be decreed to be the legal owners of the property. Young and Brown were the only parties served. They answered separately, requested separate findings in their favor, and the court found separately as to and against each of them, whereupon each moved for a new trial, and their motions being overruled, and judgment being entered against them, took separate appeals to the supreme court of the territory.

The cause was tried by the district court upon the admissions in the pleadings and the evidence adduced, and thereupon the court found, in brief, that on June 15, 1880, a patent issued to one Thomas K. West for the 160 acres in question, and was duly recorded October 7, 1881. That on January 25, 1881, the patentee and his wife conveyed to defendant Young 40 acres of the tract, for valuable consideration, the receipt of which was acknowledged, and that Young entered into actual possession of the 40 acres on that date, and had ever since occupied, used, and cultivated the land, using and claiming the

same in his own right adversely to all the world, and especially as against the plaintiffs, and had erected and made valuable, permanent improvements thereon.

That on August 13, 1881, West conveyed to his wife 80 acres of the tract by deed bearing that date, acknowledging the receipt of a valuable consideration, and recorded October 7, 1881. That on August 15, 1881, Mrs. West conveyed to defendant Brown the 80 acres in consideration of the sum of $300 paid to her on that date. That Brown entered into actual possession of the 80 acres August 15, 1881, claiming it in his own right and title thereto under the deed to him, and occupied, used, and cultivated the land, using and claiming the same in his own right from that date adversely.

That on June 15, 1885, by deed recorded that day, West and his wife conveyed the whole 160 acres to Young, for a valuable consideration, the receipt of which was acknowledged, and on the last-mentioned date Young entered into actual possession of the premises, claiming them in his own right and title thereto, and that since that date Young occupied and used the land, and had been in actual possession of the whole of it, using and claiming the same adversely.

That West and his wife on June 17, 1885, and from August 15, 1881, were not in the actual possession, or otherwise, of either the 40 or the 80 acres. That West and his wife, on June 17, 1885, conveyed the land to C. E. Thayer, who on June 19th conveyed the 120 acres to the plaintiffs. That neither said Thayer nor his wife were on June 19th, or at any other time prior to or since that date, and at the time of the delivery of the deed to the plaintiffs, in actual possession of the 40 acres, nor were they in actual possession of any part of the said tract.

That Thomas K. West was a Sioux Indian who had arrived at the age of 21 years, and who had abandoned his tribal relations, and made satisfactory proof of such abandonment *642 by taking an oath of allegiance to the United States* government, and who was entitled, under sections 15 and 16 of chapter 131 of the Laws of the United States, passed March 3, 1875, entitled "An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30, 1875, and prior years, and for other purposes," to enter a homestead under the laws of the United States, and had entered said land under said laws, and duly proved up on the same, and received the patent referred to.

That the deeds to Young, Alfred Brown, and Sophia West, were made within five years from the date of the patent to West by the United States. That the adverse possession of Brown and Young was entirely founded on conveyances that were absolutely null and void, and that the possession of Brown and Young of the premises, and the improvements made thereon, were made with full notice that West was an Indian, as previously found.

The court stated the following conclusions of law:

"(1) That the land described in said patent was absolutely inalienable prior to the 16th day of June, 1885. That the deeds from Thomas K. West to Timothy Young, of January 25, 1881, June 15, 1885, and from Thomas K. West to Sophia West, of August 13, 1881, and from Sophia West to Alfred Brown, of August 15, 1881, are null and void.

"(2) That the deed from Thomas K. West and Sophia West to C. E. Thayer on the 17th day of June, 1885, and the deed from C. E. Thayer and wife to S. S. Taylor and S. A. Bidwell, are good and valid conveyances, and conveyed the title of said premises to the said plaintiffs.

"(3) That the plaintiffs, S. S. Taylor and S. A. Bidwell, are the owners of said premises."

The supreme court of the territory reversed the judgment of the district court, and remanded the cause, with directions to dismiss the plaintiffs' complaint. The opinion will be found in 5 Dak. 335, 40 N. W. Rep. 525.

S. S. Burdett, for appellants. Robt. J. Gamble, for appellees.

*643 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court:

By section 15 of the act of March 3, 1875, (18 St. p. 402, c. 131,) any Indian born in the United States, who was the head of a family, or who had arrived at the age of 21 years, and who had abandoned, or might thereafter abandon, his tribal relations, was, on making satisfactory proof of such abandonment, entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and acts amendatory thereof: "provided, however, that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable, for a period of five years from the date of the patent issued therefor."

By section 16, in all cases in which Indians had theretofore entered public land under the homestead law, and proceeded in accordance with the regulations of the land office, the conditions prescribed by law having been complied with, the entries so allowed were confirmed, and patents directed to issue thereon, "subject, however, to the restrictions and limitations contained in the fifteenth section of this act in regard to alienation and incumbrance."

West came within the sixteenth section, and obtained his patent accordingly.

The question, upon the disposition of which the decision of the supreme court of the ter-

ritory was based, and which we are first to consider, arises upon the proper construction of the proviso to the fifteenth section. The restraint on alienation was to continue for a period of five years. Was it the intention that the computation of time should include the day of the issue of the patent? If so, the deed of June 15, 1885, was not invalid, and the decree must be affirmed.

In Matthews v. Zane, 7 Wheat. 164, 211, Mr. Chief Justice Marshall remarked that it was the known rule "that a statute for the commencement of which no time is fixed commences *from its date;" and in Arnold v. U. S., 9 Cranch, 104, 120, in which it was held that a statute providing that it should take effect "from and after the passing of this act" took effect immediately, Mr. Justice Story said that "it is a general rule that, when the computation is to be made from an act done, the day on which the act is done is to be included." *644

But this cannot be said to be a universal rule, either in England or this country. Webb v. Fairmaner, 3 Mees. & W. 473; Robinson v. Waddington, 13 Adol. & E. (N. S.) 753; Sheets v. Selden's Lessee, 2 Wall. 177; Calvert v. Williams, 34 Md. 672; Parkinson v. Brandenburg, 35 Minn. 294, 28 N. W. Rep. 919; Bemis v. Leonard, 118 Mass. 502, where many cases are referred to and considered.

In Hatter v. Ash, 1 Ld. Raym. 84, it was argued that the words "from the date," when used to pass an interest, included the day, aliter, when used by way of computation in matters of account, and Powell, senior justice, was of this opinion, but the other justices expressed none.

The distinction indicated was recognized by the supreme court of Pennsylvania in Lysle v. Williams, 15 Serg. & R. 135, where a scire facias was issued on the 22d of July, 1823, upon a bond dated the 22d of July, 1818, and payable in five years from the date, and the court held that, as upon the execution of the bond an immediate interest passed to the plaintiff, the first day should be included in the five years, and that the scire facias was properly issued.

While it is desirable that there should be a fixed and certain rule upon this subject, it must be conceded that the rule which excludes the terminus a quo is not absolute, but that it may be included when necessary to give effect to the obvious intention.

This was the view entertained by Lord Mansfield, who ruled in Pugh v. Duke of Leeds, Cowp. 714, that "the sense of the word 'from' must always depend upon the context and subject-matter, whether it shall be construed inclusive or exclusive of the terminus a quo."

In Lester v. Garland, 15 Ves. 248, it was held by Sir William Grant that, in computing time from an act or event, no general rule of inclusion or exclusion should be laid down; that it depended on the reason of the thing, according to the circumstances. *645

In Griffith v. Bogert, 18 How. 158, 163, the law of Missouri allowed the lands of a deceased debtor to be sold under execution, but prohibited it from being done until after the expiration of 18 months from the date of the letters of administration upon his estate. The case involved a sale which took place on the 1st of May, 1821, the letters of administration being dated November 1, 1819; and it was held that the sale was valid, as the terminus a quo should be included. Mr. Justice Grier, speaking for the court, discussed the vexed question of the inclusion or exclusion of the terminus a quo with great vigor, and said: "It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm, rather than destroy, any bona fide transaction or title. The intention and policy of the enactment should be sought for and carried out." And, reasoning upon the case in hand, he added: "The object of the legislature was to give a stay of execution for eighteen months, in order that the administrator might have an opportunity of collecting the assets of the deceased, and applying them to the discharge of his debts. The day on which the letters issue may be used for this purpose as effectually as any other in the year. The rights of the creditor to execution are restrained by the act for the benefit of the debtor's estate. The administrator has had the number of days allowed to him by the statute to collect his assets and pay the debts. The construction which would exclude the day of the date is invoked, not to avoid a forfeiture or confirm a title, but to destroy one, obtained by a purchaser in good faith under the sanction of a public judicial sale." And see Dutcher v. Wright, 94 U. S. 553.

It may also be observed that, as to the general doctrine that the law does not allow of fractions of a day, it is settled that, when substantial justice requires it, courts may ascertain the *precise time when a statute is approved or an act done. Louisville v. Bank, 104 U. S. 469. *646

The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent, or for a certain and reasonable time, may be valid, and the grantee forfeit his estate by violating it, (1 Prest. Est. 477;) and while such a result does not ensue in transactions with members of a race of people treated as in a state of pupilage, and entitled to special protection, (Pickering v. Lomax, 145 U. S. 310, 12 Sup. Ct. Rep. 860; Felix v. Patrick, 145 U. S. 330, 12 Sup. Ct. Rep. 862,) yet the proviso in question may fairly be held to have been adopted in view of general principles. If, when the patent issued, June 15, 1880, West could have con-

veyed, but for a specific restriction taking effect at the same moment, then that date should be included in the period of five years prescribed. The proviso is that the title shall not be subject to alienation in the various ways described, and shall be and remain inalienable, for a period of five years from the date of the patent. Possibly the language is susceptible of being construed to mean that the land should be inalienable on the day of the issue of the patent, and for five years after that date,—two periods of time; but we are of opinion that the more natural and the true construction is that only one period is referred to, and that the day the patent issued should not be excluded. The limitation on alienation was to be and to remain; that is to say, the land was to be on the first day not subject to alienation, and so to remain until the five years had expired. The protection of the Indian against the improvident disposition of his property was fully attained, in the judgment of congress, by fixing the period of five years, and no reason is perceived why any more than that time should be assumed to have been within the legislative contemplation.

The power to alienate came with the patent, and the restriction for the period named was carefully drawn to operate eo instanti; that is, to commence, in its entirety, coincidently with the possession of the power.

The decree of the supreme court of the territory is affirmed, and the mandate will issue to the supreme court of South Dakota for further proceedings in conformity to law.

(148 U. S. 84)

UNITED STATES v. FLETCHER.
FLETCHER v. UNITED STATES.

(March 6, 1893.)

Nos. 918, 919.

COURT MARTIAL—APPROVAL OF SENTENCE BY THE PRESIDENT—COLLATERAL ATTACK.

1. Article 65, Articles of War, (Act April 10, 1806; 2 St. p. 367,) provides that "no sentence of a court martial shall be carried into execution * * * until after the whole proceedings shall have been transmitted to the secretary of war, to be laid before the president of the United States for his confirmation or disapproval." *Held*, that an indorsement by the secretary of war upon the record of such proceedings, that, "in conformity with the sixty-fifth of the rules and articles of war, the proceedings of the general court martial in the foregoing case have been forwarded to the secretary of war for the action of the president. The proceedings, findings, and sentence are approved, and the sentence will be duly executed,"—is presumptively a personal approval by the president; for it is not necessary that such approval shall be evidenced by his own hand. 26 Ct. Cl. 541, reversed. U. S. v. Page, 11 Sup. Ct. Rep. 219, 137 U. S. 673, followed. Runkle v. U. S., 7 Sup. Ct. Rep. 1141, 122 U. S. 543, explained and distinguished.

2. Specifications of a charge, tried by a court martial, not objected to for insufficiency on the trial, will not be held on their face incapable of sustaining the charge, upon review of proceedings by an army officer claiming arrears of pay, on the ground of the illegality of his dismissal from the service.

3. Where a court martial has jurisdiction error in its exercise cannot be reviewed in a proceeding by an army officer, sentenced by such court to be dismissed the service, to recover arrears of pay, on the ground that he never was dismissed in fact, by reason of the failure of the president of the United States to approve the sentence.

Appeals from the court of claims.

Petition in the court of claims by Bird L. Fletcher against the United States to recover arrears of pay as a retired officer of the army. A portion of the claim was allowed. 26 Ct. Cl. 541. Both parties appeal. Reversed.

Statement by Mr. Chief Justice FULLER:

*The claimant filed an amended petition in the court of claims, December 16, 1890, as a substitute for his original petition filed December 11, 1889, seeking to recover from the United States a certain amount of money as arrears of pay alleged to be due him as captain on the retired list of the army, to which the government filed a general traverse December 22, 1890. Thereupon due proceedings were had, and the court on June 8, 1891, found, in substance, the following facts:

Bird L. Fletcher, the claimant, was on December 27, 1859, enlisted as a private in the general mounted service of the United States army. After successive promotions, by which he became corporal and second lieutenant, he was brevetted first lieutenant on May 10, 1863, for gallant and meritorious service in the cavalry action at Franklin, Tenn. He was made first lieutenant on October 12, 1864, in which rank he served until August 25, 1867, when he was promoted captain. On June 19, 1868, he was placed on the retired list of the army, by order of Gen. Grant, upon the finding of a board of examination that he was incapacitated for active service, and that his incapacity was the result of sickness and exposure incident to the service. The order retiring him directed that his name be placed upon the list of retired officers of the class provided for by the act of congress of August 3, 1861, in which the disability results from long and faithful service, or from some injury incident thereto.

A court martial was held in Philadelphia, Pa., July 10, 1872, before which Fletcher was brought for trial upon a charge of conduct unbecoming an officer and a gentleman, and upon this charge, which was supported by the averments of six specifications, he was tried. He was not represented by counsel on the trial, but conducted his case in person, and to the charge and all the specifications pleaded not guilty.

The specifications related to the incurring and nonpayment of certain indebtedness, and Fletcher was found guilty of all of them, some parts of the first, second, and fifth ex-

cepted, and guilty of the charge, and sentenced to be dismissed the service.

The proceedings, findings, and sentence of the court martial were transmitted to the secretary of war, who wrote upon the record the following order:

"War Department, July 24th, 1872.

"In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court martial in the foregoing case have been forwarded to the secretary of war for the action of the president.

"The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

"Wm. W. Belknap, Secretary of War."

From the date of this order, July 24, 1872, Fletcher received no pay as an officer of the army.

He did not dispute at the war department the validity of the dismissal, in pursuance of the sentence of the court martial, for the period of nearly 16 years, but did promptly petition congress for redress, and urge his restoration to the retired list; and he made application for pay to the accounting officers of the treasury after March 1, 1888. His complaint stated that March 27, 1888, he addressed a petition to the president of the United States, and this resulted in a report of the judge advocate general to the secretary of war, April 17, 1888, that, in accordance with Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. Rep. 1141, there was no evidence that the proceedings in Fletcher's case had been laid before or approved by the president, and that the case was still subject to the president's action. The secretary of war then transmitted the report and the original record to the president, stating that the proceedings of the court martial awaited his action, as it appeared from the facts in the report that Fletcher was still undoubtedly an officer of the army, and recommending that the sentence be approved. On July 5, 1888, the president made an order approving the proceedings, findings, and sentence of the court martial.

In his amended petition in the court of claims, the claimant alleged that the proceedings, findings, and sentence of the court martial, and the orders approving the same, were void, for the reason that the charge and specifications upon which he was tried and sentenced stated no offense within any of the articles of war, and because the order of the secretary of war in 1872 was not the act of the president.

The court of claims held that the said charge and specifications stated an offense within the articles of war, but that the sentence of the court martial did not take effect until acted upon by the president on July 5, 1888. The court therefore allowed the claimant all pay claimed by him, except such as was barred by the statute of limitations, up to the date of the last order approving the sentence of the court martial, and gave judgment for the claimant for $9,654. 26 Ct. Cl. 541.

From this judgment both parties appealed.

Asst. Atty. Gen. Parker, for the United States. George A. King, for Fletcher.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The claimant's suit was for arrears of pay claimed to be due him as a retired officer of the army of the United States, accruing from December 1, 1883, to November 30, 1890, at the rate of $2,100 per annum, and amounting to the sum of $14,700. This claim was met by a finding and sentence of a court martial, held on the 10th of July, 1872, in the city of Philadelphia, whereby Fletcher was found guilty of "conduct unbecoming an officer and a gentleman," and sentenced to be dismissed the service.

By article 65 of the act of April 10, 1806, (2 St. pp. 359, 367,) establishing rules and regulations for the government of the armies of the United States, it was provided that "no sentence of a court martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the secretary of war to be laid before the president of the United States for his confirmation or disapproval and orders in the case." And article 83 reads thus: "Any commissioned officer convicted before a general court martial of conduct unbecoming an officer and a gentleman shall be dismissed the service."

These articles and the provisions of the act of May 29, 1830, (4 St. p. 417,) amending the sixty-fifth article, were carried forward into articles 72 and 106 of section 1342 of the Revised Statutes.

Upon the record of the proceedings, findings, and sentence of the court martial which tried Capt. Fletcher, the secretary of war indorsed that: "In conformity with the 65th of the rules and articles of war, the proceedings of the general court martial in the foregoing case have been forwarded to the secretary of war for the action of the president. The proceedings, findings, and sentence are approved, and the sentence will be duly executed."

Was this order void, on the ground that it does not appear that the president personally approved the proceedings and directed the execution of the sentence?

By the first section of the act of August 7, 1789, (1 St. p. 49,) establishing an execu-

tive department, to be denominated the "Department of War," now in substance section 216 of the Revised Statutes, the secretary of war is to perform and execute such duties as shall be enjoined on, or intrusted to, him by the president, relative to the land or naval forces, or to such other matters respecting military or naval affairs as the president shall assign to the department, and to conduct the business of the department in such manner as the president shall from time to time order or instruct. And we have held that while the action required of the president in respect of the proceedings and sentences of courts martial is judicial, yet that such action need not be evidenced under his own hand.

Under article 65, the proceedings of this court martial were not forwarded to the secretary of war for individual action by him, but to enable him to lay them before the president, so that the latter might take action as prescribed. There is nothing to indicate that the secretary of war assumed to confirm or disapprove, or issue orders in the case, and as his indorsement showed that he was proceeding under that article, and that he had received the record for the purpose of being acted on by the president, the approval and the direction for the execution of the sentence were manifestly the acts of the president. The presumption is that the secretary and the president performed the duties devolved upon them respectively, and it would be unreasonable to construe the secretary's indorsement as meaning that he had received the proceedings for the action of the president in conformity with article 65, and had approved them himself, and ordered execution of the sentence in contravention of the article.

As we said in U. S. v. Page, 137 U. S. 673, 678, 680, 11 Sup. Ct. Rep. 219: "Undoubtedly the action required of the president under this article is judicial action. He decides personally, and the judgment is his own personal judgment, and not an official act presumptively his. But that judgment need not be attested by his sign manual in order to be effectual." There the indorsement read that the proceedings had been forwarded to the secretary of war, and by him submitted to the president; and we inquired: "By what process of reasoning can the conclusion be justified that, although these proceedings were laid before the president for his confirmation or disapproval, yet the findings and sentence were approved by some one else, who had no authority to act in the premises?" While in the case in hand it is not said that the proceedings were submitted to the president, it is stated that they had been forwarded to the secretary of war for the action of the president, and as that is followed by an approval and the direction of the execution of the sentence, which approval and sentence could only emanate from the president, the conclusion follows that the action taken was the action of the president.

The views of the judge advocate general, and the action of the secretary in 1888 upon a reference of the subject in answer to the petition of Capt. Fletcher, presented to the president, March 27th of that year, were induced by the case of Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. Rep. 1141, and the present decision of the court of claims was based upon it. Reference to the report of that case shows that the circumstances were so exceptional as to render it hardly a safe precedent in any other.

It appeared therein that the proceedings, findings, and sentence of the court martial were transmitted to the secretary of war, who on January 16, 1873, wrote upon the record an order approving the proceedings, with certain exceptions, and the findings and sentence, together with the further statement that, in view of the unanimous recommendation by the members of the court that the accused should receive executive clemency, and other facts, the president was pleased to remit all of the sentence except so much as directed cashiering; and that thereupon the secretary issued a general order announcing the sentence, as thus modified. It further appeared that thereafter, and on the same day, Maj. Runkle presented to President Grant a petition insisting that the proceedings had not been approved by him as required by law; that the conviction was unjust; that the record was insufficient to warrant the issuing of the order, and asking its revocation and annulment; whereupon, in pursuance of the petition, the record of the official action theretofore had was, by direction of the president, referred to the judge advocate general for review and report; that this report was subsequently made, and with the petition was found by President Hayes awaiting further and final action thereon, and, being taken up by him as unfinished business, the conviction and sentence were disapproved, and the order of January 16, 1873, revoked.

This court was of opinion that the order was capable of division into two separate parts,—one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised; and that under the circumstances, which are recapitulated, it could not be said that it positively and distinctly appeared that the proceedings had ever in fact been approved or confirmed by the president as required by the articles of war.

The facts that there was no reference to article 65 in the secretary's indorsement; that the objection that President Grant had not personally examined and approved of the proceedings was taken and urged upon President Grant himself immediately upon the promulgation of the sentence; and that he entertained the objection, thereby rec-

ognizing the contention,—seemed to make it a matter of argument whether he had personally acted in the premises.

If it had been affirmatively stated that the proceedings were submitted, perhaps the action of President Grant in the matter of the application might have been ascribed to some other ground than doubt as to his examination of the proceedings; but as the record stood, this court apparently thought that the presumptions conflicted, and, therefore, felt constrained to the conclusion announced.

We regard the certificate of the secretary in this case, in 1872, as a sufficient authentication of the judgment of the president, and perceive no ground upon which the order of that date can be treated as null and void for want of the required approval.

It is insisted, however, on behalf of the claimant that the court martial had no jurisdiction to try and convict Capt. Fletcher, because the charge and specifications stated no offense whatever, "within any rules and articles of war, or known to the military law and custom of the United States." We do not feel called upon to set forth the specifications on which the court martial acted. They related to the incurring by the accused of certain indebtedness and the nonpayment thereof, and while it is argued that the nonpayment of debts does not justify conviction of conduct unbecoming an officer and a gentleman, we think that the specifications went further than that, and contained the element that the circumstances under which the debts were contracted and not paid were such as to render the claimant amenable to the charge. The evidence is not before us in any form, nor are there findings of fact in respect to the conduct and behavior forming the subject of inquiry. The specifications were not objected to for insufficiency, and cannot properly be held to be, on their face, incapable of sustaining the charge. As the court martial had jurisdiction, errors in its exercise, if any, cannot be reviewed in this proceeding. Dynes v. Hoover, 20 How. 65; Keyes v. U. S., 109 U. S. 336, 3 Sup. Ct. Rep. 202; Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. Rep. 570.

The judgment is reversed, and the cause remanded, with a direction to dismiss the petition.

(148 U. S. 167)

ROGET v. UNITED STATES.

(March 6, 1893.)

No. 80.

NAVAL OFFICERS—RETIREMENT—LONGEVITY PAY.

An officer in the navy, who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled, under the act of March 3, 1883, to a greater rate of pay after active service ceased than 75 per centum of the pay of the grade or rank which he held at the time of retirement. 24 Ct. Cl. 165, affirmed.

Appeal from the court of claims. Affirmed.

Robert B. Lines and John Paul Jones, for appellant. Attorney General Miller, for the United States.

Mr. Justice SHIRAS delivered the opinion of the court.

This is an appeal from a judgment of the court of claims, finding in favor of the United States, and dismissing the petition of the claimant, Eugenia A. Roget, executrix of Edward A. Roget, deceased. Edward A. Roget was a professor of mathematics in the United States navy, having been commissioned July 8, 1864, to rank from May 21, 1864. On August 1st of that year, being then 62 years of age, he was placed upon the retired list, in accordance with the act of congress approved December 21, 1861, (12 St. p. 329,) which contains the following provisions:

"That whenever the name of any naval officer now in service, or who may hereafter be in the service, of the United States, shall have been borne on the naval register forty-five years, or shall be of the age of sixty-two years, he shall be retired from active service, and his name entered on the retired list of officers of the grade to which he belonged at the time of such retirement.

"Sec. 2. And be it further enacted that the president of the United States be, and he is hereby, authorized to assign any officer who may be retired under the preceding section of this act to shore duty, and such officer thus assigned shall receive the full shore pay of his grade while so employed."

"Sec. 5. And be it further enacted that all officers retired under the provisions of this act shall receive the retired pay of their respective grades as fixed by law."

Under the same act he was continued on active duty until June 30, 1873.

On July 15, 1870, a naval appropriation act was approved, (16 St. p. 331,) the third section of which contains, among other provisions, the following:

"That from and after the thirtieth day of June, eighteen hundred and seventy, the annual pay of the officers of the navy on the active list shall be as follows:

* * * * * * * *

"Professors of mathematics and civil engineers, during the first five years after date of appointment, when on duty, two thousand four hundred dollars; on leave or waiting orders, one thousand five hundred dollars; during the second five years after such date, when on duty, two thousand seven hundred dollars; on leave or waiting orders, one thousand eight hundred dollars; during the third five years after such date, when on duty, three thousand dollars; on leave or waiting orders, two thousand one hundred dollars; after fifteen years from such date, when on duty, three thousand five hundred dollars; on leave or waiting orders, two thousand six hundred dollars."

While performing active service, Prof. Roget received the full shore pay of his grade, including the increase after five years' service at the rate so provided for. On June 30, 1873, he was relieved from active service, in accordance with the naval appropriation act of March 3, 1873, (17 St. p. 547,) which *169 provides, in the first section, "that no officer on the retired list of the navy shall be employed on active duty except in time of war."

The same section of that act contains the following provision:

"That those officers on the retired list, and those hereafter retired, who were, or who may be, retired after forty years' service, or on attaining the age of sixty-two years, in conformity with section one of the act of December, eighteen hundred and sixty-one, and its amendments, dated June twenty-fifth, eighteen hundred and sixty-four, or those who were or may be retired from incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, shall, after the passage of this act, be entitled to seventy-five per centum of the present sea pay of the grade or rank which they held at the time of their retirement."

From the time Prof. Roget was relieved from duty until November 9, 1887, when he died, he was paid at the rate of $1,800 a year.

It was contended by the claimant that under the naval appropriation act, approved March 3, 1883, (22 St. p. 472,) her testator should have been credited with the time of his active service, from May 21, 1864, to March 3, 1873, and should have received the difference between the pay of a retired professor of mathematics, who has been retired within his first five years of service, and the pay of such officer who has been retired within his second five years, or $225 per annum, from July 1, 1873, to the date of his death, being 14 years and 122 days. She therefore asked for a judgment against the United States in the sum of $3,200. The court of claims, in dismissing the petition, decided that "an officer in the navy, who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled, under the act of March 3, 1883, to a greater rate of pay after active service ceased than seventy-five per centum of the pay of the grade or rank which he held at the time of retirement." *170 24 Ct. Cl. 165.

*The portion of the act of March 3, 1883, relied upon by the claimant, is as follows:

"And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service, in all respects, in the same manner as if all said service had been continuous, and in the regular navy, in the lowest grade having graduated pay, held by such officer since last entering the service: provided, that nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: provided, further, that nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer army or navy."

Prior to the approval of the act containing the foregoing provisions, there had been three statutes operating to affect the pay of professors of mathematics retired at the age of 62 years, namely, the said acts of 1861, 1870, and 1873. The first gave authority for the assignment of any retired officer to shore duty, and provided that such officer, thus assigned, should receive the full shore pay of his grade while so employed; the second provided for longevity pay for officers on the active list, including professors of mathematics; and the third fixed the pay of officers so retired at 75 per centum of the sea pay of the grade or rank which they held at the time of their retirement. The precise effect of these acts may be readily seen by a brief examination of certain terms employed in them. By the act of March 3, 1835, (4 St. p. 756,) professors of mathematics were regarded as being subject to sea duty; the language used in fixing their pay being as follows: "When attached to vessels for sea service, or in a yard, twelve hundred dollars." They are so regarded, also, by the act of August 31, 1842, (5 St. p. 576,) which provides that they "shall be entitled to live and mess with the lieutenants of seagoing and receiving vessels;" and by the act of August 3, 1848, § 12, (9 St. p. 272,) providing that they "shall perform such duties as may be assigned them by order of the secretary of the navy, at the naval school, the observatory, and on board ships of war, in instructing the midshipmen of the navy, or otherwise." Though the act of June 1, 1860, § 3, (12 St. pp. 23, 27,) declares that "no service shall be regarded as sea service but such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law," the same statute, as well as others, in fixing the pay of professors of mathematics, provided for but one rate of pay for such officers while on duty. It may therefore be considered that a professor of mathematics, assigned after his retirement to shore duty, would be entitled to the highest pay of his grade while so employed, which would be as well his sea pay as his shore pay. The grade of an officer in the navy is his official station, by which are regulated his powers, duties, and pay. His pay may be further governed by his time of service within a grade, either in fact rendered within the grade, or constructively performed therein through the force of statutes. That the office of professor of mathematics is a grade is recognized by the act of April 17, 1866, § 7, (14 St. p. 38,)

which provides, "that hereafter no vacancy in the grade of professor of mathematics in the navy shall be filled."

The operation of the statutes of 1861, 1870, and 1873, in the case of Prof. Roget, was to give him pay, during the time he performed active service, as though he were on the active list, including the longevity increase provided for by the act of 1870, and, after his active service ended, to give him 75 per cent. of the sea pay (which was also, in his case, the shore pay) provided for by the act of 1873, attached to the grade which he held at the time of his retirement. This being unquestionably the legal effect of the acts approved prior to 1883, the single question involved is whether, under the act of March 3d of that year, he was entitled to have active service credited in regulating his pay as a retired officer after his active service ceased.

Ever since the retired list of the navy was established, the pay of a retired officer, as such, has been fixed by statute at a certain per centum of the active service pay of the grade held by such officer at the time of his retirement. His active service pay at that time has always been taken as the basis in ascertaining his future pay, and we are unable to discover in the act in question any design to modify this persistent rule.

It would appear, not only that congress has manifested no intention by the act of 1883 to change the laws governing the pay of retired officers, but that it has, in at least one instance, shown the contrary purpose. By a provision in the fifth section of the act of July 15, 1870, no officer promoted upon the retired list "shall, in consequence of such promotion, be entitled to any increase of pay."

It can hardly be the intention of counsel to assume that the amount of pay in question in this case should be calculated as though Prof. Roget was retired in 1873, instead of in 1864. The retirement of an officer is a proceeding that can only take place in a prescribed manner, and it is not pretended that such proceeding occurred, with reference to that officer, more than once.

The court of claims was right in dismissing the petition of the claimant, and the judgment of that court is affirmed.

(147 U. S. 571)

WASHINGTON & G. R. CO. et al. v. TOBRINER.

(March 6, 1893.)

No. 116.

STREET RAILWAYS—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF—JUDGMENTS—APPEAL—DECISION.

1. Where the evidence of contributory negligence is not of such a conclusive character as would warrant the court in setting aside a verdict, the question of contributory negligence should be left to the jury.

2. It is the duty of a street railroad company to safely carry and deliver a passenger, and, in doing so, not only to provide safe and convenient means of entering and leaving the cars, but to stop when the passenger is about to alight, and not to start the car until he has alighted.

3. The burden of proof as to contributory negligence is upon defendant, and remains upon him during the trial; but he may avail himself of any evidence given by plaintiff, and the evidence to make out the contributory negligence need not come exclusively from the party upon whom rests the burden of proof.

4. If a conductor of a street car negligently fails to observe whether a passenger has alighted, or, knowing that he has not, negligently starts the car with a sudden jerk, in consequence whereof the passenger is thrown from the step, and injured, such negligence as might be imputed to the passenger in being upon the step at all cannot be properly considered as contributory negligence.

5. In an action for personal injuries, plaintiff may recover for future damages when the evidence justifies a finding that such damages will inevitably and necessarily result.

6. In the District of Columbia, the common-law rule that judgments do not, in general, bear interest, still prevails as to judgments in an action of tort, except as to judgments in justices' courts, which are limited to cases involving not over $100.

7. Rev. St. § 966, allowing interest on judgments recovered in the federal courts when such interest is allowed by the laws of the state in which the court is held, has no application to the District of Columbia.

8. Rev. St. D. C. § 829, prescribing the rate and time of interest on judgments rendered, is by its terms exclusively confined to actions founded on contracts, and is not applicable in cases of actions founded on torts.

9. Rev. St. D. C. §§ 713–717, being acts to amend the usury laws of the District of Columbia, only changed the rate of interest, and prescribed the consequences of transgression, and did not make judgments and decrees bear interest in the future, if they did not in the past.

10. Rev. St. D. C. § 1007, allowing interest on justices' judgments, does not allow interest on judgments in tort exceeding $100.

11. Rules 51 and 67 of the supreme court of the District of Columbia, prescribing the method of entering the verdict, do not support the view that judgments in tort bear interest, nor do the rules of the supreme court of the United States support such a view, as they are provided solely for that court.

12. Where the only error in a judgment is the allowance of interest on the amount thereof, the supreme court of the United States will not necessarily reverse, but will affirm, if at the same term there is filed therein a certified copy of a remittitur of interest filed in the court below.

In error to the supreme court of the District of Columbia.

Statement by Mr. Chief Justice FULLER:

This was an action brought by John H. Harmon to recover damages for a personal injury to him through the negligence of the railroad company. The supreme court of the District, in special term, rendered judgment on the verdict of the jury, on December 1, 1887, for $6,500; and this judgment was affirmed by the court in general term on June 12, 1889, and judgment rendered against the railroad company and its surety on appeal for the amount of the judgment of the court in special term, with interest thereon from December 1, 1887, when it was entered below, until paid, with costs. To review this judgment this writ of error was brought. The case is reported in 18 D. C. 255.

The evidence is comprehensively given by James, J., delivering the opinion, as follows:

"The plaintiff testified, in his own behalf, that on the evening of the 28th of April, 1882, at about 9 o'clock, he took passage in one of the defendant's cars on Pennsylvania avenue to go to his home, on Nineteenth street; that he took his seat about two thirds of the distance from the rear platform; that at or near Nineteenth street he signaled to the conductor to let him off; that the conductor was then inside the car, figuring up his accounts under the light; that upon receiving the signal the conductor rang the bell, and the car began to slow up, and, as he supposed, was about stopping; that there were not many passengers inside, but the platform was crowded; that he made his way through the crowd on the platform, and down onto the step, which was occupied by a man and a boy, who held onto the railings on each end of the steps; that the car was at that time almost at a standstill; that he could neither swing off nor get back; that just as he had gotten on the step the bell was rung, and the car started, and he was thereby thrown off onto the pavement, and injured. He further stated that the conductor did not go out to the platform to assist him to get off. On cross-examination he said that, at the time of his attempting to get off, there were only six or eight passengers inside of the car, while the platform was so crowded that the man and boy referred to had to stand upon the step.

"On the part of the defendant the conductor testified that the plaintiff was in the habit of riding on defendant's cars, and of getting off while the car was in motion; that, when the plaintiff signaled on the night in question, he (the conductor) rang the bell, and the car began to slow; that he was then standing on the rear platform; that he and a small boy were the only persons then on *573 the platform; that the plaintiff, * * without waiting for the car to stop after so signaling the conductor, immediately went out on the rear platform, and stepped down upon the step, at the same time holding onto the iron railing on the car, and while the car was still in motion, and moving at a slow rate of speed,—nearly at a standstill,—the plaintiff stepped off, and after he had let go of the car, he (the conductor) pulled the bell to go on again, and, as the plaintiff turned, he fell; * * * that he did not ring the bell for the car to start until after the plaintiff had stepped on the street, and let go of the car.' "

Upon the trial the court gave the following instructions, requested on behalf of the plaintiff:

"If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for him to get off, and that the car thereupon slowed, and that while plaintiff was waiting for the car to stop, and before it had fully stopped, the car started suddenly forward, through the negligent act of the conductor or driver, and that the plaintiff was thereby, and without any negligence on his part, thrown from the car and injured, then he is entitled to recover."

"If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for plaintiff to get off, and that thereupon the car slowed, and the plaintiff went out on the platform, and, while the car was moving very slowly, stepped down on the step of the car to be in readiness to step off when the car should fully stop, and that, instead of stopping fully, the car moved suddenly forward, in consequence of the negligent act of the conductor or driver, and he was thereby thrown off and injured, it would be for the jury to say, under all the facts and circumstances of the case, shown in evidence, whether the conduct of the plaintiff caused or contributed to his injury; and if they further believe that the plaintiff did, under the circumstances, what an ordinarily prudent man would have done, then he was not guilty of contributory negligence, and would be entitled to recover."

"If the jury find for the plaintiff, they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately resulted from the injury he suffered; and, if they find that the injuries sustained by the plaintiff are permanent, they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will suffer in the future. In determining this, as to the future, they will consider plaintiff's bodily vigor and age, as shown by the evidence adduced."

The defendant prayed the court to instruct the jury as follows:

"The burden of proof is upon the plaintiff to satisfy the jury that he sustained the injury which is the subject of this action by reason of the negligence of the defendant, and without contributory negligence on his part."

But the court refused to give the instruction as prayed, and modified it by striking out the words, "and without contributory negligence on his part," and gave it as modified.

Defendant asked the court to give the following instruction:

"If the jury shall find that the platform was crowded, and that the plaintiff made his way through the crowd, and got down from the platform, and onto the step below, and stood on the step without any means of support, with a person on each side and a crowd behind, and whilst the plaintiff was so standing a sudden movement of the car caused the plaintiff to fall from the step

onto the pavement, whereby he received the injury alleged, then it will be for the jury to determine from the evidence whether or not the plaintiff is chargeable with contributory negligence through such acts; and, if the jury shall find that he is so chargeable, then the plaintiff is not entitled to the verdict."

But the court refused to give the same without modification, and modified it by inserting after the word "chargeable," in the last line of the instruction, the following: "And that such negligence contributed to the injury."

Defendant also asked the court to give *575 several instructions, which need not be repeated, and which were refused or modified, and, among others, this, omitting the words in brackets:

"It was not the duty of the conductor of the street car from which the plaintiff was injured to exercise any physical control over the plaintiff in getting off the car, and if the jury shall find from the evidence that when the conductor rang the bell to stop the car, and when the plaintiff passed out of the car upon the platform and upon the step, the conductor was standing on the inside of the car, and that the platform was crowded with passengers, and that a boy was on the step next to the car, and a man was also on the other end of the step, in such a position as to prevent the plaintiff from supporting himself by either of the railings at the time the plaintiff stepped down upon the step, and that the car was in motion, and that while so on the step the plaintiff was thrown off the car by a sudden jerk or start of the car, caused by the ringing of the bell or otherwise, then it will be for the jury to determine whether or not the plaintiff is chargeable with contributory negligence [by such acts,] and if the jury shall find that he is so chargeable, [and that said negligence contributed to the accident,] the verdict must be for the defendant."

But the court refused to give this instruction without modification, and modified it by the insertion of the words given above in brackets.

At defendant's request the court gave the following instructions:

"First. If from the evidence the jury shall find that the injury would not have occurred if the plaintiff had waited until the car stopped, and that the injury was caused by the plaintiff attempting to get off the car whilst in motion, then the plaintiff contributed to the injury, and is not entitled to recover.

"Second. If the jury shall be satisfied from the evidence that the plaintiff himself so far contributed to the accident by his own negligence, or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover, and the verdict must be for the defendant."

*576 The court also charged the jury as follows:

"This case suggests four theories as to the cause of this accident which is complained of under the declarations, and as many propositions of law applicable to them. How far there is sufficient evidence in the case, or any evidence, to support any one of these theories, I shall leave to you. In the first place, the testimony on the part of the defendant is to the effect that the plaintiff had descended from the car in safety, and that he stepped and fell, from some cause not attributable to the conduct of the defendant, but from some unforeseen accident. If you find that to be the case, it is perfectly apparent that there is no ground of action at all. There is evidence in the case directly to that effect, which is to be construed by you, and weighed, in connection with all the other evidence before you. If the plaintiff undertook, after requesting the conductor to stop the car, to descend from the car while it was still in motion, however slowly it might be going, that is an act involving, necessarily, some imprudence, —so I take it; and, if that act was the cause of his falling, it would amount, in my judgment, to contributory negligence, and would defeat his action. If you are satisfied that it was an act of carelessness on his part to come out on the crowded platform, and step down on the step while it was already occupied by other people, so that he had to stand between them, and had no means of supporting himself, and in consequence of that alone he fell from the car, without any other cause,—I say, if you are satisfied that was an act of carelessness on his part, and that it was the direct cause of his falling off the car,—that would also amount to contributory negligence, which would defeat his right to recover. Fourthly, if you are satisfied that while he was upon the step, even though it might have been imprudent in him to go there, and yet, if the conductor had allowed the car to stop, he would have alighted in safety, and no accident would have happened, but that, instead of so doing, the conductor either negligently failed to observe whether or not he had alighted, or, seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and in consequence of that a sudden jerk of the car took place, *577 and that threw him down, and was the immediate cause of his falling, and that the accident would not have happened but for that fact, then I hold that the company is responsible."

Exceptions were duly taken by the defendants.

Enoch Totten and W. D. Davidge, for plaintiffs in error. W. A. Cook, L. H. Pike, C. C. Cole, and W. L. Cole, for defendant in error.

*558 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

It is contended that it was error to leave the question of contributory negligence to the jury. We do not think so. This was not a case where the facts were undisputed, and where but one reasonable inference could be drawn from them. The court was not obliged, in the exercise of a sound judicial discretion, to set aside the verdict because the evidence of contributory negligence was of such conclusive character that it could not be sustained. Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569.

It was the duty of the defendant to safely carry and deliver the passenger, and, in so doing, not only to provide safe and convenient means of entering and leaving the cars, but to stop when the passenger was about to alight, and not to start the car until he had alighted. There was a conflict of evidence as to the condition of the platform, the position of the plaintiff, and the circumstances surrounding the accident. It is conceded that to be upon the platform, or even upon the step, might not be negligence in all cases, and certainly not negligence in law; but it is insisted that the plaintiff was voluntarily riding upon the step of the car, when moving, without any means of support, and that this, in the absence of justification or excuse, would necessarily be negligence. The difficulty is that this position assumes a condition of affairs which is controverted upon the case made.

It is further argued that, while the general rule is that the burden of proof as to contributory negligence is upon the defendant, that rule was not applicable, because the presumption that the plaintiff was not in fault was overcome by plaintiff's own evidence, and, therefore, that the court should have instructed the jury that the burden of proof was not only upon the plaintiff to satisfy the jury that he sustained the injury by reason of the negligence of the defendant, but also that this was without contributory negligence on his part. Testing this contention by the evidence of the plaintiff alone, without admitting that this should be done where the *559 defendant has gone into evidence, and the ruling he asks must be given, in view of all the testimony, the precise question was decided in Railroad Co. v. Horst, 93 U. S. 291, 298, adversely to defendant's position. In that case the defendant adduced no evidence, and it was contended that plaintiff's evidence showed that the accident resulted from his negligence, and that, therefore, the trial court erred in charging that "the burden of proving contributory negligence rests on the defendant, and it will not avail the defendant unless it has been established by a preponderance of evidence." This court held the instruction correct, and said: "The court did not say that if such negligence were established by the plaintiff's evidence the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence, coming exclusively from the party on whom rested the burden of proof. It is not improbable that the charge was so given by the court from an apprehension that the jury might without it be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof, or insufficient proof, on the subject, there was a fatal defect in his case. It was therefore eminently proper to say upon whom the burden of proof rested; and this was done without in any wise neutralizing the effect of the testimony the plaintiff had given, if there were any, bearing on the point adversely to him."

The defendant did not attempt to have the case taken away from the jury at the conclusion of plaintiff's evidence, and, if it had, we do not think a motion to that effect could have been sustained. As a mere matter of law, the burden as to contributory negligence remained the same, under the circumstances, and it would have been error if the court had given the instruction as requested.

It is urged with particular earnestness that the fourth branch of the charge was objectionable in stating that, even though plaintiff was negligent in being upon the step before the car had stopped, yet if they were satisfied that the accident would not have happened if the conductor had allowed the car to stop, but that instead of so doing the conductor either negligently failed to observe whether he had alighted or not, or, seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and in consequence of that a sudden jerk of the car took place, which threw him down, and was the immediate cause of the injury, and that the accident would not have happened but for that fact, then the plaintiff could recover. The argument is that the rule applied in the instruction is that which obtains where the plaintiff's negligence exposes him to the risk of injury, and the defendant omits, after becoming aware of plaintiff's danger, to use ordinary care and diligence to avert the consequences; and it is said that whether a defendant is negligent or not, in failing to adapt his conduct to a condition of things caused by the negligence of the plaintiff, depends upon whether the defendant had time and opportunity to ascertain and avoid the injury. Railway Co. v. State, 29 Md. 420, and Railway Co. v. State, 31 Md. 357, with other like cases, are cited to the point that the exception to the general rule as to contributory negligence is not otherwise applicable. The language of Judge Alvey, in the latter case, is quoted as follows: "It must appear, either that the defendant might, by a proper degree of caution, have avoided the consequences of the injured party's neglect, or that the latter could not,

by ordinary care, have avoided the consequences of the defendant's negligence. This, however, implies time for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence. But, where there is a concurrence of negligence of both in the production of injury to one of the parties, the causes are commingled, and are regarded as equally proximate to the result produced, and therefore not susceptible of apportionment." But, as explained by Judge James in the opinion in this case, the omission to which the instruction refers was not the omission to observe that a person had placed himself in danger of being hurt by the defendant, whereby the latter was called upon to exercise care to avert that consequence, but it was the omission to observe whether the passenger whom the defendant was setting down had actually alighted. The duty resting upon the defendant was to deliver its passenger, and that involved the duty of observing whether he had actually alighted before the car was started again. If the conductor failed to attend to that duty, and did not give the passenger time enough to get off before the car started, it was necessarily this neglect of duty that did the mischief. It was not a duty due to a person solely because he was in danger of being hurt, but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger. Viewed in this light, the instruction was unobjectionable. If the conductor negligently failed to observe whether plaintiff had alighted, or, knowing that he had not, negligently started the car too soon, and in consequence of that a sudden jerk of the car took place, and threw him down, and was the immediate cause of his falling, and the accident would not have happened but for that fact, we think it clear that such negligence as might be imputed to the plaintiff in being upon the step at all could not, under the circumstances supposed, be properly held to have been contributory negligence. To hold so would be to determine that a carrier could defend his own negligence in the particulars named upon the ground that, if the plaintiff had not been there, he would not have been hurt. It may be said that he placed himself where he was in risk of falling off, but that was a risk he could not have anticipated as the result of a sudden start before he had got off, because he had a right to assume that the car would actually stop to allow him to get off, and if it had, as it should have done, upon the hypothesis of the instruction, no accident would have happened. Under the terms of the instruction the injury ensued directly from the defendant's negligence, and that was its proximate cause. Coasting Co. v. Tolson, 139 U. S. 551, 558, 11 Sup. Ct. Rep. 653.

The learned judge who tried the case, in explaining its various aspects, stated that it suggested four theories as to the cause of the accident, and whether there was sufficient or any evidence to support any one of these theories, he should leave to the jury. He meant, of course, that the jury should consider the case from all the points of view presented, and exclude such of the contentions as were unsupported by the evidence. We see no ground upon which the defendant can complain of this. We cannot find, upon exploring the evidence,—all of which is given in the record,—that it reasonably tended to show that the plaintiff was injured in getting off the car while it was in motion. The plaintiff denied it, and the conductor said that it was safe for the plaintiff to get off, and that he got off. Yet the court permitted the jury to pass upon the case as if the proofs raised an actual controversy upon the point. Perhaps such an inference might have been drawn, as plaintiff's claim was that he was about to get off; but, taking the opening passage of the charge in connection with what followed, we think that the defendant cannot complain that it was improperly deprived of the judgment of the court, and that thereby the door was open to mere conjecture on the part of the jury, to its injury.

Another error assigned is that the instruction in relation to damages was objectionable in permitting an award for the future effects of the injury; but there was evidence which justified a finding that future damages would inevitably and necessarily result, and, this being so, there was no error in the instruction upon that subject.

It appears to us that this case was carefully tried, and properly left to the jury, and that no error warranting the reversal of the judgment was committed.

It is further urged that the court, in general term, erred in rendering a judgment for interest against the defendant and its surety, notwithstanding the judgment of the special term bore no interest. The question is whether, by the law of the District of Columbia, a judgment in an action of tort carries interest. In McDade v. Railroad Co., 5 Mackey, 144, this subject was considered by the supreme court of the District, and the court concluded that such judgments did bear interest, Hagner, J., delivering an elaborate opinion to that effect. It is conceded that, at common law, judgments, whatever the cause of action, did not bear interest. Perkins v. Fourniquet, 14 How. 328. This was so in Maryland at the time of the cession of the District, with perhaps some exceptions, not embracing judgments in actions of tort. Hammond v. Hammond, 2 Bland, 370; Railway Co. v. Sewell, 37 Md. 443. To change the common law in the District after the cession, of course, required an act of congress.

By the act of June 24, 1812, (2 St. p. 756, c. 106, § 6; Rev. St. D. C. § 829,) it was provided as follows: "Upon all judgments rendered on the common-law side of the circuit

court of said District, in actions founded on contracts, interest at the rate of six per centum per annum shall be awarded on the principal sum due until the judgment shall be satisfied; and the amount which is to bear interest, and the time from which it is to be paid, shall be ascertained by the verdict of the jury sworn in the cause."

By its terms this provision was confined exclusively to actions founded on contracts. As appears from Newson v. Douglass, 7 Har. & J. 417; Karthaus v. Owings, 2 Gill & J. 430; Railway Co. v. Sewell, 37 Md. 443; and many other cases,—only some causes of action carried interest at common law, in Maryland, as matter of right; its allowance otherwise being left to the jury, to be decided according to the equities of the transaction, and, with few exceptions in cases of contract, no judgment in any form carried interest. This law applied the remedy, but it declared that, while interest was to be allowed on the principal sum due, the amount which was to bear interest, and time from which the interest was to run should be ascertained by the verdict of the jury. Interest was not to be awarded upon a judgment for the aggregate of principal and interest, but interest was recoverable upon the principal sum due from the date ascertained as directed.

The eighth section of the act of August 23, 1842, (5 St. pp. 516, 518, c. 188,) provided "that, on all judgments in civil cases hereafter recovered in the circuit or district courts of the United States, interest shall be allowed, and may be levied by the marshal, under process of execution issued thereon, in all cases where, by the law of the state in which such circuit or district courts shall be held, interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such state." This was carried forward into section 966 of the Revised Statutes. The purpose of this act was to bring about uniformity between the tribunals of the United States and of the states upon the subject of interest, and the supreme court of the District of Columbia is neither within its terms nor its object. It is wholly inapplicable. Whatever the law of the District of Columbia is upon the subject of interest controls of course.

On the 22d of April, 1870, an act was approved, entitled "An act to amend the usury laws of the District of Columbia," the first section of which read: "That the rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars, for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as hereinafter provided." The second section made it lawful, in all contracts thereafter to be made, for the parties to agree, in writing, for ten per centum per annum, or any less sum, of interest on money loaned or in any manner due and owing. The other sections related to the penalty for contracting to receive a greater rate, the recovery back of unlawful interest so received, and to the effect of the law upon the national banking act. 16 St. p. 91. These sections constitute sections 713–717 of the Revised Statutes of the District.

This act related, as its title correctly stated, to the usury laws of the District, and the rate of interest at six per cent. was to continue, except as provided by the subsequent section, penalty being denounced for contracting, in writing, for a greater rate than 10, or verbally for a greater rate than 6, per cent. Judgments and decrees, as well as the loan or forbearance of money, goods, or things in action, are referred to, but the act does not say that they shall bear interest in the future, if they did not in the past. On the contrary, that which had been was to continue, and the changes wrought by the statute were only in the rate and the consequences of transgression. There is nothing to indicate a legislative intention to declare that all judgments and decrees should thereafterwards bear interest by virtue of the statute, or to make any change in that respect. Such a view disregards the language of the act, which confines the exception to existing law to the enumeration of the succeeding sections. Judgments bore interest in actions founded on contracts as provided by the act of 1812, the award of interest being based upon the verdict and to be collected on the principal sum. Judgments in tort did not bear interest. The rule could, indeed, be altered or repealed by congress, but the statute to that effect should be plain and unambiguous, or the repugnancy between the old law and the new incapable of being reasonably overcome. We are unable to conclude that this act of 1870 comes within the settled rules of construction in this regard.

By section 997 of the Revised Statutes of the District, justices of the peace have jurisdiction where the amount claimed for debt or damages arising out of contracts or damages for injuries to persons or property does not exceed $100, and, by section 1007, justices' judgments bear interest from their date until paid or satisfied; but it does not follow that, because congress intended to allow interest upon judgments in tort not exceeding $100, therefore all judgments in tort bear interest.

Reference was made at the bar to certain rules of the supreme court of the District, which are, and have been, since 1869, as follows:

"(51) A general verdict for the plaintiff shall be recorded thus: 'The jury, on their oath, say they find the issue aforesaid in

favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises, is the sum of $——, besides costs.' If the action be founded on contract, the record of the verdict shall proceed, 'with lawful interest from the —— day of ——, 18—, besides costs.'

*568 "'If the verdict be for the defendant, then, 'The jury, on their oath, say they find for the defendant,' unless, upon set-off pleaded, a balance is found due the defendant; and then the record of the verdict shall proceed, 'and that the money payable to him by the plaintiff by reason of the premises, is the sum of $——, with interest from the —— day of ——, 18—, besides costs.'

"If there be several counts in the declaration, and the jury find for the plaintiff on some, and for the defendant on the rest, the verdict shall be entered thus: 'The jury, on their oath say, they find for the plaintiff on the (——) issues, and that the money payable to him by the defendant, by reason thereof, is the sum of $——, [with interest from the —— day of ——, 18—,] besides costs; and for the defendant on the (——) issues.'"

"(67) Whatever the cause of action may be, if the judgment be for the recovery of money, it shall be awarded generally without any distinction of debt from damages, thus: 'It is considered that the plaintiff recover against the defendant $——, [with interest as aforesaid,] being the money payable by him to the plaintiff by reason of the premises, and $—— for his costs of suit, and that he have execution thereof.'"

These rules are in conformity with the act of 1812. The jury find the principal sum, and the time from which interest on the contract shall be given. In an action of tort the jury include interest, if given at all, in the damages assessed. The form of the judgment prescribed follows the verdict, discriminates between contract and tort, and recognizes that the judgments that carry interest do so by reason of the verdict to that effect. We think no support to the view that judgments in tort bear interest by force of law can be derived from these rules.

Nor is the contention sustained by reference to the rules of this court. By the twenty-third section of the judiciary act of 1789, now section 1010 of the Revised Statutes, it was declared: "Where, upon such writ of error, the supreme or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error *569 just damages for his delay,* and single or double costs, at their discretion." And by various rules of this court, promulgated from time to time, this jurisdiction has been regulated. Thus, in cases of affirmance, where the writ is for mere delay, 10 per cent. damages may be awarded, in addition to interest, and interest is given at the same rate that similar judgments bear interest in the courts of the state where the judgment was rendered; and the same rule is applied to decrees for the payment of money, unless otherwise ordered by this court. Rule 23. But the question of interest is solely for the court to determine, as the act of 1842 did not repeal the twenty-third section of the judiciary act. Boyce v. Grundy, 9 Pet. 275; Mitchell v. Harmony, 13 How. 115, 149; Perkins v. Fourniquet, 14 How. 328, 331; In re Washington & G. R. Co., 140 U. S. 91, 11 Sup. Ct. Rep. 673.

We are of opinion that error was committed in the judgment of affirmance in respect of the allowance of interest.

In Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. Rep. 494, which was a case of contract, the matter in dispute in the District supreme court in general term was, with interest accrued before the affirmance, largely in excess of the amount necessary to give jurisdiction to this court. A motion was made to dismiss, which was overruled; and Mr. Justice Gray, delivering the opinion of the court, pointed out that the promissory note sued on, by its express terms, bore interest at the rate of 8 per cent. yearly from its date until paid, and that, computing interest accordingly, the sum in dispute was much more than the jurisdictional amount; and as to Railroad Co. v. Trook, 100 U. S. 112, and District of Columbia v. Gannon, 130 U. S. 227, 9 Sup. Ct. Rep. 508, (which involved judgments rendered in cases in tort,) cited in support of the motion, he remarked that the judgment in special term for damages for an action sounding in tort "bore no interest, either by the general law, or by the judgment of affirmance in general term." In each of the cases referred to the judgment of affirmance was only for the amount which the sum or value of the matter in dispute had to exceed in order to give us jurisdiction. Had the original judgments carried interest by force of law, jurisdiction would have attached. Association v. Miles, 137 U. S. 689, *570 11 Sup. Ct. Rep. 234.* But, as the question was not fully discussed, we have thought it proper to reconsider it in the light afforded by the opinion of the supreme court of the District in McDade's Case.

While, however, we are of opinion that there was error in this particular in the judgment of affirmance, we are not constrained to reverse it, if the interest be remitted. Bank v. Ashley, 2 Pet. 327; Construction Co. v. Seymour, 91 U. S. 646, 656; Gilmer v. Kennon, 131 U. S. 22, 29, 9 Sup. Ct. Rep. 696. In Bank v. Ashley, the remittitur was filed in this court. In Construction Co. v. Seymour, the remittitur was filed in the court below, and a certified copy thereof filed here. If the defendant in error shall, within a reasonable time during the present term of this court, produce and file a certified copy of the remittitur of the interest in the supreme court of the District, the judgment, less the interest, will be affirmed; but, if this is not done, it will be reversed. In

either event the costs must be paid by defendant in error.

Mr. Justice BREWER did not hear the argument, and took no part in the decision.

(148 U. S. 148)

STATE OF INDIANA v. UNITED STATES.

(March 13, 1893.)

No. 1,162.

PUBLIC LANDS—APPLICATION OF PROCEEDS TO MAKING ROADS—CLAIMS OF STATES.

1. Under the act of March 3, 1857, providing for a settlement between the United States and the several states of the accounts growing out of the sale of public lands, and requiring the account to be stated on the same principles prescribed in the act of March 2, 1855, relating to a settlement with the state of Alabama, the United States is under no obligation to account to the state of Indiana for the 2 per cent. of the net proceeds of sales in that state, which the United States was to apply to the making of a road "leading to the said state;" for in the case of Indiana the 2 per cent., and much more, was expended for that purpose, while in the case of Alabama the government did not apply the money to the purpose designated, but expressly relinquished the same to the state, to be by her expended for certain public improvements.

2. Under the provision that the money should be applied to making a road "leading to the said state," congress was at liberty to apply it on any part of the road, and hence it was immaterial what part of the entire sums expended on the road was properly chargeable to the states of Ohio, Illinois, and Missouri, under the similar provisions in the acts providing for their admission.

Appeal from the court of claims. Affirmed.

Statement by Mr. Justice GRAY:

This was a petition filed in the court of claims on October 23, 1889, by the state of Indiana, against the United States, to recover the sum of $412,184.97, alleged to be due to the state of Indiana out of moneys received by the United States from sales of public lands in that state. The court of claims dismissed the petition. 28 Ct. Cl. —. The petitioner appealed to this court. The facts found by the court of claims, and the material provisions of the statutes bearing upon the claim of the petitioner, were as follows:

In the act of April 30, 1802, c. 40, for the admission of the state of Ohio into the Union, one of the propositions offered by congress, and accepted by the state, was that one twentieth part of the net proceeds of lands within the state, afterwards sold by congress, should "be applied to the laying out and making public roads leading from the navigable waters empting into the Atlantic, to the Ohio, to the said state, and through the same, such roads to be laid out under the authority of congress, with the consent of the several states through which the road shall pass;" and it was provided that the propositions so offered were on condition that the state should provide, by ordinance irrevocable without the consent of congress, that all lands sold by congress should be exempt from taxation under authority of the state for five years after sale. 2 St. p. 175. By the act of March 3, 1803, c. 21, § 2, it was enacted that 3 per cent. of these proceeds should be paid from time to time, to the state, to be applied to the laying out, opening, and making roads within it. 2 St. p. 226.

By the act of March 29, 1806, c. 19, for building a road from Cumberland in Maryland to the state of Ohio, (since known as the "Cumberland" or "National" road,) and by subsequent acts passed before the admission of the state of Indiana into the Union, congress appropriated for the building of that road various sums amounting to $710,000, to be reimbursed out of the 2 per cent. fund. 2 St. pp. 357, 555, 661, 730, 829; 3 St. pp. 206, 282. The expenses upon the road during that period largely exceeded the moneys credited to that fund.

The act of April 19, 1816, c. 57, for the admission of the state of Indiana into the Union, likewise provided that 5 per cent. of the net proceeds of the sale by congress of lands in the state should be reserved for the making of public roads and canals, of which three fifths should be applied to those objects by the state, and two fifths "to the making of a road or roads leading to the said state, under the direction of congress." 3 St. p. 290. And by the act of April 11, 1818, c. 49, the secretary of the treasury was directed to pay the 3 per cent., from time to time, to the state of Indiana. 3 St. p. 424.

Similar provisions were contained in the acts for the admission into the Union of Mississippi, in 1817; of Illinois, in 1818; of Alabama, in 1819, and of Missouri, in 1820. 3 St. pp. 348, 428, 489, 545.

By the act of May 15, 1820, c. 123, congress directed the road to be continued from Cumberland to Wheeling, in the state of Virginia: provided, however, "that nothing in this act contained, or that shall be done in pursuance thereof, shall be deemed or construed to imply any obligation on the part of the United States to make, or to defray the expense of making, the road hereby authorized to be laid out, or of any part thereof." 3 St. p. 604.

In 1822 the road had been finished from Cumberland to Wheeling. In the same year, an act ordering the erecting of tollgates and the imposition of tolls on the road was passed by both houses of congress, but was vetoed by President Monroe.

A continuance of the road was laid out, graded, bridged, and made a highway from the Ohio river, opposite Wheeling, to the seat of government of the state of Missouri, and upon it was transported the government mail, and it was opened and used by the public. But this was not accomplished until after tollgates had been erected and tolls

imposed upon it by the states of Ohio and Virginia, as authorized by the acts of congress of March 2, 1831, c. 97, and March 2, 1833, c. 79. 4 St. pp. 483, 655. By successive acts, passed from 1829 to 1856 inclusive, and collected in the opinion of the court of claims, congress surrendered the road, as fast as completed, to the states through which it ran.

By the act of September 4, 1841, c. 16, § 16, the 2 per cent. of the net proceeds of lands sold by the United States in the state of Mississippi, and reserved by former acts for the making of a road or roads leading to that state, was relinquished to the state of Mississippi, to be applied to the making of a railroad from Brandon, in that state to the boundary line of Alabama; and by section 17 the like fund was relinquished to the state of Alabama, to be applied to the construction of certain lines of internal improvements in that state. 5 St. pp. 457, 458.

By the act of March 2, 1855, c. 139, entitled "An act to settle certain accounts between the United States and the state of Alabama," it was enacted "that the commissioner of the general land office be, and he is hereby, required to state an account between the United States and the state of Alabama, for the purpose of ascertaining what sum or sums of money are due to said state, heretofore unsettled, under the sixth section of the act of March 2, 1819, for the admission of Alabama into the Union, and that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians within the limits of Alabama, and allow and pay to the said state five per centum thereon, as in case of other sales." 10 St. p. 630.

The act of March 3, 1857, c. 104, entitled "An act to settle certain accounts between the United States and the state of Mississippi and other states," required the commissioner of the general land office, by section 1, "to state an account between the United States and the state of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said state, heretofore unsettled, on account of the public lands in said state, and upon the same principles of allowance and settlement as prescribed in the" act of March 2, 1855, c. 139, and to include in like manner the reservations under Indian treaties, and further provided, in section 2, that "the said commissioner shall also state an account between the United States and each of the other states upon the same principles, and shall allow and pay to each state such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre." 11 St. p. 200.

On December 4, 1872, the commissioner of the general land office stated an account between the United States and the state of Indiana, in which he found that, by accounts referred to, there appeared to be due to the state the following sums:

Balance due December 31, 1856, on account of 3 per cent. fund...	$ 47 12
Amount of 2 per cent. on net proceeds of sales of public lands from December 1, 1816, to December 31, 1856, (the expenses incident to sales since that date being in excess of the gross receipts)....	413,568 61
Amount of 5 per cent. on the cash value, at $1.25 per acre, of lands within permanent Indian reservations	6,333 73
	$419,949 46

The commissioner also referred to a table of the acts of congress making appropriations for the construction of the Cumberland road, which showed that the sums appropriated from 1818 to 1837, under acts requiring them to be reimbursed out of the 2 per cent. reserved for the laying out and making roads in the states of Ohio, Indiana, and Illinois, amounted to $2,502,900.45, and that the additional sums appropriated from 1825 to 1836, under acts requiring them to be reimbursed out of the two per cent. reserved for laying out and making roads in those three states and Missouri, amounted to $1,555,000. The commissioner then stated that it would thereby be seen that the proportion of the sums from time to time appropriated for the construction of the Cumberland road, which, by law, were to be replaced in the treasury out of the 5 per cent. accruing in Ohio, Indiana, Illinois, and Missouri, would more than absorb the entire amount of the 2 per cent. which had accrued upon the sales of lands in Indiana, and that, therefore, in the absence of special legislation upon the subject, nothing would appear to be at present payable to the state of Indiana, except the sums of $47.12 on the 3 per cent. account, and $6,333.73 for Indian reservations.

On January 25, 1873, the comptroller of the treasury certified the balance, consisting of those two sums, and amounting to $6,380.85, to be due to the state of Indiana. On February 10, 1873, the secretary of the treasury, under the authority given him by the act of March 30, 1868, c. 36, (15 St. p. 54,) referred the account to the comptroller for re-examination, and he thereupon vacated the former certificate. On February 5, 1874, the comptroller reaffirmed the former decision and certificate, as to the sum of $6,380.85, but reserved for future consideration the question as to the further claim made by the state. This amount of $6,380.85 was paid to the state, but was not accepted by it as a final settlement of its demands.

It did not appear, either from that account or from the evidence in the case, what part of the expenditures upon the National road was properly chargeable to "making a road to the said state," or what proportion of such expenditures for making a road to the

state of Indiana was properly chargeable to the states of Ohio, Illinois, and Missouri.

On October 17, 1889, the state of Indiana made a formal demand upon the commissioner of the general land office to state an account between the United States and the state of Indiana in accordance with the act of March 3, 1857. But no further account than that above mentioned has been stated by the commissioner of the general land office.

Wm. E. Earle, for the State of Indiana. Asst. Atty. Gen. Parker, for the United States.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

By each of the acts of congress successively admitting the states of Ohio, Indiana, Illinois and Missouri into the Union, congress agreed that 5 per cent. of the net proceeds of public lands within the state, sold by congress, should be applied to the making of a road or roads leading to the State; and by those and other acts it was provided that, of this 5 per cent. fund, 3 per cent. should be disbursed by the states, and two per cent. by the United States. The general purpose was to promote the construction of a national highway connecting the new states in the interior with the old states on the Atlantic seaboard.

In the act for the admission of Indiana, the original obligation assumed by congress in this respect did not define the termini of the road or roads to be built, or bind congress to complete any road, or require the 2 per cent. of the proceeds of the sales of lands in Indiana to be expended within the state; but the only obligation was to apply this 2 per cent. fund "to the making of a road or roads leading to the said state, under the direction of congress." It was for congress to decide on what part of the road leading to Indiana this fund should be expended; and congress had the right to treat the road as a whole, constructed for the benefit of all the states through which it passed.

It is unnecessary to determine whether this obligation was in the nature of a contract, only, or whether it can be considered as in any sense constituting a trust; because, in either aspect, the contract has been performed, or the trust executed, by applying the fund in question to the making of a road "leading to the said state" of Indiana.

It appears by the statement of the account between the United States and the state of Indiana by the commissioner of the general land office (which there is nothing in the case to control) that the sums appropriated to the construction of the Cumberland road leading to the state of Indiana greatly exceeded the whole amount of the 2 per cent. fund from sales of lands in the state, and that, therefore, in the absence of special legislation upon the subject, nothing was payable to the state of Indiana on account of this fund.

Congress having a general authority to apply this fund to any part of the road leading to the state of Indiana, the presumption is that this authority was honestly and fairly exercised, and there is nothing whatever in the record which has any tendency to rebut this presumption. Such being the case, the statement in the findings of fact that it did not appear, from that account or otherwise, what part of the expenditures upon the road was properly chargeable to "making a road to the said state," or what proportion of such expenditures for making a road to the state of Indiana was properly chargeable to the states of Ohio, Illinois, and Missouri, is wholly immaterial; and it was so treated by both parties at the argument.

As appears by the definition of the petitioner's position at the beginning of the brief of its counsel, the failure of the United States to build the National road was not made the foundation of the claim, but "was only suggested in argument as a motive, by way of incidental explanation" of the act of March 3, 1857, c. 104, § 2, upon which he relied, and under which he contended that "it was immaterial what moneys had been expended by the government toward the construction of the National turnpike." The decision of the case, therefore, turns upon the interpretation and effect of this act.

The argument for the appellant is based upon the following enactments: By the act of September 4, 1841, c. 16, §§ 16, 17, the United States relinquished to the states of Alabama and Mississippi the 2 per cent. fund accruing from sales of lands in those states. By the act of March 2, 1855, c. 139, the commissioner of the general land office was required to state an account between the United States and the state of Alabama, "for the purpose of ascertaining what sum or sums of money are due to said state, heretofore unsettled," under the act of 1819, admitting that state into the Union, and to include in that account the reservations under treaties with Indians within the limits of Alabama, "and allow and pay to the said state five per centum thereon, as in case of other sales." By the act of March 3, 1857, c. 104, § 1, the commissioner was required to state an account between the United States and the state of Mississippi "upon the same principles of allowance and settlement as prescribed in" the act of 1855; and, by section 2 of the act of 1857, "said commissioner shall also state an account between the United States and each of the other states upon the same principles, and shall allow and pay to each state such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre."

It is argued for the appellant that, as by the act of 1857 the account between the

United States and the other states is to be settled "upon the same principles" as prescribed in that act with relation to Mississippi, and in the act of 1855 with relation to Alabama, and as by the act of 1841 the 2 per cent. fund had been relinquished to Alabama and to Mississippi, therefore the payment to the state of the whole 2 per cent. is one of the principles on which the account with each of the other states is to be settled.

But the premises relied on do not support the conclusion. Neither the act of 1857 nor the act of 1855 refers to the act of 1841. The act of 1857 requires the account with *each state to be settled on "the same principles of allowance and settlement as prescribed" in the act of 1855. The principles of allowance and settlement prescribed in the act of 1855 are that the account with Alabama be stated "for the purpose of ascertaining what sum or sums of money are due to said state, heretofore unsettled," under the act for its admission into the Union, and including 5 per cent. on the Indian reservations within the state, "as in case of other sales." The principles of settlement are that the United States shall be charged with the sums due, treating Indian reservations as sales. They may not be limited to Indian reservations, and may well include any unpaid balance of the 3 per cent. fund which congress had agreed should be disbursed by the states, as well as any part of the 2 per cent. fund which had not been applied by the United States to the making of a road or roads according to their original obligation. But there is nothing in any of the acts upon the subject which warrants the inference that congress intended that, because the United States held themselves to be liable to Alabama and to Mississippi for the 2 per cent. fund which they had never applied as they had agreed, they should therefore be liable to the other states for the like 2 per cent. fund which had been fully appropriated and expended in accordance with their obligations to those states.

These views being conclusive against the right of the state of Indiana to recover anything in this case, it is unnecessary to consider the other questions discussed in the opinion of the court of claims, and argued in this court.

Judgment affirmed.

(148 U. S. 124)

UNITED STATES v. POST.

(March 13, 1893.)

No. 1,061.

POST OFFICE—LETTER CARRIERS — COMPENSATION FOR EXTRA WORK.

Under the letter carriers' eight-hour law (Act May 24, 1888, 25 St. at Large, p. 157) a letter carrier is entitled to extra pay for work in excess of eight hours, whether such excess is employed in duties strictly pertaining to carrying letters, or in other work in the post office, which is authorized by the regulations of the department, and required by the postmaster.

Appeal from the court of claims. Affirmed.

Atty. Gen. Miller and H. M. Foote, Asst. Atty. Gen., for the United States. Charles King, George A. King, and William B. King, for appellee.

*Mr Justice BLATCHFORD delivered the opinion of the court. *125

This is a suit brought in the court of claims by Aaron S. Post against the United States, by an original petition filed March 26, 1891. A traverse of the petition was filed May 23, 1891, and an amended petition January 11, 1892. In the latter it is set forth that the claimant was, from May 24, 1888, to December 31, 1889, a letter carrier in the post office at the city of Salt Lake City, in the territory of Utah, of the class entitled to a salary of $850 a year; that during that period he was, from time to time, actually and necessarily employed, in excess of eight hours a day, in the performance of the duties assigned to him as such carrier, aggregating an excess of a specified number of hours; that by the act of congress of May 24, 1888, c. 308, (25 St. p. 157,) entitled "An act to limit the hours that letter carriers in cities shall be employed per day," he became entitled to extra pay for all the time during which he was so employed in excess of eight hours a day; and that he had applied to the post-office department for payment of the same, and it had not been paid; and he claimed judgment for a specified amount and costs. A traverse of the amended petition was filed February 21, 1892. Eight other cases were before the court of claims, and tried at the same time, with *petitions in the same form, and claiming various amounts; the claimants serving for various periods, and their classes and salaries being various. *126

The court of claims found that Post was a letter carrier at the post office at Salt Lake City, between May 24, 1888, and December 21, 1889, of the second class, at a salary of $850 a year. The other findings were as follows:

"(2) During their aforesaid terms of service said claimants were actually employed in the performance of their duties more than eight hours a day, the excess over such eight hours being shown in the following finding:

"(3) The manner, time, and nature of their employment was generally as follows:

"They were required to report for duty at the post office at 7 A. M. From 7 to 7:30 they were employed within the post office, in the distribution of mail matter; that is to say, in taking letters and papers from newly-arrived pouches, assorting them, and placing them in the boxes for box and general delivery.

"From 7:30 to 8 they were severally engaged in arranging their own mail matter for carrier delivery by streets and numbers; and where the residence of a person was not expressed in the direction of a letter, and was not known or remembered, in looking it up in the directory.

"From 8 to 11 they were occupied on their routes, in delivering and collecting mail matter.

"From 11 to 11:30 they were engaged within the post-office building, in making returns of persons not found, and other things connected with their route delivery.

"From 11:30 to 1 they were employed within the post office, in the general distribution of mail matter.

"From 1 to 2 they were absent, and off duty.

"From 2 to 3:30 they were again employed on the post-office work of distributing general mail matter.

"From 3:30 to 4 they were severally engaged in arranging their own mail matter for delivery.

"From 4 to 6 they were again occupied on their routes, in delivering and collecting mail matter, and in making their returns.

*127 "From 6 to 7 they were again absent and off duty.

"From 7 to 8 they were again employed on the post-office work of distributing general mail matter.

"The above statement represents an ordinary or average day's employment. The time of going out and the time of being out on the routes in fact varied with the size of the mail, as did the time of their being relieved from duty at night. But their reporting for duty at 7 in the morning, at 2 in the afternoon, and at 7 in the evening was constant.

"The above statement does not apply to Sundays. On Sundays the carriers made no deliveries. They were employed, however, in the office; but the time of employment did not exceed eight hours. During the time covered by this claim there were 9 carriers and 3 clerks employed in said post office.

"(4) The carriers, by one of their number, remonstrated against the performance of work not connected with their duties as carriers. The postmaster, however, held that 'under the regulations the postmaster could use them in that service.' He therefore required them to perform it.

"(5) During the time embraced within the present claims the following regulations of the post-office department were in force, all under the general title, 'Free-Delivery Service,' (Postal Laws and Regulations, 1887, pp. 259, 261, 266, 268, 269:)

" 'Sec. 628. Postmasters to Supervise Carrier Service. Postmasters will supervise their carrier service, and are specially enjoined—

" '1. To see that superintendents, carriers, and clerks connected with this service are fully informed as to their responsibilities and duties.* * *

" '3. To frequently visit the stations, and see that the regulations are there observed and proper order and discipline maintained.

" '4. To issue all necessary orders and instructions necessary to carry out the regulations and promote the efficiency of the service.

" '5. To reprimand the carriers for irregularities, or report them for removal to the superintendent of free delivery, as the nature of the offense may require. See section 642.

*" 'Sec. 642. Reprimand, Suspension and Removal. The due performance of their duty by carriers, and the observance of law, regulations, and orders prescribed for their conduct, will be enforced by reprimand for slight offenses; by suspension, with loss of pay, for more serious ones, not, however, to exceed thirty days; and by suspension and recommendations for removal for grave offenses, or persistent disregard of the rules herein prescribed, or of the orders of the postmaster not inconsistent herewith. In all other cases of recommendation for removal, carriers should not be suspended, but postmasters should await the action of the department.'

"All the following are under the subtitle 'General Duties of Carriers:'

" 'Sec. 647. Duties Generally. Carriers shall be employed in the delivery and collection of mail matter, and during the intervals between their trips may be employed in the post office in such manner as the postmaster may direct, but not as clerks.

" 'The delivery and collection by them must be frequently tested, at irregular intervals, to determine their efficiency.

" 'Sec. 648. Delivery of matter. The mails must be assorted and the carriers started on their first daily trip as early as practicable. They must proceed to their routes with expedition, and by the most direct way. A schedule of the order of delivery of each route shall be made in a legible hand, by names of streets and numbers of houses, and the mail delivered according to such schedule. Mail matter directed to box numbers must be delivered through the boxes. Mail matter addressed to street and number must be delivered by carriers unless otherwise directed. Mail matter addressed neither to a box-holder nor to a street and number must be delivered by carrier, if its address is known, or can be ascertained from the city directory; otherwise, at the general delivery.

" 'Sec. 649. Care in Delivery of Mail. Carriers will exercise great care in the delivery of mail to the persons for whom it is intended, or to some one known to them to be authorized to receive it. They will, in case of doubt, make respectful inquiry with the view to ascertain the owner. Failing in this, they will return the mail to the office, to be disposed of as the postmaster may direct.'

" 'Sec. 651. Directory to be Used to Ascer-

tain Addresses. Where a directory is published, it must be used, when necessary, to ascertain the address of persons to whom letters are directed, and it should also be used in the case of transient newspapers, and other matter of the third and fourth classes, where the error in or omission of street address is evidently the result of ignorance or inadvertence; but when circulars, printed postal cards, or other matter, except letters, shall arrive at any post office in large quantities, apparently all sent by the same person or firm, and from which the street addresses have been purposely omitted, the directory need not be used to supply such omission, and all of such circulars, etc., which cannot readily be delivered through boxes or by carriers, shall be sent to the general delivery to await call.'

"(6) In the case of Aaron S. Post, the claimant, between the 24th day of May, 1888, and the 31st day of December, 1889, was employed, by order of the postmaster, in excess of eight hours a day, as follows:

"Before 7 A. M., the regular hour when the carriers reported for duty, he arrived at the office, and opened the eastern mail, which came at about 5 in the morning, in order to prepare the same for the southern mail. This was done so that it would not have to lie over twenty-four hours. The time thus employed was two hundred and forty-six and one-half hours.

"During intervals between 7 A. M., when carriers reported for duty, and 6 P. M., when their work as carriers ended, he was employed in the office, in opening the mail, stamping it, and distributing the same, as hereinbefore stated, in excess of eight hours, nine hundred and eighty-six hours.

"After his last trip and his returns as carrier were made,—i. e. after 7 P. M.,—he was employed on the post-office work, of distributing general mail matter in the office, four hundred ninety-three hours."

On such findings of fact, the court found, as a conclusion of law, that Post was entitled to recover for 1,725 1-2 hours of extra work, amounting, at the rate of 29.1 cents per hour, to $502.12. The opinion of the court in the nine cases, including that of Post, is found in 27 Ct. Cl. 244. A judgment was entered in favor of Post on March 10, 1892, for $502.12, from which judgment the United States appealed to this court.

The act of May 24, 1888, reads as follows: "That hereafter eight hours shall constitute a day's work for letter carriers in cities or postal districts connected therewith, for which they shall receive the same pay as is now paid for a day's work of a greater number of hours. If any letter carrier is employed a greater number of hours per day than eight, he shall be paid extra for the same in proportion to the salary now fixed by law."

The contention of the United States is that the statute has reference only to letter carrier service, and that the claimant, to bring himself within its provisions, must show, not only that he has performed more than eight hours of service in a day, but also that such eight hours of service related exclusively to the free distribution and collection of mail matter, and that the extra service for which he claims compensation was of the same character.

In this connection reference is made to sections 1764 and 1765 of the Revised Statutes Section 1764 provides as follows: "No allowance or compensation shall be made to any officer or clerk by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services, whatever, which any officer or clerk may be required to perform, unless expressly authorized by law." Section 1765 provides as follows: "No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulation, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Referring to section 647 of the Postal Laws and Regulations of 1887, which were in force during the time embraced within the claim in question, under the head of "Free-Delivery Service," (and which section 647 is set forth in finding 5 of the court of claims,) under the subtitle "General Duties of Carriers," it providing as follows: "Carriers shall be employed in the delivery and collection of mail matter, and, during the intervals between their trips, may be employed in the post office in such manner as the postmaster may direct, but not as clerks,"—it is contended for the United States that the duties of letter carriers are a necessary incident to the creation of the free-delivery service; that the statute necessarily defines their services to be a distribution and collection of mail, and such other duties as are necessarily incident thereto, such as receiving the mail allotted to them by clerks in the post office, arranging it for distribution, and making a proper disposition of it, when not delivered, upon their return to the post office; and that any other service which a carrier may perform is not contemplated by the act of May 24, 1888, and is an extra service, within the meaning of sections 1764 and 1765 of the Revised Statutes, payment for which is not authorized by law.

For the claimant it is contended that, under section 647 of the regulations of the department, as set forth in finding 5 of the court of claims, the extra service for which the claim is made was an employment of the letter carrier, not only in the delivery and collection of mail matter, but also in the post

office, during the intervals between his trips, in such manner as the postmaster directed, but not as a clerk.

It is not stated in the findings that the claimant was so employed as a clerk, nor does it appear what the duties of a clerk in the post office in question were, but merely that, during the time covered by the claim, there were nine carriers and three clerks employed in that post office. It is also found, by finding 4, that the carriers remonstrated against the performance of work not connected with their duties as carriers, but that the postmaster held that, under the regulations, he could use them in that service, and therefore required them to perform it. This, in view of the provision of section 647 of the regulations, is substantially a finding that they were not employed as clerks.

The whole contention on the part of the United States amounts to this: That the court of claims has substantially found that none of the extra work for which compensation is claimed was incident to the general duties of the claimant as a letter carrier, and that the statute in regard to extra service relates exclusively to that which is connected with the general duties of the claimant as a letter carrier, and not to compensation for extra service, when he is not employed for eight hours a day in the performance of his general duties as a letter carrier.

The statute of 1888 provides that eight hours shall constitute a day's work "for letter carriers" in cities or postal districts connected therewith. It does not state what duties the letter carriers shall perform during such day's work, but merely that they shall receive for such day's work of eight hours the same pay that was then paid for a day's work of a greater number of hours. It further provides that, if a letter carrier is employed a greater number of hours per day than eight, he shall be paid extra for such greater number of hours in proportion to the salary fixed by law for his compensation. This extra pay is given to him by the statute, distinctly, for his being employed a greater number of hours per day than eight. The statute does not say how he must be employed, or of what such employment is to consist. It is necessary only that he should be a letter carrier, and be lawfully employed in work that is not inconsistent with his general business under his employment as a letter carrier. The employment authorized by section 647 of the regulations is defined to be an employment in the post office in such manner as the postmaster may direct, during the intervals between the carrier's trips in delivering and collecting mail matter, provided that he be not employed in the post office as a clerk therein.

The court of claims, in its opinion, arrived at the following conclusions: (1) That the letter carriers were entitled to recover, not only for all work done by them on the street, in delivering and collecting mail matter, but also for all work done in the post office, in receiving and arranging the letters of their routes; (2) that as to the distribution of mail matter for the boxes and general delivery, as found in finding 3, during the times intervening between one trip and another in the same day, the regulations of the department set forth in finding 5 could properly be construed as permitting such services; and (3) that as to the services of the same character rendered after the termination of the last trip for the day of the carrier in delivering and collecting mail matter, they were services fairly within the power of the postmaster to prescribe.

We are of opinion that, in respect of all such services, the letter carrier, if employed therein a greater number of hours than eight per day, was entitled to be paid extra. To hold otherwise would be to say that the carrier was employed contrary to the regulations of the department, when it clearly appears that he was employed in accordance with such regulations. The statute was manifestly one for the benefit of the carriers, and it does not lie in the mouth of the government to contend that the employment in question was not extra service, and to be paid for as such, when it appears that the United States, in accordance with the regulations of the post-office department, actually employed the letter carriers the extra number of hours per day, and it is not found that they were so employed as clerks. The postmaster was the agent of the United States to direct the employment, and, if the letter carriers had not obeyed the orders of the postmaster, they could have been dismissed. They did not lose their legal rights under the statute by obeying such orders.

Judgment affirmed.

Mr. Justice JACKSON took no part in the decision of this case.

(148 U. S. 134)

UNITED STATES v. GATES.

(March 13, 1893.)

No. 1,060.

POST OFFICE—LETTER CARRIERS — COMPENSATION FOR EXTRA WORK.

Under the letter carriers' eight-hour law (Act May 24, 1888) the government cannot set off against a claim for extra hours' work on certain days a deficit of hours occurring because the carrier worked less than eight hours on Sundays and legal holidays.

Appeal from the court of claims. Affirmed.

Sol. Gen. Aldrich, for the United States. Charles King, George A. King, and William B. King, for appellee.

Mr. Justice BLATCHFORD delivered the opinion of the court.

In this case, Frank Gates filed a petition in the court of claims May 27, 1891, setting forth that from May 24, 1888, to July 31,

1888, he was a letter carrier in the post office at the city of New York, of the class entitled to a salary of $1,000 a year; that during that period he was, from time to time, actually and necessarily employed in excess of eight hours a day, in the performance of the duties assigned to him as such carrier, aggregating a specified excess; that by the act of May 24, 1888, (set forth in case No. 1,061, U. S. v. Post, 13 Sup. Ct. Rep. 567, just decided,) he became entitled to extra pay for all the time during which he was so employed in excess of eight hours a day; that he had applied to the post-office department for payment, and it had not been paid; and that he claimed judgment for a specified amount, besides costs. A traverse of the petition was filed July 14, 1891, and the case was heard by the court of claims, which, on the evidence, found the facts to be as follows:

*135 "(1) The claimant was, during the months of May, June, and July, 1888, a letter carrier of the first class, salary $1,000 a year, in the city of New York, in the state of New York.

"(2) From May 24, 1888, to July 31, 1888, he was actually and necessarily employed, in the performance of his duties, more than eight hours a day, the excess over such eight hours being as follows:

	Hrs.	Min
May, 1888	16	53
June, 1888	78	58
July, 1888	69	18
Total	165	9

"He has received no extra pay for the excess.

"(3) For the said period of time, claimant performed only fifteen hours of service on the ten Sundays, and four hours and thirty minutes on Decoration day, and the same time on the 4th day of July."

On such findings of fact the court found, as a conclusion of law, that Gates was entitled to recover for the 165 hours and 9 minutes of extra work performed by him, without being required to deduct therefrom the deficit of less than 8 hours a day worked on Sundays and holidays, as shown by finding 3, amounting, at 34.2 cents per hour, to $56.48; and for that amount a judgment was entered for him, to review which the United States has appealed.

In the opinion of the court of claims, reported in 27 Ct. Cl. 244, 259, it is stated that No. 1,061, U. S. v. Post, 13 Sup. Ct. Rep. 567, (just decided,) embraced, with a single exception, all the questions presented by the present case, No. 1,060, besides many more questions, and that No. 1,060 presented one question which was not presented in the other case. That question is stated in the opinion as follows: "On week days the carriers were employed more than eight hours, but on Sundays less, and the deficit of the latter nearly equals the excess of the former. The post-office department, by its circular February 19, 1891, has directed postmasters 'to determine the time a letter carrier may have *136c *been required to work during any month in excess of eight hours per day, as follows:

"'Ascertain the aggregate hours worked during the month. Multiply the number of days worked during the month by eight, and subtract the product thus obtained from the aggregate number of hours worked, and the remainder will be the extra time for which the carrier is entitled to pay at the following rates:

Salary.	First quarter.	Second quarter.	Third and fourth quarters.	Average quarter.
$600	20⅞ cents per hour.	20⅝ cents per hour.	20¾ cents per hour.	20⅝ cents per hour.
800	27¾ cents per hour.	27½ cents per hour.	27½ cents per hour.	27⅝ cents per hour.
850	29½ cents per hour.	29¼ cents per hour.	28⅞ cents per hour.	29 5-24 cents per hour.
1,000	34¾ cents per hour.	34⅝ cents per hour.	34 cents per hour.	34½ cents per hour.

"'The time necessarily consumed in the performance of the service between "Report for duty" and "End of duty" is the "actual time" to be allowed, and the interim between deliveries is the carrier's own time, and cannot in any case be charged against the United States.'

"The carrier's eight-hour law declares 'that hereafter eight hours shall constitute a day's work,' but it allows compensation to continue in the form of an annual salary, and requires no deduction to be made if the duties of the day do not extend through the prescribed time. It also declares that, 'if any letter carrier is employed a greater number of hours per day than eight, he shall be paid extra for the same.' To sustain the interpretation given to the act by the department, it will be necessary to read in it, by construction, the words 'on an average,' i. e. if any letter carrier is employed on an average a greater number of hours per day than eight, he shall be paid extra for the same. This the court is not at liberty to do. The carrier is entitled to eight hours' work, and to his pay if work is not furnished to him. For any excess on any day he is entitled to extra pay. The only set-off that can be maintained is when he is absent from duty without leave. The department is at liberty to keep a carrier employed eight hours every day, *137 but not to give him a deficit of work one day and an excess another."

In the brief of the solicitor general in the present case, it is stated that in his opinion the decision of the court of claims was correct; that he is prevented from dismissing the appeal only by the fact that another department of the government has differed from that view, and declines to follow it until the question is decided authoritatively by this court; and that justice to the letter carriers seems, therefore, to require that the case be submitted to this court for its determination, which he does without argument.

The conclusions which we have reached in No. 1,061 cover the same questions arising in this case which are presented in that; and, as the appellant does not challenge the decision of the court of claims as to the question presented in this case which is not presented in No. 1,061, it is sufficient to say that we concur with the views of that court, above stated, as to that question.

Judgment affirmed.

Mr. Justice JACKSON took no part in the decision of this case.

(148 U. S. 157)

In re SCHNEIDER.

(March 14, 1893.)

SUPREME COURT — JURISDICTION IN CRIMINAL CASES—ERROR TO SUPREME COURT OF DISTRICT OF COLUMBIA.

The supreme court of the United States has no jurisdiction to review on writ of error a judgment of the supreme court of the District of Columbia in general terms affirming a judgment of the trial court sentencing a prisoner to death for murder. Cross v. U. S., 12 Sup. Ct. Rep. 842, 145 U. S. 571, followed.

Petition on behalf of Howard J. Schneider for the allowance of a writ of error to the supreme court of the District of Columbia, to review a judgment of that court affirming a judgment of the trial court convicting said Schneider of murder, and imposing sentence of death. Denied.

Jeremiah M. Wilson, William F. Mattingly, and A. A. Hoehling, Jr., for petitioner.

*162 *Mr. Chief Justice FULLER. The application for a writ of error or appeal is denied upon the authority of Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. Rep. 22; In re Heath, 144 U. S. 92, 12 Sup. Ct. Rep. 615; In re Cross, 146 U. S. 271, 13 Sup. Ct. Rep. 109; Cross v. U. S., 145 U. S. 571, 12 Sup. Ct. Rep. 842. See, also, Railroad Co. v. Grant, 98 U. S. 398; Dennison v. Alexander, 103 U. S. 522; U. S. v. Wanamaker, 147 U. S. 149, 13 Sup. Ct. Rep. 279.

(148 U. S. 162)

In re SCHNEIDER.

(March 14, 1893.)

HABEAS CORPUS—WHEN ISSUED—ERROR IN CRIMINAL TRIALS.

The fact that, in a capital case, the prisoner exhausted his peremptory challenges, and the court overruled his challenges for cause, so that, as he avers, he was deprived of a trial by an impartial jury, as guaranteed by the constitution of the United States, is not a matter affecting the jurisdiction of the trial court, but is mere matter of error, and hence is no ground for issuing a writ of habeas corpus.

Application on behalf of Howard J. Schneider for leave to file a petition for writs of habeas corpus and certiorari to release him from the custody of Jerome B. Burke, warden of the jail of the District of Columbia, by whom he was held under sentence of death for murder, imposed by the supreme court of the District. Denied.

The ground of the application was, in substance, that the petitioner had been denied the right, guarantied by the constitution of the United States, of a trial by an impartial jury. This charge was founded upon the allegation that the prisoner exhausted his peremptory challenges, and that his challenges for cause were overruled by the court in the case of certain jurors, after examination on their voir dire, and that such jurors sat at the trial. The examination of such jurors was set out in full in the petition.

Jeremiah M. Wilson, William F. Mattingly, and A. A. Hoehling, Jr., for petitioner.

*163 *Mr. Chief Justice FULLER. Leave to file petition for writs of habeas corpus and certiorari is denied. The ground of the application does not go to the jurisdiction or authority of the supreme court of the District, and mere error cannot be reviewed in this proceeding. Ex parte Parks, 93 U. S. 18; Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. Rep. 542; Ex parte Wilson, 114 U. S 417, 5 Sup. Ct. Rep. 935; Nielsen, Petitioner, 131 U. S. 176, 9 Sup. Ct. Rep. 672.

(148 U. S. 214)

PASSAVANT et al. v. UNITED STATES.

(March 20, 1893.)

No. 1,118.

CUSTOMS DUTIES—VALUATION—BOARD OF GENERAL APPRAISERS—REVIEW—SUPREME COURT—JURISDICTION.

1. Under the customs administrative act of June 10, 1890, (26 St. at Large, p. 131,) a federal circuit court has no jurisdiction to review a decision of the board of general appraisers upon a question involving merely the valuation, and not the classification or rate of duty on imported merchandise. 50 Fed. Rep. 788, affirmed.

2. It was within the competency of congress to provide by the customs administrative act of June 10, 1890, (26 St. at Large, p. 131,) that the decision of the board of general appraisers should be final as to the dutiable valuation of merchandise.

3. When the valuation of imported merchandise, as fixed by the board of general appraisers, exceeds by more than 10 per cent. the value declared in the entry, it is the duty of the collector, under the customs administrative act of June 10, 1890, § 7, (26 St. at Large, p. 131,) as matter of mere computation to levy an additional sum equal to 2 per cent. of the total appraised value for each 1 per cent. by which the appraised exceeds the declared value.

4. Such additional duty is a legal incident to the decision of the board of general appraisers, and where the importer has full notice of the proceedings before the board, and ample opportunity to be heard on the question of the market value of the goods, the levy and collection of the additional duty is not a deprivation of property without due process of law, nor is the importer subjected to a penalty without notice or opportunity to be heard.

5. Under the judiciary act of March 3, 1891, (26 St. at Large, p. 827,) on appeal from a decree of a circuit court dismissing an application for a review of the decision of the board of general appraisers as to the valuation of imported merchandise as provided for in the cus-

toms administrative act of June 10, 1890, (26 St. at Large, p. 131,) the supreme court can consider only the question of the jurisdiction of the circuit court.

Appeal from the circuit court of the United States for the southern district of New York.

Proceeding by Passavant & Co. to review a decision of the board of general appraisers sustaining the action of the collector of the port of New York in fixing the valuation of certain imported merchandise. A motion to dismiss the application for a review was granted. 50 Fed. Rep. 788. The importers appeal. Affirmed.

Edwin B. Smith, for appellants. Asst. Atty. Gen. Parker, for the United States.

Mr. Justice JACKSON delivered the opinion of the court.

The principal question presented by the record in this case is whether, under the customs administrative act of June 10, 1890, (26 St. at Large, p. 131,) the circuit courts of the United States have any jurisdiction to entertain an appeal by importers from a decision of the board of general appraisers as to the dutiable value of imported merchandise; in other words, whether the circuit courts of the United States have, under the provisions of said act, any authority or jurisdiction, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers, ascertaining and fixing the dutiable value of imported goods, when such board has acted in pursuance of law, and without fraud, or other misconduct, from which bad faith could be implied.

The material facts of the case on which this question arises are the following: In November, 1890, and July, 1891, the appellants, Passavant & Co., imported into New York from France gloves of different classes or grades, which were entered by the importers at certain valuations. The collector of the port of New York, under the authority conferred by section 10 of said administrative act, caused the imported goods to be appraised, and upon such appraisal their value was advanced or increased by the appraiser to an amount exceeding by more than 10 per cent. the value thereof as declared by the importers upon entry. The importers being dissatisfied with this advanced valuation, a reappraisement was made by one of the general appraisers, and on further objection by the importers to this valuation, the matter was sent to the board of general appraisers, under and in accordance with the provisions of section 13 of the customs administrative act. This board, after due notice and examination of the question submitted, sustained the increased valuation of the merchandise. Thereupon the collector of the port levied and assessed upon the imported goods a duty of 50 per cent. ad valorem, that being the rate of duty on the gloves under paragraph 458 of the tariff act of October 1, 1890; and, in addition thereto, a further sum equal to 2 per cent. of the total appraised value for each 1 per cent. that such appraised value exceeded the value declared in the entry, under and by virtue of section 7 of said act of June 10, 1890, which provides and directs that "if the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued."

The importers duly served upon the collector a protest against his appraisement of duty for any and all excess above 50 per cent. ad valorem, and upon any greater value than the declared or entered value, for the alleged reasons that no legal reappraisement had been made; that the board of appraisers had declined to receive or entertain evidence offered by them as to the true market value of the merchandise; that the board had determined matters upon estimates or values furnished by agents of the treasury; that evidence of persons who were not experts, and had no personal knowledge of the value of gloves in the markets of France, had been taken and acted on; that the importers were given no opportunity to controvert evidence against them; that the original invoice was correct; that the duties should not be assessed upon any greater amount, and that the action of the board was in all respects illegal. The collector duly transmitted this protest, with the papers in the case, to the board of general appraisers, who adhered to the increased valuation, affirmed the action of the collector, and held that the decision of the board as to such valuation was final and conclusive under section 13 of said act of June 10, 1890, and could not be impeached or reviewed upon protest. Thereupon, and within due time, the importers filed their application in the United States circuit court for the southern district of New York for a review of the case, and a reversal of the decision of the board of appraisers and the action of the collector in assessing the duties on the basis of the increased valuation placed upon the imported merchandise, and in imposing the additional duty as provided by section 7, above referred to.

The petitioners, in their application, set forth and complained of many alleged errors of law and fact on the part of the board of general appraisers, which need not be specially noticed, as they were manifestly not well founded, and have been abandoned. The board of general appraisers, in pursuance of

*217 the usual order in such cases, returned to the circuit court the record and evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon, etc. From this return it appeared that the proceedings as to the appraisement of the merchandise and the determination of their dutiable value were in all respects regular; that the board of appraisers duly examined and decided the case after fixing a day and giving reasonable notice thereof to the importers, who were allowed the opportunity to introduce evidence, and to be heard on the matter submitted. It is stated in the opinion of the board, which forms part of said return, that "the appellants were served with reasonable notice of these several hearings after a day fixed therefor, and were cited to appear before this board, and offer evidence to sustain the contentions of fact alleged as the grounds of their protest. This they failed to do, and the board accordingly adjudges all of said issues against them as confessedly untrue. The decision of the collector in each case is affirmed."

Upon the record as thus presented the assistant United States attorney moved the court to dismiss the application or appeal for want of jurisdiction to entertain the same. This motion was sustained, and the circuit court thereupon certified to this court, under the fifth section of the act of March 3, 1891, (26 St. at Large, p. 827,) the question whether said court had any jurisdiction to enter upon, hear, and decide the issues sought to be raised by the allegations of the petition, which are specially set out in the certificate, but need not be here enumerated, as they are embraced in the two general claims or propositions, hereinafter stated, which are relied on by appellants before this court.

In addition to the certification of the question of jurisdiction, the circuit court, upon dismissing the petition allowed the importers an appeal from the order or judgment of dismissal, which was taken. But this appeal, although general in form, does not and could not bring up for review anything more than the question of jurisdiction certified by the lower court. An ordinary appeal from a final judgment of the circuit court lies, since the act of March 3, 1891, to the court of appeals, and not to this court. Hubbard v. Soby, 146 U. S. 56, 13 Sup. Ct. Rep. 13. The certificate and the appeal, therefore, present substantially the same question, and need not, for that reason, be separately considered. It is not claimed or alleged in either the protests made by the importers as to the appraisement of the merchandise or in their application to the circuit court to review and reverse the decision of the board of general appraisers, that there was any wrongful or erroneous classification of the gloves, or improper rate of duty levied thereon, under the tariff act of October 1, 1890; but the substantial complaint is that the dutiable value of the imported goods was not greater than the value mentioned in the invoice and declared in the entry, and that the advanced appraisement was, therefore, erroneous, and also that the merchandise was not liable for any additional or penal duty such as the collector levied and imposed thereon under section 7 of the act of June 10, 1890, by reason of the advanced or increased valuation placed upon the same by the appraisers.

Can a complaint of this character be entertained and considered by the circuit courts of the United States in a case like the present, where the board of general appraisers has, upon the appeal of the importers, ascertained and decided that the imported article actually possesses a value greater than that stated in the invoice or entry? Can the decision of the board on the question of the dutiable value of the merchandise be reviewed by the courts under the provisions of section 15 of the customs administrative act? This is the real question presented, and we are clearly of the opinion that no such jurisdiction is conferred by this statute, or any other provision of law. It is provided by section 15 of the act "that if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the secretary of the treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, they, or either of them, may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision."

It was said by Mr. Justice Blatchford, speaking for the court in Ex parte Fassett, 142 U. S. 479–487, 12 Sup. Ct. Rep. 295, that "the appeal provided for in section 15 [of said act] brings up for review in court only the decision of the board of general appraisers as to the construction of the law, and the facts respecting the classification of imported merchandise, and the rate of duty imposed thereon under such classification. It does not bring up for review the question of whether an article is imported merchandise or not, nor, under section 15, is the ascertainment of that fact such a decision as is provided for. The decision of the collector from which appeals are provided for by section 14 are only decisions as to 'the rate and amount' of duties charged upon imported merchandise, and decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character."

The appeal to the court in the present case seeks to review no such decisions as are thus enumerated as falling within its jurisdiction under said sections. On the contrary, the

decision of the board of general appraisers sought to be reviewed and corrected by this application to the court relates to the re-appraisement of the imported goods. By section 13 of the act the decision of the board on that matter is declared to "be final and conclusive as to the dutiable value of such merchandise against all parties interested therein." On such valuation the collector, or the person acting as such, is required to ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise and the dutiable costs and charges thereon according to law.

It was certainly competent for congress to create this board of general appraisers, called "legislative referees" in an early case in this court, (Rankin v. Hoyt, 4 How. 335,) and not only invest them with authority to examine and decide upon the valuation of imported goods, when that question was properly submitted to them, but to declare that their decision "shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein."

*In Hilton v. Merritt, 110 U. S. 97, 3 Sup. Ct. Rep. 548, it was held that the valuation of merchandise made by the customs officers, under the statutes, for the purpose of levying duties thereon, was conclusive on the importer, in the absence of fraud on the part of the officers. In this case several sections of the Revised Statutes of the United States relating to customs duties were referred to, among them being section 2930, which prescribed the method of appraising imported merchandise, and provided that "the appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." Under that provision this court held that the valuation of imported merchandise made by the designated officials or appraisers was, in the absence of fraud on the part of such appraisers, conclusive on the importer. The same rule was reasserted in the recent case of Earnshaw v. U. S., 146 U. S. 60, 13 Sup. Ct. Rep. 14, in which it was held that a reappraisement of imported merchandise under the provisions of section 2930, Rev. St., when properly conducted, was binding. The earlier decisions of this court cited and referred to in Hilton v. Merritt and Earnshaw v. U. S. establish the same general rule. The provisions of the customs administrative act of June 10, 1890, as to the finality and conclusiveness of the decision of the board of general appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the government, congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the government's revenues would be seriously obstructed and interfered with. The statute authorizes no such proceeding, and the circuit court can exercise no such jurisdiction.

The appraised value of the merchandise having been conclusively ascertained in the manner provided by law, and being found to exceed by more than 10 per centum the value declared in the entry, the collector, as a matter of mere computation, under the direction and authority of section 7 of said act, properly levied and collected, in addition to the ad valorem duty imposed by law on such merchandise, a further sum equal to 2 per centum of the total appraised value for each 1 per centum that such appraised value exceeded the value declared in the entry.

Section 7 of said act is substantially similar to section 8 of the act of congress passed on the 30th of July, 1846, (9 St. at Large, pp. 42, 43,) which declared that, if the appraised value of imports which have actually been purchased should exceed by 10 per centum or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there should be levied, collected, and paid a duty of 20 per centum ad valorem on such appraised value. In Sampson v. Peaslee, 20 How. 571, that provision was sustained and enforced, except as to so much of the additional duty of 20 per centum as was levied upon the charges and commissions. The court there say that the ruling of the lower court, in confining the additional duty to the appraised value of the imports, was the correct interpretation of the section.

As stated by Mr. Justice Campbell, speaking for the court, in Bartlett v. Kane, 16 How. 274, such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." They are designed to discourage undervaluation upon imported merchandise, and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called "additional duties" or "penalties." Congress had the power to impose them under either designation or character. When the dutiable value of the merchandise is finally ascertained to be in excess of the value declared in the entry by more than 10 per centum, this extra duty or penalty attaches, and the collector is directed and required to levy and collect the same in addition to the ad valorem duty provided by law. The importers in this case

cannot be heard to complain of this additional duty or penalty, which was a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute. They had full notice of the proceedings before the board of general appraisers upon their appeal to said board, and ample opportunity to be heard on the question of the market value of the imported goods. It cannot, therefore, be properly said that they have been subjected to penalties without notice or an opportunity to be heard, or been deprived of their property without due process of law.

The judgment of the circuit court dismissing the importers' appeal to that court for want of jurisdiction must, therefore, be affirmed.

(148 U. S. 142)

ROSENTHAL v. COATES.

(March 13, 1893.)

No. 3.

REMOVAL OF CAUSES — SEPARABLE CONTROVERSY — TIME OF REMOVAL.

1. An assignee brought suit in the state court to disincumber a fund in his possession of alleged liens, and each defendant set up a separate defense, and asked payment out of the fund. The trial court decided against the assignee, who appealed; but, pending the appeal, paid all the defendants but one, but did not dismiss them from his suit. The appellate court reversed the judgment of the lower court, and remanded the case for further proceedings. *Held*, there was no separable controversy between the assignee and the defendant not paid, within the meaning of the removal of causes acts.

2. Under the act of March 3, 1875, governing removals of suits from the state to the federal courts, it is necessary to file a petition for the removal in the state court before or at the term at which said cause could be first tried.

3. A removal for local prejudice, under Rev. St. § 639, could only be had where all the parties to the suit on one side were citizens of different states from those on the other. Jefferson v. Driver, 6 Sup. Ct. Rep. 729, 117 U. S. 272, followed.

4. If a party has good ground to remove a suit from a state to a federal court, he must not experiment on his case in the state court, and, upon an adverse decision, then transfer to the federal court.

Appeal from the circuit court of the United States for the western district of Missouri. Affirmed.

*144 *Statement by Mr. Justice BREWER:

On August 3, 1878, the Mastin Bank of Kansas City failed, and also executed a deed of general assignment to Kersey Coates for the benefit of all creditors. Coates accepted and administered the trust. At the time of the failure the Mastin Bank had on deposit in the Metropolitan Bank of New York a large sum,—$50,000 and over,—that bank being its New York correspondent. It had, prior to August 3d, and in the regular course of business, drawn and sold drafts on the Metropolitan Bank to different parties. One of the parties holding such drafts was Rosenthal, the appellant. He brought suit in New York city to secure payment from the Metropolitan Bank out of the funds in its hands, but the decision of Mr. Justice Blatchford, then judge of the circuit court of the United States for the southern district of New York, into which court the case had been removed, was adverse to his right to appropriate any portion of that fund to the payment of his draft. Rosenthal v. Bank, 17 Blatchf. 318. It would seem from the opinion that the case proceeded no further than to sustain a demurrer to the bill, with leave to the plaintiff to move on notice, etc., for an amendment. What orders, if any, were entered thereafter in that case are not disclosed by this record.

*On June 23, 1881, Coates, as assignee of the Mastin Bank, filed in the circuit court of Jackson county, Mo., a petition, in which he set forth the failure of the bank; the assignment; his acceptance of the trust; the amount of the deposit in the Metropolitan Bank to the credit of the Mastin Bank at the time of the failure, which deposit had subsequently passed into his hands; the fact that various drafts had been drawn by the latter on the former bank prior to the failure, which drafts were outstanding and unpaid; and that the holders of these drafts claimed the right to have that fund appropriated specially to the payment of their drafts. The holders of the drafts were made parties defendant, and the prayer was, substantially, that their rights in this fund be determined; to which petition Rosenthal, among other defendants, answered. He admitted the charge made in the petition that a decree adverse to his claim of payment out of that fund had been rendered in the circuit court of the United States for the southern district of New York, but, nevertheless, claimed the benefit of a different line of decisions obtaining at that time in the trial courts of Missouri. This case came on regularly for hearing in the state trial court, and a decree was there entered directing Coates, the assignee, to pay all the other holders of drafts in full out of that fund, it being conceded to be sufficient in amount, but denying Rosenthal any right therein, by reason of the prior adjudication in New York city. From such decree Coates and Rosenthal both appealed; Coates, however, gave no supersedeas bond. When the case reached the supreme court, the question involved having been recently theretofore presented in another case, and decided adversely to the right of the holders of these drafts to payment out of such fund, that court simply entered an order reversing the decree of the circuit court, and remanding the case for further proceedings. No special notice seems to have been taken of the fact that the decree of the trial court was adverse to Rosenthal, and, in accordance with the conclusions of the supreme court, should have been affirmed. When the case returned to the circuit court, and before it was reached for further hearing, Coates had paid all the

other holders of drafts. Thereupon Rosenthal filed a petition for removal to the circuit court of the United States for the western district of Missouri, he being a citizen of New York and Coates a citizen of Missouri. This petition for removal was filed on February 10, 1885. The record having been transmitted to the federal court, a motion was made to remand, and, on October 25, 1886, it was sustained, and from this order remanding the case to the state court Rosenthal has appealed to this court.

O. H. Dean and Geo. Hoadly, for appellant. T. A. Frank Jones, for assignee of Mastin Bank.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The motion to remand was properly sustained. No removal could be had under the act of 1875, because the application was not made before or at the term at which said cause could be first tried. The case had been once tried in the circuit court, and thereafter reversed on appeal by the supreme court of the state.

Neither could it be removed on the ground of local prejudice, which is one of the grounds set forth in the petition for removal, because such removal can be had only where all the parties to the suit on one side are citizens of a different state from those on the other. Jefferson v. Driver, 117 U. S. 272, 6 Sup. Ct. Rep. 729. Here, several of the defendants were citizens of Missouri,—the same state that Coates was a citizen of. Neither did the payment by Coates to the other defendants change the status of the suit. The petition did not disclose a separable controversy between Coates, the assignee, and Rosenthal, or any other holder of a draft, but a single controversy between him and all the defendants. Looking back of the form to the substance, it will be seen to have been one between all the creditors of the Mastin Bank as a body, represented by Coates, the assignee, as plaintiffs, and the defendants as another body; and the question was whether this fund should be applied solely to the payment of the claims of the latter, or distributed generally among all of the former. Whether the fund was sufficient to pay all of the draft holders in full or not was, therefore, immaterial. It was not enough to pay all the creditors, and they collectively, and as represented by the assignee, Coates, were the real party in interest on the other side. The suit was, in effect, one by the assignee to disincumber this fund in his possession of alleged liens, and the fact that each defendant had a separate defense to this claim did not create a separable controversy as to him. Safe Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. Rep. 733; Graves v. Corbin, 132 U. S. 571, 586, 10 Sup. Ct. Rep. 196; Young v. Parker's Adm'r, 132 U. S. 267, 10 Sup. Ct. Rep. 75. Nor did any defendant create a separable controversy, by simply petitioning in his answer for payment out of that fund.

The appellant relies on the case of Yulee v. Vose, 99 U. S. 539. But in that case there was a separable controversy, and one in fact separated by the decision of the court of appeals of the state of New York. The case of Brooks v. Clark, 119 U. S. 502, 7 Sup. Ct. Rep. 301, is more in point. See, also, Shainwald v. Lewis, 108 U. S. 158, 2 Sup. Ct. Rep. 385; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. Rep. 726. The other defendants, although they have received the amounts due on their drafts, are not necessarily eliminated from this suit. Payments were made by Coates pending an appeal, under a mistaken notion of the law. He may be entitled to a decree declaring that they have no recourse upon this special fund, and then, perhaps, pursue some remedy to recover what he has erroneously paid. It is unnecessary to speculate what may be done. It is enough that they are still parties to the record, against whom some relief may be had, and that there is no separable controversy between the assignee and any defendant.

Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the federal court. Here, Rosenthal has gone through the state trial and appellate courts, and his rights have been finally declared by the supreme court of the state; and though, as yet, no formal decree has been entered in the trial court, it is none the less true that he has experimented with the state courts and been beaten, and now seeks a different forum. Jifkins v. Sweetzer, 102 U. S. 177.

The order to remand is affirmed.

(143 U. S. 222)

In re SANBORN.

(March 20, 1893.)

No. 11.

APPEALABLE JUDGMENTS—COURT OF CLAIMS—INDIAN CLAIMS AND CONTRACTS.

1. The findings of fact and conclusions of law which the court of claims makes and transmits to a department on any "claims or matter" referred to it by such department with the claimant's consent, under the provisions of section 12 of the act of March 3, 1887, (1 Supp. Rev. St. [2d Ed.] 559,) is advisory only, and is, therefore, not a judgment which is subject to review in the supreme court under section 9 of that act.

2. An application to the interior department, asking the government to retain, out of moneys due an Indian tribe, a certain amount alleged to be due the claimant under a contract with the Indians, may be considered a "matter pending in a department involving controverted questions of fact and law," which may be referred to the court of claims under section 12 of the act of March 3, 1887, (1 Supp. Rev. St. [2d Ed.] 559,) but it is not a suit against the United States, within the meaning of section 9, which allows appeals to the supreme court.

3. Rev. St. §§ 2103–2105, prescribing the form and substance of contracts between Indians and agents or attorneys respecting claims against the United States, and making the approval of the secretary of the interior necessary, are only intended to protect the Indians from improvident contracts, and do not create a legal obligation on the part of the United States to see that the Indians perform their part of the contracts.

Petition by John B. Sanborn for a writ of mandamus to the chief justice and judges of the court of claims, commanding them to allow an appeal to the supreme court. Denied.

Charles King, George A. King, and William B. King, for petitioner. Asst. Atty. Gen. Maury, for respondent.

Mr. Justice SHIRAS delivered the opinion of the court.

*223 A claim of John B. Sanborn, presented in the department of the interior, for certain fees under a contract with Sisseton and Wahpeton Indians, of 10 per cent. of the amount appropriated for said Indians by section 27 of the Indian appropriation act of March 3, 1891, (26 St. p. 989,) was referred by the secretary of that department, with the consent of the claimant, to the court of claims, in pursuance of section 12 of the act of March 3, 1887, (1 Supp. Rev. St. [2d Ed.] 561.) That court having concluded that Sanborn was not entitled to recover, and having reported its findings of fact and conclusions of law to the department, Sanborn, on the 6th day of July, 1892, asked for the allowance of an appeal to the supreme court of the United States. This application, being made in a vacation of the court of claims, was heard and denied by the chief justice, but was renewed and argued before all the judges on November 2, 1892, and was denied by the court, which adopted the opinion of the chief justice previously filed upon the motion before him.

Thereupon Sanborn filed in this court his petition praying that a writ of mandamus be allowed to the chief justice and judges of the court of claims, commanding them to allow his appeal as prayed for.

The question for us to answer is whether, where a claim or matter is pending in one of the executive departments which involves controverted questions of fact or law, and the head of such department, with the consent of the claimant, has transmitted the claim, with the vouchers, papers, proofs, and documents pertaining thereto, to the court of claims, and that court has reported its findings of fact and law to the department by which it was transmitted, the claimant has a right by appeal to bring the action of that court before us for review.

The petitioner does not complain of any illegality on the part of the court below in dealing with his claim. He concedes that the action of that court had been invoked with his consent. What he complains of is the refusal of the court to allow his appeal, and we learn from the opinion of the court that its refusal to allow the appeal was not put upon any irregularity or defect in the claim, or in the application for the allowance of an appeal, but upon its view that the proceedings before it were not the subject of appeal to this court.

We must find an answer to the question thus put to us by a construction of the act of March 3, 1887, read in the light of the previous legislation establishing the court of claims, and regulating the subject of appeals from its judgments to this court.

This subject came for the first time before this court in the case of Gordon v. U. S., 2 Wall. 561, wherein it was held that, as the law then stood, no appeal would lie from the court of claims to this court. The reasons for this conclusion are stated in the opinion of Chief Justice Taney, reported in the appendix to 117 U. S. 697, and interesting as his last judicial utterance. Briefly stated, the court held that, as the so-called "judgments" of the court of claims were not obligatory upon congress or upon the executive department of the government, but were merely opinions, which might be acted upon or disregarded by congress or the departments, and which this court had no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power, and could not, therefore, be revised by this court.

A similar question arose in this court as early as 1794, in the case of U. S. v. Todd, an abstract of which case appears in a note by Chief Justice Taney to the later case of the U. S. v. Ferreira, 13 How. 52, and wherein it was held that an act of congress conferring powers on the judges of the circuit court to pass upon the rights of applicants to be placed upon the pension lists, and to report their findings to the secretary of war, who had the right to revise such findings, was not an act conferring judicial power, and was, therefore, unconstitutional.

The case of U. S. v. Ferreira was that of an appeal from the district court of the United States for the district of Florida. The judge of that court had acted in pursuance of certain acts of congress, directing the judge to receive, examine, and adjust claims for losses suffered by Spaniards by reason of the operations of the American army in Florida. It was decided that the judge's decision was not the judgment of the court, but a mere award, with a power to review it conferred upon the secretary of the treasury, and that from such an award no appeal could lie to this court.

Afterwards, and perhaps in view of the conclusion reached by this court in these cases, on March 17, 1866, (14 St. p. 9,) congress passed an act giving an appeal to the supreme court from judgments of the court of claims, and repealing those provisions of the act of March 3, 1863, which practically

subjected the judgments of the supreme court to the re-examination and revision of the departments, and since that time no doubt has been entertained that the supreme court can exercise jurisdiction on appeal from final judgments of the court of claims. U. S. v. Alire, 6 Wall. 573; Same v. O'Grady, 22 Wall. 641.

Express provision for such appeals was made by section 707 of the Revised Statutes, as follows: "An appeal to the supreme court shall be allowed on behalf of the United States from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court."

Additions were made to the statutory law on this subject by the act of March 3, 1887, (1 Sup. Rev. St. [2d Ed.] 559,) the ninth section of which is as follows: "That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that case made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects and as near as may be to the statutes and rules of the court governing appeals and writs of error in like causes."

The twelfth section of the statute is in the following words: "That when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court of claims, and the same shall be there proceeded in under such rules as the court shall adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted."

With these statutory provisions and decisions of the supreme court before it, the court below held that a finding of fact and law made, at the request of a head of a department, with the consent of the claimant, and transmitted to such department, is not a judgment within the meaning of the 9th section of the act of March 3, 1887, or of the 707th section of the Revised Statutes, and is not, therefore, appealable to this court.

Such a finding is not made obligatory on the department to which it is reported, certainly not so in terms, and not so, as we think, by any necessary implication. We regard the function of the court of claims in such a case as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by congress.

It is therefore within the scope of the decision in Gordon v. U. S. The provisions providing for appeals in the ninth section of the act of 1887 have reference to cases under the prior sections of the act, which treat of cases or suits brought against the United States, whether in the district courts, circuit courts, or court of claims, and wherein final judgments or decrees shall be entered. This seems to be clear from the terms used: "The plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the limitations and conditions therein contained." The reference here is to the 707th section of the Revised Statutes, which, as already said, provides for an "appeal to the supreme court on behalf of the United States from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars."

In the case before us there was, as held by the court of claims, no final judgment obligatory upon the department of the interior, or enforceable by execution from any court. Moreover, there was really no suit to which the United States were parties. The claimant did not pretend that the government owed him anything for property sold or services rendered. His effort was to get the department of the interior, which was paying money over to Indians under treaties, to withhold from them an agreed percentage thereof for services rendered by him to the Indians. While such a claim may be rightfully regarded as a matter pending in one of the executive departments, which involves controverted questions of fact or law, within the meaning of the twelfth section of the act of 1887, we are unable to regard it as a suit brought against the United States within the contemplation of the ninth section of that act. It is true that by several statutes which appear in a compendious form in sections 2103, 2104, and 2105 of the Revised Statutes, the form and substance of contracts between Indians and agents or attorneys for services to be performed in reference to claims by such Indians against the United States, are prescribed, and the approval of such contracts by the secretary of the interior and the Indian commissioner is made necessary. But such enactments, intended to protect the Indians from improvident and unconscionable contracts, by no means create a legal obligation on the part of the United States to see that the Indians perform their part of such contracts.

Section 2104 provides that "the secretary

of the interior and commissioner of Indian affairs shall determine whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract."

Such a claim may be, as already said, a matter pending in the department of the interior, within the meaning of the twelfth section of the act of 1887, but it is plainly not a suit against the United States with respect to which an appeal is provided for by the ninth section.

The application for a writ of mandamus must therefore be denied.

(148 U. S. 187)

BIER v. McGEHEE.

(March 13, 1893.)

No. 1,254.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—FEDERAL QUESTION.

Const. La. 1879, art. 233, declared the consolidated bonds of the state, held by the state for the Agricultural and Mechanical College and the Louisiana Seminary fund, to be null and void. The state treasurer thereafter fraudulently reissued and put such bonds in circulation. *Held*, that there was no contract between a subsequent purchaser and the state, the obligation of which was impaired by article 233, and that a suit by such purchaser against the seller to rescind the sale involved no federal question.

In error to the court of appeals for the parish of Orleans, state of Louisiana. Writ dismissed.

Statement by Mr. Justice BROWN:

This was a motion to dismiss a writ of error upon the ground that no federal question was involved.

Suit was begun by a petition filed by McGehee in the civil district court of the parish of Orleans, December 10, 1889, setting forth that in May, 1888, petitioner had purchased of defendant, Bier, a certain state bond numbered 788, "denominated and represented to be a consolidated bond of the state of Louisiana," for the sum of $1,000, issued January 1, 1874, under authority of Act No. 3 of the state legislature of 1874; that, after the purchase of said bond and payment therefor, it was claimed by the state of Louisiana, through the attorney general, as its property, and that it had been stolen by one Burke from the state treasurer, and the return of said bond, with $60 received in payment of the coupons attached thereto, was demanded by the attorney general. The petitioner further averred that the bond was purchased by him under the full belief that Bier was the lawful owner thereof, but that he was not at the time of the sale by him, or since, the owner thereof, and that he had good reason to believe and so charged that the bond was then the lawful property of the state of Louisiana, and part of the Agricultural and Mechanical College fund held by the state; that said bond was worthless in his hands; that the defendant refused to repay the purchase price. He prayed for a judgment rescinding the sale of the bond, and that the defendant be condemned to take back the same, and return the amount paid therefor.

Defendant, in his supplemental answer, denied that he was ever the holder of the bond, or that he had ever sold the same to the plaintiff; and averred that he had never purchased or acquired any such bond that was not acquired in good faith, in open market, before maturity, in the due and regular course of trade, as commercial paper; and that any law of the state of Louisiana supposed to affect or alter the contract contained in the consolidated bonds of the state, issued under the act of 1874, was repugnant to the constitution of the United States.

Upon the trial it was proved, and not denied by Bier, that he had purchased the bond after the adoption of the constitution of the state in 1879. The state treasurer's report of 1879 was put in evidence to show that the state was the owner of the bond at that time. The court decreed that the sale of the bond be rescinded, and that the defendant, Bier, be compelled to take back the bond, with the coupons attached, and the sum of $60, received for the coupons paid in error, etc. Defendant appealed to the court of appeals of the parish of Orleans, which affirmed the judgment, and thereupon he sued out a writ of error from this court, which defendant in error, McGehee, moved to dismiss.

F. L. Richardson, for the motion. H. L. Lazarus, opposed.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

Plaintiff in error invokes the jurisdiction of this court upon the ground that article 233 of the constitution of the state of Louisiana, which declared that the consolidated bonds of the state, held for the Agricultural and Mechanical College and the Louisiana Seminary fund, were null and void, was repugnant to section 10, art. 1, of the constitution of the United States, prohibiting states from passing laws impairing the obligation of contracts.

The article in question declares the debt due by the state to the Agricultural and Mechanical fund to be $182,313.03, being the proceeds of the sales of lands and land scrip granted by the United States to the state for the use of a college for the benefit of agriculture and the mechanical arts; directs that said amounts shall be placed to the credit of said fund on the books of the auditor and treasurer as a perpetual loan; that the state shall pay an annual interest of 5 per cent. on said amount from January 1, 1880, for the use of said college; and that the con

solidated bonds of the state, then held by the state for the use of said fund, were to be *140 null and void after January 1, 1880, "and the general assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the general assembly may direct."

That the constitution of a state is a "law" of the state, within the meaning of the constitution of the United States, prohibiting states from passing laws impairing the obligation of contracts, is not denied, and the plaintiff in error assumed the position that it is beyond the power of the state to annul or cancel bonds outstanding and presumably in the hands of bona fide purchasers. If Bier had been a holder for value of this bond when the constitution of 1879 was adopted, it would evidently be beyond the power of the state, by act of the legislature, or by an amendment to its constitution, to nullify such bond in his hands; but if, when the constitutional amendment was adopted, the bond was still in the possession of the state, there was then no contract with Bier upon which such amendment could operate, and hence no contract subject to impairment. City of New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 12 Sup. Ct. Rep. 142. There was no objection to the state declaring bonds still in its possession to be null and void. The amendment was practically an inhibition against issuing bonds of the state for a certain purpose.

The court found that there was no material difference between the facts of this case and those of a prior case against the same defendant, arising from the purchase of another of the same issue of bonds; and, in its opinion in such prior case, (Aycock v. Lee,) the court of appeals of Orleans held that it would take judicial notice of the fact that the bonds, while in the possession of one Burke, then treasurer of the state, had become and were null and void by the operation and effect of article 233 of the constitution; and that Burke, having fraudulently reissued and put such bonds in circulation, absconded from the state, and became and still was a fugitive from justice. The court further found that defendants received from the plaintiff $913.75 for a paper represented to be a consolidated bond of the state, which the state had declared to be null and void, and which was the lawful property of the state, and *141 that defendants were never owners of said bond; that plaintiff did not know such facts when he purchased; and that said bond was valueless in his hands. The court further found that these bonds were never put in circulation by the state, but, that, while they were held by the state in trust for the use of the Agricultural and Mechanical College fund, they were annulled by the constitution of 1879, and their destruction ordered; that the claim made that innocent holders were entitled to exemption from inquiry into the equities between the original parties was wholly inapplicable to these bonds, which never were issued and put in circulation by the state; that there was no equitable estoppel against the state, from the fact that the general assembly failed to have the bond destroyed, as required by the constitution, or from the fact that coupons attached to it were paid from the state funds set apart for the payment of the interest on the state debt; and that the negligence of the general assembly, the crime of the state treasurer, and the erroneous payment of said coupons, could not singly or operating together give validity to the bonds whose nullity had been declared, and whose destruction had been ordered. The court further held that what the plaintiff covenanted to purchase, and what defendants covenanted to sell, was a legal bond of the state; that there was an implied warranty on their part that the bond belonged to them, and that it was a genuine legally outstanding and negotiable bond of the state; that what the plaintiff received was a bond of no validity; and that "for this error of fact and of law as well regarding the essential quality of the bond sold, and without which plaintiff would not have purchased it, the contract may be rescinded."

It is quite evident from this statement that there was no federal question involved in the case. The only such question which could possibly have arisen related to the power of the state to annul by constitutional amendment its own obligations; but that could only be raised upon the theory that the obligation had been put in circulation, and that there was a contract on the part of the state to pay the holders. If the bonds were still in possession of the state, (and the court found that they were,) there was no contract to be impaired. The real questions involved *142 were whether the bonds which had been stolen by the former treasurer were valid obligations of the state in the hands of McGehee, the plaintiff; and, secondly, whether the defendant, Bier, was liable for money received by him upon a consideration which had failed.

In the case of Sage v. Board, 144 U. S. 647, 650, 12 Sup. Ct. Rep. 755, it was said by this court, speaking of this same issue of bonds, that the supreme court of Louisiana had decided "that the governor, as the chief executive officer of the state, had no power whatever to deal with those bonds, or to dispose of them, except in the precise manner and for the distinct purpose pointed out by the law; and that any act of his in contravention of its provisions in that regard would be void, and could not confer on any person or holder of the bonds a right to recover them, or to enforce their liquidation or payment." This decision was held not to have raised a federal question, and the writ of error was dismissed.

It is true that article 233 did not identify the bonds beyond describing them as "the consolidated bonds of the state for the use of

the said fund," (Agricultural and Mechanical;) but the treasurer, in whose possession they were, could not fail to know what bonds were intended; and whether such bonds, subsequently stolen by him and put in circulation, were, though not identified as belonging to this fund, valid obligations of the state, in the hands of innocent holders, was not a federal question.

The writ of error will therefore be dismissed.

(148 U. S. 245)

HUME v. BOWIE.

(March 20, 1893.)

No. 1,107.

EXCEPTIONS, BILL OF — SETTLEMENT — DEATH OF JUDGE — NEW TRIAL — SUPREME COURT — JURISDICTION — APPEALABLE ORDERS.

1. Where a term of the circuit court of the District of Columbia has been extended indefinitely for the purpose of settling a bill of exceptions, and the attorneys are unable to agree upon it, and the judge dies before settling it, the supreme court of the district, in general term, has authority to grant a new trial, pursuant to rule 64 of that court, which provides for new trials when the judge is unable to settle the bill of exceptions.

2. An order by the general term of the supreme court of the District of Columbia, granting a new trial, in a case in which it has power to grant the same, is not a final judgment reviewable on writ of error in the supreme court of the United States.

3. Rule 2 of the supreme court of the District of Columbia provides that the May term of the circuit court shall not extend beyond the second Saturday in July. Rule 62 provides that the bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it. *Held*, that for this purpose the May term could be extended indefinitely up to and beyond the beginning of the succeeding term.

In error to the supreme court of the District of Columbia.

Action in the circuit court of the District of Columbia by William B. Bowie against Frank Hume on a contract of indorsement. Upon the death of plaintiff, Anne H. Bowie, executrix, was substituted as party plaintiff. Upon her death, Richmond Irving Bowie, administrator de bonis non, with the will annexed, was substituted. Verdict for defendant. Plaintiff took an appeal to the supreme court, general term, but the justice who had heard the cause died without settling the bill of exceptions. Thereupon plaintiff moved in the circuit court to set aside the verdict and for a new trial. By agreement this motion was heard in the general term, and was there granted. Defendant brings error. Heard on motion to dismiss the writ of error for want of jurisdiction. Granted.

Statement by Mr. Chief Justice FULLER:

This was an action brought by William B. Bowie in the supreme court of the District of Columbia against Frank Hume, as indorser upon a promissory note. The defendant pleaded to the declaration; issue was joined; and on the trial of the cause a verdict was rendered May 25, 1888, in favor of the defendant. During the trial various exceptions were reserved to the rulings and instructions of the court, which were duly noted at the time by the presiding justice upon his minutes. A motion for new trial was made and overruled June 2, 1888, and an appeal to the general term was thereupon taken, and a bond on appeal duly executed and approved.

The record discloses that on January 3, 1888, the court in general term entered an order directing that, in addition to the circuit court to be held by Mr. Justice Hagner on the fourth Monday of January, 1888, a second circuit court should be held at the same time by Mr. Justice Merrick, the court to be held by Mr. Justice Hagner to be known as "Division No. 1," and the court to be held by Mr. Justice Merrick to be known as "Division No. 2." On April 27, 1888, the court in general term ordered that the circuit courts then being held in divisions Nos. 1 and 2 should be continued further by the same justices through the May term thereof. This case was tried in the circuit court, division No. 2, by Mr. Justice Merrick; verdict returned May 25th; motion for new trial overruled June 2d; appeal prayed June 5th; bond approved June 12th. On July 14, 1888, an order was entered by that justice providing that "the May term of the circuit court, division number two, is hereby entered as extended, that the bill of exceptions not yet filed may be settled, to wit: [Here follow names of cases, including this case.]" On the same day, in division No. 1, the court ordered "the term of this court extended for the purpose of settling bills of exceptions and case in the following cases: [Cases named;] and thereupon the May term adjourned without day, except as above stated."

On January 24, 1889, an order was entered by the general term, assigning the justices to serve for the year 1889, as follows: "First, for the general term, Justices Hagner, James, and Merrick; second, for the circuit court, Chief Justice Bingham; third, for the equity court and orphans' court, Justice Cox; fourth, for the district court, Justice James; fifth, for the criminal court, Justice Montgomery."

April 8, 1889, the death of William B. Bowie was suggested, and Anne H. Bowie, executrix, was substituted as party plaintiff, and, on April 23d, she filed her motion to set aside the verdict and judgment, and to grant a new trial, "because the bill of exceptions containing the exceptions reserved on the trial of the cause cannot be settled, signed, and sealed as required by law, the justice of this court, who presided at the trial of this cause, (in division No. 2, May term, 1888, of this court,) having departed this life without having settled or signed and sealed the same."

Due notice of this motion was given, and

it was finally called up on June 8, 1889, before Chief Justice Bingham, holding a special term and circuit court, and "at the request of both parties, by their respective attorneys, was directed to be heard in the general term in the first instance." Subsequently the death of Anne H. Bowie was suggested, and Richard Irving Bowie, as administrator de bonis non, with the will annexed, substituted.

*247 The motion in question was heard upon certain certificates and affidavits, which are set forth in a bill of exceptions taken upon the disposition of the motion. It appeared that the bill of exceptions preserved on the trial was prepared by counsel for plaintiff, and submitted to counsel for defendant, but that they could not settle it by agreement, and that, before it was considered by the justice who presided at the trial, the latter became ill, and afterwards, on February 6, 1889, died, leaving it unsettled.

On April 26, 1892, the motion was sustained by the general term, the judgment and verdict set aside, and a new trial granted. From this order a writ of error was sued out.

The following are sections of the Revised Statutes of the District of Columbia:

"Sec. 770. The supreme court, in general term, shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term; and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules. It may also determine by rule what motions shall be heard at a special term, as nonenumerated motions, and what motions shall be heard at a general term in the first instance."

"Sec 803. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed.

"Sec. 804. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had.

"Sec. 805. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

"Sec. 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard, in the first instance, at a general term."

Among the rules of the supreme court of the District of Columbia are these:

"(2) The terms of the court shall be as follows: Of the general term, on the 4th Monday of January; 4th Monday of April; 1st Monday of October. Of the circuit court, on the 4th Monday of January; 2d Monday of May, which term shall not continue beyond the 2d Saturday in July, except to finish a pending trial; 3d Monday of October. Of the district court, on the 1st Monday of June; 1st Monday of December. Of the criminal court, on the 1st Monday of March; 3d Monday of June; 1st Monday of December. Of the special terms, on the first Tuesday of every month, except August, in which month there shall be no term of court."

"(54) Motions for new trial may be grounded on errors of law in the rulings of the justice presiding at the trial.

"First. The motion may be made upon the bills of exception, in which case it must be filed in the circuit court, but shall be heard in the general term in the first instance.

"Second. The justice who tried the cause may, in his discretion, before any bills of exceptions are prepared, entertain a motion to set aside the verdict for errors of law founded on the exceptions reserved during the trial and noted on his minutes. An appeal may be taken from the decision of the justice on such motion, in which case a bill of exceptions must be settled in the usual manner."

"(61) If a party desires to present for review in the general term the rulings or instructions of the presiding justice for alleged errors of law, he must, at the trial and before verdict, except to such rulings or instructions; and he may at the time *of taking exception* 248 reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes, and proceed with the trial, and afterwards settle the bill of exceptions.

"(62) The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it.

"(63) Every bill of exceptions shall be drawn up by the counsel of the party tendering it and submitted to the counsel on the other side; and, where the bill of exceptions is not settled before the jury retires, the counsel tendering the bill of exceptions shall give notice in writing to the counsel on the other side of the time at which it is proposed that the bill of exceptions shall be settled, and shall also, at least three days, Sundays exclusive, before the time designated on such notice, submit to the counsel on the other side the bill of exceptions so proposed to be settled; and, if they cannot agree, it shall be settled by the justice who presided at the trial, and in that case the justice shall be at-

tended by the counsel on both sides, as he may direct.

"(64) In case the judge is unable to settle the bill of exceptions, and counsel cannot settle it by agreement, a new trial shall be granted."

Enoch Totten, for the motion. W. D. Davidge and S. T. Thomas, opposed.

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*Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

This case comes before us on a motion to dismiss the writ of error for want of jurisdiction, upon the ground that the judgment brought here by the writ is not a final judgment. Baker v. White, 92 U. S. 176; Rice v. Sanger, 144 U. S. 197, 12 Sup. Ct. Rep. 664; Brown v. Baxter, 146 U. S. 619, 13 Sup. Ct. Rep. 260. The question involved is one of power; for, if the court had power to make the order when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable.

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*The rule is unquestionably correctly laid down in Muller v. Ehlers, 91 U. S. 249, that when judgment has been rendered, and the term expires, a bill of exceptions cannot be allowed, signed, and filed as of the date of the trial, in the absence of any special circumstances in the case, and without the consent of parties or any previous order of court; but it is always allowable, if the exceptions be seasonably taken and reserved, that they may be drawn out and signed by the judge afterwards, and the time within which this may be done must depend upon the rules and practice of the court and the judicial discretion of the presiding judge. Dredge v. Forsyth, 2 Black, 563; Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. Rep. 150.

The supreme court of the district had power to prescribe rules upon the subject, and had done so. Under those rules, whenever the judge was unable to settle the bill of exceptions, and counsel could not settle it by agreement, a new trial followed as matter of course. If, therefore, in this case, the bill of exceptions was open to be settled at the time of the granting of the new trial, the power to grant the latter existed. If the bill were settled, the court, in general term, could hear the case, and, if reversible error were found, could set aside the judgment; and, if the bill could not be settled, the judgment was necessarily so far in fieri as to be susceptible of being vacated under the rule. Ordinarily where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted, (Insurance Co. v. Wilson, 8 Pet. 291, 303; Borrowscale v. Bosworth, 98 Mass. 34, 37; People v. Judge of Superior Court, 41 Mich. 726, 49 N. W. Rep. 925; State v. Weiskittle, 61 Md. 48; Benett v. Steamboat Co., 16 C. B. 29; Newton v. Boodle, 3 C. B. 795; Nind v. Arthur, 7 Dowl. & L. 252;) and here the rule is so prescribed.

The rules also provided that the terms of court might be prolonged by adjournment for the purpose of settling bills of exceptions, and an order was accordingly entered prolonging the term at which this judgment was rendered, for the purpose of doing that in this case. This was equivalent to *the prac- tice in many jurisdictions of entering an order granting additional time, after the expiration of the term, in which to settle such bills. The provision as to the prolongation of the term for the particular purpose is a mere difference in phraseology, and not of the substance, and the question as to the close of the term in other respects is quite immaterial.

It is argued that as rule 2, fixing the terms of the circuit court, provides that the May term shall not continue beyond the second Saturday in July, except to finish a pending trial, the order extending the term under rule 62, for the special purpose of settling bills of exceptions, beyond the limit fixed by rule 2, could not extend such term beyond the commencement of the succeeding term, which was in this instance the third Monday of October, 1888. The May term, it is said, must necessarily have come to an end, either by the act of the justice who held it or by operation of law through the efflux of time and the commencement of the succeeding term. But we are of opinion that under these rules the term may be continued indefinitely by order of court, so far as the settlement of bills of exceptions is concerned, and concur in the views of the supreme court of the district expressed in Jones v. Railroad Co., 18 D. C. 426, where it was held that rule 62 was valid, and that, while it would be more proper to specify the time to which the term might be extended under the provisions of that rule, yet an omission to do so did not invalidate the order.

It is to be remembered that the supreme court of the district sitting at special term and the supreme court sitting in general term is still the supreme court; that the judgment of the general term setting aside a verdict and judgment at law, and ordering a new trial, is equivalent to remanding the cause to the special term for a new trial; that an appeal from the special to the general term is simply a step in the progress of the cause during its pendency in the court; and that, though the judges may differ, the tribunal remains the same. Railroad Co. v. Moore, 121 U. S. 573, 7 Sup. Ct. Rep. 1334; Ormsby v. Webb, 134 U. S. 62, 10 Sup. Ct. Rep. 478. Some other judge must act on a motion for new trial by reason of inability created by death, *and, while this order was entered at a term subsequent to that at which the judg-

ment was rendered, it was entered in a matter kept within the control of the court by the order of prolongation. Mr. Justice Merrick, if living, might have settled the bill of exceptions in the case in April, 1889, at the time the motion under consideration was made; and inasmuch as, because of his decease, the bill of exceptions could not be settled by him, and counsel could not settle it by agreement, rule 64 applied. At all events, the court had power to carry that conclusion into effect, and, this being so, the order that it entered awarding a new trial was not a final judgment.

The distinction between Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. Rep. 901, and this case is that there a verdict and judgment had been taken against the defendant, and no motion was made or proceeding had at that term for the purpose and with the view of setting aside the judgment. The litigation was at an end upon the adjournment of the term, and the successful party discharged from further attendance.

The result is that the writ of error must be dismissed.

(148 U. S. 360)

JOHNSTON v. STANDARD MIN. CO.

(March 27, 1893.)

No. 133.

LACHES—WHAT CONSTITUTES—WAIVER.

1. On October 12, 1880, plaintiff conveyed a quarter interest in a mining claim pursuant to a written contract, which the vendee agreed to record, and which stated that the vendee was to have suit instituted to vest title in him as against certain adverse claimants, and, when this was accomplished, to reconvey a one-eighth interest. The vendee never recorded the contract, and failed to institute any suit, and compromised a suit begun by the adverse claimants. Soon after receiving the conveyance, the vendee conveyed the property to a corporation in which he was interested. Of these facts plaintiff had notice, or knowledge sufficient to put him on inquiry. The corporation, or its successor, obtained a patent for the claim in February, 1884, of which plaintiff obtained knowledge in February, 1885. August 1, 1885, he filed a bill to compel a reconveyance and accounting, but the suit was not prosecuted with diligence, and about a year later was dismissed for want of jurisdiction. August 19, 1886, a second suit was filed, which was afterwards dismissed because of defective summons. October 21, 1887, the present suit was filed. In the mean time the property was developed, and had increased in value from a few thousand to several million dollars, and the stock of the corporation had largely come into the hands of persons ignorant of plaintiff's claim. *Held*, that plaintiff was guilty of laches barring the suit. 39 Fed. Rep. 304, affirmed.

2. The mere institution of a suit does not, of itself, relieve a person from the charge of laches, and if he fail to prosecute it with diligence the consequences are the same as if it had never been instituted.

3. A claimant of an interest in a mining claim, of which the legal title is held by another under contract to convey to the claimant in a certain contingency, waives his right to a conveyance by consenting to the formation of a corporation to take and develop the property.

Appeal from the circuit court of the United States for the district of Colorado. Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity to establish the ownership of the plaintiff in one fourth of a mining claim known as the "J. C. Johnston Lode," and for a decree that the defendant be required to execute a deed of the same, and to account to plaintiff for one fourth of the net proceeds of the mine. The bill, which was originally filed in the state court against the Standard Mining Company, Isaac W. Chatfield, and other defendants, was subsequently removed to the circuit court of the United States, upon the petition of the Standard Mining Company, as a suit involving a separate controversy between itself and the plaintiff, Johnston.

The bill averred, in substance, that on September 14, 1880, plaintiff, being then the owner and in possession of an undivided half of the J. C. Johnston lode mining claim, situated in the Roaring Fork mining district, Pitkin county, Colo., executed a certain title bond, whereby he agreed to sell and convey to the defendant Chatfield an undivided one-fourth interest in such mining claim, with other property, for a consideration of $1,200; that on October 12, 1880, plaintiff executed to Chatfield a deed of his entire interest in such mining claim for a nominal consideration of $1,200; that his interest at the time was an undivided half, and that such conveyance was in pursuance of said bond as to a one-fourth interest covered by said bond, and, as to the remaining one-fourth interest, such conveyance was in trust that Chatfield, with Charles I. Thomson and Daniel Sayre, who were his legal advisers, and who were also made defendants, would defend Johnston's title to this claim against another, known as the "Smuggler Claim No. 2," with which these parties represented to him that it was in conflict, and would perfect plaintiff's title to the J. C. Johnston claim by obtaining a patent therefor, and would thereupon convey to plaintiff an undivided one-eighth interest in the property, free and clear of all costs and expenses of the patent proceedings, and of the threatened litigation with the Smuggler No. 2 claim, and of all charges, incumbrances, and assessments, and would hold the remaining one eighth of said title for Thomson & Sayre as compensation for their legal services, and for the costs of litigation; "but it was expressly agreed and understood that, if said services should not be necessary, and should not be performed, said Thomson & Sayre should receive nothing, and that the said remaining one eighth should be reconveyed to plaintiff."

The bill further averred that, upon the solicitation of these parties, plaintiff was induced to employ Thomson & Sayre upon these terms, and thereupon executed the deed to Chatfield of all his interest in the claim, and in pursuance of such agreement a

contract, in writing, was drawn up, and signed by Chatfield and plaintiff, whereby the former agreed, upon perfecting the title to the claim, to convey to plaintiff an undivided one eighth free and clear of all expenses and of the proposed litigation; that plaintiff did not retain a copy of this contract, but that the same was left in the possession of Thomson & Sayre, who promised to have the same recorded, but failed to do so.

The bill further averred that on December 14, 1880, Chatfield conveyed to the Fulton Mining Company, also made a defendant, all his interest in such claim; that such conveyance was made before the incorporation of the Fulton Mining Company, and, therefore, that it acquired no title by said conveyance; that the incorporators of said Fulton Mining Company were the defendants in this suit, including Chatfield, Thomson, and Sayre, and the same defendants were all directors of such company for the first year of its existence, and that all of them had, before such conveyance by Chatfield to the company, full knowledge and actual notice of the uses and trusts upon which Chatfield held plaintiff's title as aforesaid; that in February, 1881, the Fulton Mining Company made application for letters patent for the J. C. Johnston mining claim, and that letters patent were issued to said mining company, bearing date February 21, 1884, but that plaintiff did not learn of the issuance of said patent until February, 1885; that, upon learning of the same, plaintiff immediately made demand upon Chatfield, individually and as manager of the Fulton Mining Company, for a conveyance of his interest in the property according to plaintiff's contract with Chatfield, which demand was refused.

The bill further charged that from time to time, after the execution of his contract with Chatfield, and until he learned of the issuance of the letters patent to the Fulton Mining Company, he frequently inquired of Chatfield as to the progress that was being made to perfect the title to the J. C. Johnston claim, and that Chatfield always answered such inquiries, that the patent had not been received, but that application had been made therefor, and that everything would be all right; that he had implicit confidence in said Chatfield, and, knowing also that the issuance of United States patents for mining claims was usually attended with long delays, plaintiff never suspected that anything was wrong until he learned of the issuance of the patent, and until his demand was refused, as aforesaid. It was further charged that no bona fide suit or proceeding was ever brought or threatened by the claimants of Smuggler No. 2 claim, as was represented by Chatfield, Thomson, and Sayre; that the only such suit ever brought by any claimants of Smuggler No. 2 was begun in the circuit court of the United States in May, 1881; that a demurrer to the complaint was filed on July 20, and no further proceedings were taken until December 18, 1882, when the cause was dismissed by stipulation of the parties, but that such proceedings were taken without the knowledge or consent of the plaintiff; that such suit was without foundation or merit; and that said Thomson & Sayre caused the same to be brought only that they might appear to defend the same, and thereby apparently perform the services for which they were to receive one-eighth share of said Johnston claim. Plaintiff further averred that he did not discover the fraud practiced upon him by the said Thomson & Sayre until April, 1885, when he was informed of the same by his attorney, who, at his request, investigated and reported the facts in relation thereto.

The bill further averred that the Fulton Mining Company conveyed the claim to one William J. Anderson, who was made a defendant, by deed dated July 5, 1886, for a consideration of $125,000, and that Anderson attempted to convey the same to the Standard Mining Company, now the sole defendant, by deed dated June 17, 1887, for a consideration of $2,500,000, but that all of said parties had full knowledge and actual notice of the plaintiff's interest in the property, and the trusts upon which Chatfield took title thereto, and that such conveyances were fraudulent and void as to plaintiff, and made with special intent to defraud and hinder him.

He further averred that the several defendants had mined large quantities of ore from the claim, and prayed that he be adjudged to be the owner of one fourth of such claim; that the defendant be decreed to execute a deed of the same to him, and be required to account to him for the proceeds of the ore; and, in case such relief could not be granted, for a personal judgment against Chatfield for the value of an undivided one eighth of such mine, and against Thomson & Sayre for the value of another one eighth, and for an accounting from them personally for the ores mined.

The Standard Mining Company filed its answer to this bill in the federal court, and upon the issue formed between the parties testimony was taken, the case heard by the district judge, and on March 1, 1889, an interlocutory decree entered substantially in accordance with the prayer of the bill, and an accounting ordered. The defendant immediately applied for a rehearing, and the case was reheard without reference to the grounds relied upon in the petition for rehearing, which did not raise the question of laches; and the case was again taken under advisement, when the court delivered a second opinion, dismissing the bill upon the ground of laches. Thereupon plaintiff filed a petition for a rehearing upon this ques-

tion, which was denied by the court without argument. Plaintiff thereupon appealed to this court.

Hugh Butler and Geo. S. Boutwell, for appellant. Chas. S. Thomas, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The bill was dismissed in the court below upon the ground of laches, and the correctness of its ruling in that particular is the first question presented for our consideration.

The gist of the plaintiff's bill is the alleged fraud of Chatfield in failing to carry out his contract of October 12, 1880, wherein he agreed that, in the event of succeeding in certain legal proceedings to be instituted by him for vesting the legal title to the Johnston claim in the plaintiff, he would convey to plaintiff an undivided one-eighth interest in the lode, free and clear of all expenses incidental to the litigation; plaintiff, upon his part, agreeing to pay an undivided one eighth of the expenses which should accrue in the developing and opening of the lode. The lode in question had been located on the preceding 4th of August by Johnston, as owner of one half; Joseph W. Adair, as owner of one fourth; and George A. Crittenden, as owner of the remaining fourth. It seems there was a conflict between this and another mining claim, known as "Smuggler No. 2," and the agreement with Chatfield was made for the purpose of contesting this claim.

*305 It also appeared that plaintiff was one of the parties who had located the Smuggler No. 2 claim; that, early in the year 1880, plaintiff had entered into what is known as a "grub-stake" contract with one Acheson, individually and as agent and attorney in fact of Edward Dunscomb and James E. Seaver, whereby plaintiff agreed to locate mining claims on behalf of himself and these parties, in consideration of which they agreed to furnish all the supplies and pay all the expenses which should be required in prospecting, locating, and developing such mining claims; that, in pursuance of such agreement, plaintiff found indications of a silver-bearing lode on Smuggler mountain, in the Roaring Fork mining district, and on April 15, 1880, located Smuggler No. 2 mining claim upon this vein; that such location was made in the joint names of plaintiff, owner of one fourth, and the wives of Dunscomb and Seaver, each claiming three eighths; that after such location, and before the discovery of any vein within the limits of the Smuggler claim, the other parties abandoned such claim, failed to furnish the necessary supplies and money to the plaintiff, who continued to develop and work the ground on his own account and at his own expense; that on August 4, 1880, plaintiff discovered within the limits of said Smuggler claim a vein or lode, and thereupon duly located the same as the J. C. Johnston lode mining claim, for the use of himself, Crittenden, and Adair, as above stated; that, upon learning of such discovery and location, Acheson, Dunscomb, and Seaver negotiated with Crittenden and Adair for the purchase of their interests in the Johnston claim, and on August 10, 1880, purchased the same for $1,000; that at the same time they negotiated with plaintiff, and agreed to purchase his one-fourth interest, but failed to do so.

Plaintiff further contended that these facts respecting the location of the two claims, and the negotiations with Acheson, Dunscomb, and Seaver, were known to Chatfield, Thomson, and Sayre, who still insisted that there were certain parties who, as grantees of Dunscomb and Seaver, claimed title under the Smuggler location adversely to plaintiff's interest in the Johnston claim, and that legal proceedings had already been, or were about to be, commenced to enforce said claims; that Chatfield, Thomson, and Sayre represented that it was desirable to perfect the *306 title of the Johnston claim by obtaining a patent therefor, and to this end they had secured, or would secure, a conveyance from the owners of the other half of the Johnston claim. They further represented to him that, for the better management of the property, they proposed to organize a stock company, and to that end they had secured the other half interest in the Johnston claim; and that the defendants were then associated together, and had agreed to organize a stock company for that purpose, and that the Fulton Mining Company was shortly thereafter incorporated by them. These conflicting claims with regard to the ownership of the property within the limits of these two claims was evidently the foundation of the agreement of October 12, 1880, whereby Chatfield agreed to clear up the title to the property, and to convey one eighth to the plaintiff.

Most of the testimony was directed to the relative merits of the Smuggler No. 2 and the J. C. Johnston locations, apparently upon the assumption by the defendant that the plaintiff was bound to prove that the owners of the Johnston lode had the better title. Plaintiff, however, contends that the contract of October 12, 1880, and the other conveyances made about the same time, when read in the light of the surrounding circumstances, are conclusive evidence of the following: First, that the interest actually purchased by Chatfield in the Johnston mine was a quarter interest, and that the remaining fourth of Johnston's interest in the property, which he deeded to Chatfield, was in trust; second, that this fourth interest was the interest referred to in the contract as being claimed adversely to Chatfield by certain persons; third, that the defendants Thomson & Sayre were employed to insti-

tute the "legal proceedings" mentioned in the contract, and were to receive as a contingent fee for their services in that behalf an eighth of the Johnston mine, in case those proceedings were successful; fourth, that in such case Johnston was to receive the remaining eighth of this contested quarter; fifth, that the "legal proceedings" mentioned contemplated and included an application for letters patent, and the acquisition of the government title, as well as a suit of some kind.

*367 *Upon the basis of the fifth and last proposition above stated the plaintiff contends that it would follow that a cause of action did not accrue to him until a patent had been issued by the government, which did not take place until July, 1884, and that as plaintiff was not informed of this fact until some time in 1885, and as he filed his first bill against Chatfield in the United States court on August 1, 1885, he insists that he fulfilled all the requirements of the law with respect to diligence, and that the defense of laches is not sustained. We think this position, however, is founded upon a somewhat strained interpretation of the contract in question. It provides that "in the event of the party of the first part [Chatfield] prevailing and succeeding in certain legal proceedings about to be instituted and commenced by the party of the first part for the vesting of the legal title in the party of the first part, against persons who claim adversely to him an interest in the following described property, * * * that the party of the first part, upon so acquiring the title, legal and equitable, to the said mine, by means of the legal proceedings so about to be commenced, doth hereby covenant and agree to and with the said party of the second part [Johnston] to convey to the said party of the second part an undivided one-eighth interest in and to the said above-described lode, which shall be free and clear from all expense incidental to the litigation incident to said contemplated suit." A compliance with this contract on Chatfield's part evidently required the commencement within a reasonable time, and the diligent prosecution of, a suit for the establishment of his title to the property, since the question of adverse claims could not be determined by the mere application for a patent without the institution of a suit, or the compromise of these conflicting claims. That this was the construction put upon it by Chatfield himself is evident from the fact that, three days after this contract was made, he executed a quitclaim deed to Thomson & Sayre of an undivided one-eighth interest in the Johnston lode for a nominal consideration of $500. It is admitted, however, that no money consideration was paid for this conveyance, and Chatfield testifies that the actual consideration for this deed to Thomson & Sayre was the legal services which they

*368 were to perform in and about the "legal proceedings" mentioned in the contract, and he further testifies that those services were never performed. This is all that Chatfield appears to have done at this time in the performance of his contract. Whether, if suit had been begun and prosecuted to a successful termination, a bill would have lain before the patent was issued, it is not necessary to decide, since it is clear that the failure of Chatfield to institute legal proceedings within a reasonable time was a breach of his contract, and entitled plaintiff to treat it as at an end.

There were also significant facts occurring thereafter which should have put plaintiff upon inquiry, and stimulated him to activity in asserting his rights. As he was one of the original locators, both of the Smuggler No. 2 and the Johnston claims, he must have known that, in any controversy between them, he would have been an important witness; and the very fact that he was not called upon indicated that the suit was not being prosecuted, and strengthened the inference, derivable from all the testimony, that the claim was not then considered of sufficient value to warrant the institution of a suit. That he was accessible as a witness is evident from his own testimony that he was in Thomson & Sayre's office in 1881, and was working at that time for Chatfield on a subcontract. The incorporation of the Fulton Mining Company in 1880, and the conveyance by Chatfield, Crittenden, and Adair of the entire property to the mining company by deeds put upon record, were wholly inconsistent with the spirit, if not with the letter, of the contract, and were circumstances calculated to arouse suspicion, since they divested Chatfield of his interest in the mine, disabled him from instituting legal proceedings in his own name, and put the ownership of the mine in the shape of capital stock, which was liable at any time to pass into the hands of purchasers who might be entirely ignorant of the plaintiff's interest. It is but just, however, to say in this connection that plaintiff seems to have been apprised of the fact that these parties were about to associate themselves together in forming a stock company, and that the advantages of such a

*369 corporation were urged upon him, and in his first bill he averred that it was understood that the company would convey and transfer to him stock in such company to the amount of his interest in the lode, and that Chatfield would hold his interest in trust for the plaintiff until his title to the location had been established. If he assented to the formation of the corporation, and to the transfer of the mine to it, he clearly waived his right to reclaim an interest in the mine itself. It is also a circumstance proper to be considered, as bearing upon the equities of this defense, that at the time of the institution of this suit a large propor-

tion, if not a majority, of the stock in this company had passed into the hands of purchasers who had not been connected with the formation of the company, and were entirely ignorant of the Johnston-Chatfield contract.

In May, 1881, plaintiff went to the office of Thomson & Sayre, in Leadville, asked how the case was, and was informed that it was compromised. He then told them he would like to take the papers and copy them. They gave them to him. He took them, and looked them over; went down to have them copied, but found it would cost too much, and did not have it done. These papers were the contracts between Chatfield and himself, Crittenden, Adair, and himself, and the original grub-stake contract between Dunscomb, Seaver, and himself. He must then have been informed of the fact that the contract of October 12, 1880, had not been recorded, although Thomson & Sayre promised him it should be. In 1882 it seems that he spoke to Chatfield, and said that he thought he ought to be entitled to his interest in the property; that they should have gone on and contested the case; to which Chatfield replied that they had found that there was "no shadow of a ghost to maintain his case." Even then he did not act.

It was not until April, 1885, more than a year after the Fulton Mining Company had obtained a patent to the property, that he made a formal demand upon Chatfield, and on August 1, 1885, filed his first bill in the circuit court of the United States to establish his title to a quarter interest in the lode. This suit does not seem to have been prosecuted with much diligence, since it was allowed to linger for nearly a year, and was then dismissed, apparently, for a want of jurisdiction appearing upon the face of the bill. It has been frequently held that the mere institution of a suit does not, of itself, relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun. Hawes v. Orr, 10 Bush, 437; Erhman v. Kendrick, 1 Metc. (Ky.) 149; Watson v. Wilson, 2 Dana, 406; Ferrier v. Buzick, 6 Iowa, 258; Bybee v. Summers, 4 Or. 361.

On the 19th of August, 1886, a second suit was brought in the state court, which, after some delay, caused in part by the death of the plaintiff's counsel, was dismissed because of a defective summons under the state practice.

While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that where the question of laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. This principle was applied at the present term of this court in Foster v. Railway Co., 146 U. S. 88, 13 Sup. Ct. Rep. 28, to a case where a stockholder in a railway company sought to set aside a sale of the road which had taken place 10 years before, when the facts upon which he relied to vacate the sale were of record, and within easy reach. See, also, Wood v. Carpenter, 101 U. S. 135, 141; Kennedy v. Green, 3 Mylne & K. 722; Buckner v. Calcote, 28 Miss. 432; Cole v. McGlathry, 9 Me. 131; McKown v. Whitmore, 31 Me. 448.

The duty of inquiry was all the more peremptory, in this case, from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. A property which, in October, 1880, plaintiff sold to Chatfield upon the basis of $4,800 for the whole mine is charged in a bill filed October 21, 1887, to be worth $1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require, not only clear proof of fraud, but prompt assertion of plaintiff's rights. Felix v. Patrick, 145 U. S. 317, 334, 12 Sup. Ct. Rep. 862; Hoyt v. Latham, 143 U. S. 553, 567, 12 Sup. Ct. Rep. 568; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. Rep. 418; Great West Min. Co. v. Woodmas of Alston Min. Co., 14 Colo. 90, 23 Pac. Rep. 908.

The language of Mr. Justice Miller in Oil Co. v. Marbury, 91 U. S. 587, 592, with regard to the fluctuating value of oil wells, is equally applicable to mining lodes: "Property worth thousands to-day is worth nothing to-morrow; and that which to-day would sell for a thousand dollars, at its fair value, may by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

We think it is clear that the plaintiff did not make use of that diligence which the circumstances of the case called for, and the decree of the court below, dismissing his bill, is therefore affirmed.

(148 U. S. 262)

HOHORST v. HAMBURG-AMERICAN PACKET CO.

(March 27, 1893.)

No. 134.

APPEALS—FINAL DECREE—SUPREME COURT.

A decree dismissing a bill in equity as to one of several defendants sought to be jointly charged is not a final decree from which an appeal may be taken to the supreme court.

Appeal from the circuit court of the United States for the southern district of New York. Dismissed.

S. S. Clark, for appellant. Walter D. Edmonds, for appellee.

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

This was a bill filed by Friedrich Hohorst, a citizen of the state of New York, "against the Hamburg-American Packet Company, a corporation organized and existing under the laws of the kingdom of Hanover, empire of Germany, and doing business in the city of New York; Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, citizens of the United States, and residents of the state of New York; and Arend Behrens and William Koester, citizens of the United States and residents of the state of New Jersey,"—for infringement of patent, in the circuit court of the United States for the southern district of New York, September 15, 1888. September 17th the subpoena was served on Henry R. Kunhardt, Sr., as a defendant, and as general agent of the Hamburg Company.

November 5, 1888, a general appearance for all the defendants was filed, and on December 18, 1888, a demurrer on behalf of the packet company, assigning as grounds that the causes of action against the several defendants were distinct and unconnected, and hence that the bill was multifarious, and for want of equity. A motion was made by complainant December 24th to amend, and on January 7, 1889, a motion by defendant to dismiss. On January 28, 1889, leave to amend was granted, and the motion to dismiss denied, and on February 2, 1889, the amendments were made. These consisted in the insertion of the word "jointly" in the allegation of the defendants' infringement, and also of the following allegation: "Your orator further states that all of the defendants above named are inhabitants of the city and county of New York; that the defendant the Hamburg-American Packet Company has its principal business office in this country, located in the city and county of New York; that the defendants Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens, and William Koester are, and during the time of the infringements above set forth were, copartners under the firm name of Kunhardt & Co., and as such copartners are and were the agents and managers of the business of the Hamburg-American Packet Company in this country, and have their principal business office as such located in the city and county of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have co-operated and participated in all the said acts and infringements."

On February 16, 1889, defendant Hamburg Company served notice of final hearing upon the bill of complaint and demurrer, and on February 21st a notice was given of a motion that the appearance entered on behalf of the Hamburg Company be changed from a general appearance into a special appearance, and the service of subpoena made upon that defendant be set aside, and the bill of complaint dismissed as against the company, because of lack of jurisdiction of the court over its person.

In April, 1889, an order was granted that unless complainant withdrew his amended complaint as to the defendant company, and stipulated to go to trial as to said defendant on the original bill of complaint, the notice of appearance should be, and was thereby, amended into a special appearance, and the service of the subpoena set aside, and the bill of complaint dismissed as against said company. 38 Fed. Rep. 273.

On April 11, 1889, the notice of appearance was amended accordingly, subpoena set aside, and the bill of complaint dismissed as against the company; whereupon complainant appealed to this court.

So far as appears from the record, the suit is still pending and undetermined as against the codefendants of the company. We are of opinion, therefore, that this appeal cannot be maintained, because the decree rendered in favor of the company was not a final decree.

In U. S. v. Girault, 11 How. 22, 32, which was a writ of error to review a judgment rendered by the circuit court of the United States in Mississippi in favor of some of the defendants only, in an action on a bond, leaving the suit undisposed of as against one defendant, this court would not reverse the judgment according to the practice in Mississippi, but dismissed the writ of error; and Mr. Justice Nelson, delivering the opinion, said: "The practice in this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in." Metcalfe's Case, 11 Coke, 38, was cited, where it was held that a record of the common pleas could not be removed into the king's bench before the whole matter was determined in the common pleas, as it was entire, and could not be in both courts at the same time; and also Peet v. McGraw, 21 Wend. 667, wherein Mr. Justice Nelson, then chief justice of New York, declared that a case could not be sent up in fragments by

a succession of writs of error. Again, in Holcombe v. McKusick, 20 How. 552, it was said: "It is the settled principle of this court, and the same in the king's bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional, and does not authorize the court below to send up the case, unless all the matters between the parties to the record have been determined."

The same rule is applicable to an appeal in admiralty, (Dayton v. U. S., 131 U. S. Append. lxxx.,) and in equity, (Frow v. De la Vega, 15 Wall. 552, 554.) In the latter case it was held that a final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others. It is true that there a default had been entered with a decree pro confesso against one of several defendants, and a final decree had been made absolute against him, whereupon the court proceeded to try the issues made by the answers of the other defendants, and dismissed complainant's bill; but this attitude of the case illustrated and required the application of the general rule.

In Withenbury v. U. S., 5 Wall. 819, it was decided that where a decree in a prize cause disposed of the whole matter in dispute upon a claim filed by particular parties, which was final as to them and their rights, and final also, so far as the claimants and their rights were concerned, as to the United States, it was final; while in Montgomery v. Anderson, 21 How. 386, where the district court of the United States sitting in admiralty decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, it was held that such a decree was not final.

There are cases in equity in which a decree, disposing of every ground of contention between the parties except as to the ascertainment of an amount in a matter separable from the other subjects of controversy, and relating only to some of the defendants, may be treated as final, though retained for the determination of such severable matter. Hill v. Railroad Co., 140 U. S. 52, 11 Sup. Ct. Rep. 690. But this case presents no such aspect. Complainant insisted, by his amended bill, that the alleged liability was joint, and that "all the defendants have co-operated and participated in all the said acts and infringements."

In Ex parte Shaw, 145 U. S. 444, 12 Sup. Ct. Rep. 935, a bill was filed against the mining company and others in the circuit court of the United States for the southern district of New York, and service of subpoena was made upon the secretary of the company. The company appeared specially, and moved for an order to set aside the service, which was granted, whereupon complainant applied to this court by petition for writ of mandamus to the judges of the circuit court to command them to take jurisdiction against the company upon the bill. The ground on which our jurisdiction was invoked was the inadequacy of any other remedy, and it was argued that, as the cause could proceed as to the other defendants, no final judgment could be entered upon the order of the circuit court, and no appeal taken therefrom.

Under the circumstances this appeal must be dismissed for want of jurisdiction, and it is so ordered.

(148 U. S. 255)

PENNSYLVANIA CO. v. BENDER.

(March 20, 1893.)

No. 1,142.

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—PROCEDURE—APPEAL.

1. Under the removal acts, an allegation showing diverse "residence" is not equivalent to an allegation of diverse "citizenship," and is insufficient to show federal jurisdiction.

2. Under the act of 1887, (24 St. at Large, p. 552, § 2,) a removal is not effected by a mere entry in a federal court finding the petition, affidavit, and bond for removal sufficient. The proper procedure is to obtain an order of removal from the federal court, file that order in the state court, and take a transcript therefrom, and file it in the federal court.

3. A state appellate court is not required, on a writ of error, to examine a transcript of the record of a federal circuit court, which was no part of the record in the trial court, for the purpose of showing that the cause was in fact removed to the federal court before the trial. Kanouse v. Martin, 15 How. 198, distinguished.

In error to the supreme court of the state of Ohio.

On motion to dismiss the writ of error. Granted.

Statement by Mr. Justice BREWER:

*On September 12, 1887, the defendant in error filed his petition in the court of common pleas of Holmes county, Ohio, to recover from the defendant, the Pennsylvania Company, the sum of $10,000. On October 3d the defendant answered. On March 2, 1888, it filed a petition for removal to the United States circuit court for the northern district of Ohio. On March 24th a motion was made to strike this petition from the files, which on March 27th was sustained. At the May term, 1888, a trial was had, both parties appearing. A verdict was returned by the jury for $6,000, upon which judgment was duly entered. Thereafter a petition in error was filed in the circuit court of Holmes county to reverse such judgment. To this petition in error were attached two transcripts, one of the record in the court of common pleas, and the other of a certain journal entry of the circuit court of the United States for the northern district of Ohio. This journal entry was as follows:

"George S. Bender, Administrator, vs. The Pennsylvania Company. Law. Tuesday, March 6, 1888. This day came on to be

heard the petition of the defendant for an order for the removal of this case from the court of common pleas of Holmes county, Ohio, and, it appearing to the court that the defendant has filed in this court its petition, bond, and affidavit under the 2d section of the act of congress of March 3, 1887, entitled 'An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes,' &c., from which it appears to the court that said affidavit is in compliance with said 2d section of said act of congress, and that said bond is sufficient and satisfactory, and that said defendant, by its petition, affidavit, and bond, has shown that it is entitled to remove cause to this court."

In that court a motion was made to strike the petition in error from the files, which motion was sustained. Thereupon the defendant filed its petition in error in the supreme court of the state to reverse this ruling. On May 17, 1892, that court sustained the ruling of the circuit court, and affirmed the judgment, to reverse which judgment of affirmance plaintiff in error sued out a writ of error from this court. The case is now submitted on a motion to dismiss.

L. R. Critchfield, for the motion. Lucien L. Gilbert and J. R. Carey, opposed.

MR. JUSTICE BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

So far as the record of the case in the court of common pleas is concerned, there is obviously no error, and no semblance of a federal question. The petition there filed for removal was manifestly defective. It simply alleged that the plaintiff was a resident of the state of Ohio, and did not show his citizenship. In the petition in error filed in the circuit court no complaint was made of the order of the court of common pleas, striking out this petition for removal. Looking, therefore, only at the record of the court of common pleas, as it was presented to the circuit court, there was but one thing that it could do, and that was to affirm the judgment.

The contention, however, of the plaintiff in error, is that the order made in the United States court prior to the trial in the common pleas operated, by virtue of the act of congress of March 3, 1887, to oust the common pleas court jurisdiction, and remove the case to the federal court, and that, therefore, the subsequent proceedings of trial and judgment were coram non judice and void.

But no order of removal was made by the federal court. The journal entry, which is certified by the clerk to be the entire entry, is simply a finding that the application for removal is sufficient, and such as entitles the defendant to remove the cause to the federal court. But such finding does not remove the case, any more than an order overruling a demurrer to a petition makes a judgment. Such an order is simply an adjudication of the right of the plaintiff to a judgment. Upon it alone execution cannot issue. There must be a judgment, or, in other words, an order based upon the determination of the right. A mere finding that the party is entitled to a removal is no order, and does not of itself work the removal.

There is a difference between the act of 1887 and earlier statutes in respect to the provisions for removals. Thus, in the act immediately prior,—that of 1875,—the proceedings were these: The party desiring to remove filed in the state court his petition and bond, which, being done, the act provided that "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit," and also that upon the filing of the copy of the record in the circuit court of the United States "the cause shall then proceed in the same manner as if had been originally commenced in the said circuit court." Under that statute the proceedings were had in the state court,—proceedings, therefore, of which it had knowledge; and the specific provision was that upon the filing of a sufficient petition and bond the state court should accept them, and proceed no further. No adjudication by the state court of the sufficiency of the petition and bond was essential, no failure of such adjudication prevented a removal, and yet the state court had a right to examine and see whether the petition and bond were sufficient. As said in Removal Cases, 100 U. S. 457, 474, "we fully recognize the principle heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner can remove the cause, as a matter of right."

The act of 1887 (volume 24, p. 552, § 2) establishes a different procedure, as follows: "Any defendant * * * may remove such suit into the circuit court of the United States, for the proper district, * * * when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court." There is no specific declaration when proceedings in the state court shall stop. The right to a removal is determined by the federal court, and determined upon evidence satisfactory to it. When it is satisfied that the conditions exist, the defendant may remove. How? The proper way is for him to obtain an order from the federal court for the removal, file that order in the state court, and take from it a transcript, and file it in the federal court. It may be said that these steps are not, in terms, prescribed by the statute. That is true; and also true that no specific procedure is named. The language, simply, is that the defendant may remove when he has satisfied the federal court of the existence of sufficient

prejudice. The statute being silent, the general rules in respect to the transfer of cases from one court to another must obtain. If the order of one court is to stay the action of another, the latter is entitled to notice. If a case is to pass from one court to another, this is done by filing a transcript of the record of the one in the other. Virginia v. Paul, 148 U. S. —, 13 Sup. Ct. Rep. 536. Such orders and transfers are generally in appellate proceedings, yet something of the same kind is appropriate and necessary, in the orderly administration of affairs, to transfer, by order of the federal court, a case from the state court to itself. Certainly this statute does not abolish the law of comity which controls the relations of the courts of two sovereignties exercising jurisdiction within the same territorial limits, nor does it abrogate the duty of counsel to seasonably advise the courts of which they are counsel of any matter which, if known, would prevent an erroneous exercise of jurisdiction. At any rate, if these exact steps are not requisite, something equivalent thereto is. If there had been more attention paid to these matters in removal proceedings, there would have been less irritation prevailing in state tribunals at removals.

But, again, the Revised Statutes of the State of Ohio of 1890 contain these sections:

"Sec. 6709. A judgment rendered, or final order made, by the common pleas court, may be reversed, vacated, or modified by the circuit court for errors appearing on the record.

"Sec. 6710. A judgment rendered, or final order made, by the circuit court, any court of common pleas, probate court, or the superior court of any city or county, may be *reversed, *vacated, or modified by the supreme court, on petition in error, for errors appearing on the record."

And these provisions are in accord with the general rule in reference to the scope of inquiry in a reviewing court. Now, the record of the common pleas court disclosed no order of removal, no steps essential thereto. Obviously, upon that record, as heretofore said, the circuit court could do nothing but affirm the judgment. The record of another court was presented and invoked to compel a decision that there was error in the proceedings of the common pleas court; and in support of this contention the case of Kanouse v. Martin, 15 How. 198, is cited. In that case it appeared that a suit was commenced in the court of common pleas for the city and county of New York. The defendant filed a petition and bond for removal. The court of common pleas denied his petition, and proceeded to try the case. Judgment having been rendered against him, he took the case to an appellate state court. The record which was sent up did not include the removal proceedings; they being matters which the statutes of New York state did not authorize to be incorporated into, and made a part of, the record. Diminution of the record was suggested, and thereupon a transcript of those proceedings was sent to the appellate court; but that court, holding that they were not, under the statutes of New York, technically a part of the record, refused to consider them, and affirmed the judgment. On a writ of error from this court the judgment was reversed, and it was held that although those matters were not technically a part of the record according to the statutes of New York, yet that the act of congress granting the right of removal was binding upon all the courts of the states, and that, if the proceedings were sufficient under that statute for removal, it was the duty of the appellate court to disregard the state limitation, and inspect the removal proceedings. In its opinion, on page 208, this court said:

"But it is objected that this is a writ of error to the superior court, and that by the local law of New York that court could not consider this error in the proceedings of the *court of common pleas, because it did not* appear upon the record, which, according to the law of the state, consisted only of the declaration, the evidence of its service, the entry of the appearance of the defendant, the rule to plead, and the judgment for want of a plea, and the assessment of damages, and that these proceedings, under the act of congress, not being part of this technical record, no error could be assigned upon them in the superior court. This appears to have been the ground upon which the superior court rested its decision. That it was correct, according to the common and statute law of the state of New York, may be conceded. But the act of congress which conferred on the defendant the privilege of removal, and pointed out the mode in which it was to be claimed, is a law binding upon all the courts of that state; and if that act both rendered the judgment of the court of common pleas erroneous, and, in effect, gave the defendant a right to assign that error, though the proceeding did not appear on the technical record, then by force of that act of congress the superior court was bound to disregard the technical objection, and inspect these proceedings."

But all that that case decided was that, when the statute of the state fails to make certain proceedings had in the trial court a part of the record for review in the appellate court, a law of congress which gives a specific effect to those proceedings, if sufficient in form, compels an examination of them in the appellate court, in order that it may be there determined whether the trial court improperly refused to give the due effect to them. Or, to state it in other words, the act of congress broadens the technical rule of the state statute so as to include in the record other proceedings actually had in the trial court. But that case does not decide that an appellate and reviewing court must

examine other than the proceedings of the court whose judgment is sought to be reviewed. See upon this question the case of Goodenough Horseshoe Manuf'g Co. v. Rhode Island Horseshoe Co., decided by this court in 1877, and reported in 24 Lawy. Co-op. Ed. 368.

The motion to dismiss must be sustained.

(148 U. S. 266)

COLUMBUS WATCH CO. et al. v. ROBBINS et al.

(March 27, 1893.)

No. 1,242.

CIRCUIT COURT OF APPEALS—CERTIFICATE TO SUPREME COURT—REQUEST FOR INSTRUCTION—SUFFICIENCY.

A certificate of the circuit court of appeals which asserts that, as its judgment "differs from that of a co-ordinate court, the instruction of the supreme court is requested upon the question," is essentially defective, since it neither specifically sets forth the question to be answered nor states that instruction is desired for the proper decision of such question.

On a certificate from the United States circuit court of appeals for the sixth circuit.

In equity. Bill by Royal E. Robbins and Thomas M. Avery, trustees, against the Columbus Watch Company, David Green, and William J. Savage, for infringement of a patent. The circuit court, after a final hearing, entered the usual interlocutory decree, sustaining the validity of the patent, declaring infringement, directing an injunction perpetual in form, and referring the cause to a master to take an account of damages and profits. 50 Fed. Rep. 545. From this interlocutory decree an appeal was taken to the circuit court of appeals under section 7 of the judiciary act of March 3, 1891. In that court the parties united in an application requesting the court to hear and finally determine the merits of the controversy relating to the validity of the patent, and for the infringement of the same. That court held, however, that, on an appeal under section 7, its power was limited to determining the question whether the injunction was providently granted in the exercise of a legal discretion, and that it could have no jurisdiction to render a decision on the other questions, even at the request of both parties. See 52 Fed. Rep. 337. But in view of the fact that a different conclusion had apparently been reached by the circuit court of appeals for the fifth circuit in Jones Co. v. Munger Manuf'g Co., 50 Fed. Rep. 785, 1 C. C. A. 668, it certified the question to the supreme court. Certificate dismissed.

James Watson and M. D. Leggett, for appellants. Lysander Hill, Geo. S. Prindle, and Frederick P. Fish, for appellees.

*267 *Mr. Chief Justice FULLER delivered the opinion of the court.

The record in this case consists of the following certificate, signed on the 10th day of October, 1892, by the judges then holding the circuit court of appeals for the sixth circuit:

"This cause comes before this court by an appeal from the decree of the circuit court of the United States for the eastern division of the southern district of Ohio, sustaining the letters patent of the appellees, and declaring that the appellants have infringed said letters patent, and directing the issue of a perpetual injunction, and ordering the statement of an account of profits and damages.

"The transcript presented to this court shows that the appeal was taken immediately from said decree, before accounting was had. Both parties desired that this court should give a full hearing on the merits of said decree, so far as relate to the validity of the patent and infringement, and should enter a final decree in this court thereon, the parties agreeing between themselves to suspend accounting until the decision of this court can be had. This court, however, cannot find that they have, under the seventh section of the act creating United States circuit appellate courts, jurisdiction to grant such a hearing and enter such a final decree as is asked, because said decree of the circuit court is only an interlocutory decree, and presents on appeal, under section 7, only the question whether the decree for an injunction, interlocutory in fact, however final in form, was improvidently granted in the legal discretion of the court, and involves only incidentally the question of the validity of the patent and the infringement complained of. The circuit court of appeals for the fifth circuit, under similar circumstances, after listening to adverse argument, in Jones Co. v. Munger Manuf'g Co., 50 Fed. Rep. 785, 1 C. C. A. 668, held that said section 7 gave jurisdiction to the court, on agreement of parties, to render a final decree on the merits of the validity and infringement of the patent involved. As the judgment of this court differs from that of a co-ordinate court, the instruction of the supreme court is respectfully requested upon the question.

"It is therefore ordered that a copy hereof, certified under the seal of the court, be transmitted to the clerk of the supreme court of the United States."

By section 6 of the judiciary act of March 3, 1891, establishing circuit courts of appeals, (26 St. p. 826, c. 517,) it is provided that the judgments or decrees of those courts shall be final in certain enumerated classes of cases, and, among them, in all cases arising under the patent laws, but that in such cases the circuit court of appeals may certify to "the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper de-

cision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

*269 And it is also provided, in respect of cases in which the judgments and decrees of the circuit courts of appeals are made final, that "it shall be competent for the supreme court to require, by certiorari or otherwise, any such case to be certified to the supreme court for its revision and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court." Thus, in the interest of jurisprudence and uniformity of decision, the supervision of this court, by way of advice or direct revision, is secured. In re Woods, Petitioner, 143 U. S. 202, 12 Sup. Ct. Rep. 417; Lau Ow Bew, Petitioner, 141 U. S. 583, 12 Sup. Ct. Rep. 43; Id., 144 U. S. 47, 58, 12 Sup. Ct. Rep. 517.

In order, however, to invoke the exercise of our jurisdiction in the instruction of the circuit courts of appeals as to the proper decision of questions or propositions of law arising in the classes of cases mentioned, it is necessary that such questions or propositions should be clearly and distinctly certified, and that the certificate should show that the instruction of this court as to their proper decision is desired.

It was long ago settled under the statutes authorizing questions upon which two judges of the circuit court were divided in opinion to be certified to this court, that each question so certified must be a distinct point or proposition of law, clearly stated, so that it could be definitely answered, (Perkins v. Hart, 11 Wheat. 237; Sadler v. Hoover, 7 How. 646; Jewell v. Knight, 123 U. S. 426, 432, 8 Sup. Ct. Rep. 193; Association v. Wickham, 128 U. S. 426, 9 Sup. Ct. Rep. 113,) and that, if it appeared upon the record that no division of opinion actually existed among the judges of the circuit court, this court would not consider a question as certified, even though it were certified in form, (Railroad Co. v. White, 101 U. S. 98; Webster v. Cooper, 10 How. 54; Nesmith v. Sheldon, 6 How. 41.)

We regard the certificate before us as essentially defective. It does not specifically set forth the question or questions to be answered, and, apart from that, it does not state that instruction is desired for the proper decision of such question or questions. On the contrary, it appears therefrom that the court had arrived at a conclusion, nothing doubting, (for reasons, we may remark, given in its opinion reported in 52 Fed. Rep. 337,) but that, because the circuit court of appeals *for another circuit had reached *270 the opposite conclusion, under similar circumstances, the request for instruction is preferred.

While the fact that the circuit court of appeals for one circuit has rendered a different judgment from that of the circuit court of appeals for another, under the same conditions, might furnish ground for a certiorari, on proper application, the assertion of the existence of such difference, and of the wish that it might be determined by this court, is not equivalent to the expression of a desire for instruction as to the proper decision of a specific question or questions requiring determination in the proper disposition of the particular case. The difference can only exist when the courts have actually reached contradictory results, but each must proceed to its own judgment, unless such grave doubts arise as to induce the conviction that this court should be resorted to for their solution in the manner provided for.

As, in our judgment, this certificate is not in compliance with the statute, we must decline to certify any opinion upon the matters involved, and direct the cause to be dismissed.

(148 U. S. 301)

CAMERON v. UNITED STATES.

(March 27, 1893.)

No. 42.

PUBLIC LANDS—UNLAWFUL INCLOSURES—SUMMARY PROCEEDINGS — COLOR OF TITLE — MEXICAN GRANTS.

1. A civil suit, instituted, under Act of February 25, 1885, (23 St. p. 321,) in the name of the United States, against persons inclosing public lands, for the destruction of such inclosure, is a summary proceeding in the nature of a suit in equity for abatement, and defendant is not entitled to a jury trial.

2. This statute was only intended to prevent mere trespassers from inclosing public lands, and in a proceeding thereunder it is a sufficient defense to show that the lands inclosed are not public lands, or that defendant had color of title acquired in good faith.

3. A claim to land by certain boundaries under a Mexican grant of "four square leagues of land in the place called 'San Rafael de la Zanja,'" the limits to be designated by stone monuments, is a claim under color of title, it appearing that such designation was actually made; that judicial possession was delivered in pursuance thereof; and that, though the surveyor general, on application for confirmation of the grant, has reported in favor of limiting it to four square leagues, the claim and report are still pending undetermined before congress. 21 Pac. Rep. 177, reversed.

4. Where, under such circumstances, a portion of the lands is occupied under a claim of title to all within the boundaries thus fixed, it cannot be regarded as part of the public lands of the United States; for it is the settled policy of the government to protect all claims to land, though founded on an inchoate or imperfect title, until their validity is determined by a competent tribunal.

5. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether the doubt arises from

the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title.

6. No change of policy in this respect as to Arizona is to be inferred from the fact that the provision in the act (10 St. at Large, p. 308) establishing the office of surveyor general for New Mexico, (then including Arizona,) that "until the final action of congress on such claims all lands covered thereby shall be reserved from sales or other disposals by the government, and shall not be subject to the donations granted by the previous provisions of this act," was omitted from the act (16 St. at Large, p. 230) establishing the same office for Arizona, especially as the sundry civil appropriation act for the same year (16 St. at Large, p. 304) provides that the surveyor general of Arizona shall have all the powers and perform all the duties enjoined upon the surveyor general of New Mexico.

Mr. Chief Justice Fuller dissenting.

Appeal from the supreme court of the territory of Arizona.

Suit by the United States under Act Feb. 25, 1885, (23 St. p. 321,) against Colin Cameron for the destruction of an inclosure of public lands. Judgment for complainant. 21 Pac. Rep. 177. Defendant appeals. Reversed.

Statement by Mr. Justice BROWN:

This case was originally instituted by the filing of a complaint by the United States in the district court of the first judicial district of the territory of Arizona to compel the removal by the defendant, Cameron, of a wire fence, by which it was alleged he had inclosed about 800 acres of public lands "without any title or claim or color of title acquired in good faith thereto, and without having first made application to acquire title thereto, or any part thereof, according to law." The proceeding was taken under an act of congress of February 25, 1885, (23 St. p. 321,) to prevent the unlawful occupancy of public lands. The first section of the act reads as follows: "All inclosures of any public lands in any state or territory of the United States, heretofore or to be *302 hereafter made, erected, or constructed by any person, * * * to any of which land included within the inclosure the person * * * making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use or occupancy of any part of the public lands of the United States in any state or any of the territories of the United States without claim, color of title, or asserted right, as above specified, as to inclosure, is likewise declared unlawful, and hereby prohibited."

In his answer the defendant denied in general terms the allegations of the complaint, and in an amendment thereto set up a Mexican grant of May 15, 1825, to one Romero and other citizens of Santa Cruz; the death of Romero in 1873; the purchase by Alfred A. Green of the interest of his heirs in the grant; the sale by Green to one Rollin R. Richardson of an undivided nine tenths of Green's interest upon certain terms and conditions expressed in the contract; the entry by Richardson upon the land, claiming the right to the possession thereof; the sale by Richardson to the defendant, Cameron, of all his interest in the land, and the assignment of his contract with Green, whereby the defendant became the equitable owner of the said undivided nine-tenths interest, and "is in the possession thereof, and entitled to be in possession thereof." The answer further averred that an application was then pending before congress for the confirmation of this grant; that the same had been examined by the surveyor general of Arizona, who had reported it to be a valid grant, and recommended that it be confirmed to the representatives of Romero and his associates to the extent of four square leagues, but defendant claimed that it should be confirmed to the exterior boundaries thereof, as set forth and described in the original expediente. Upon the trial the court found the issues in favor of the United States; decreed the inclosure to be of public lands, and therefore unlawful; and rendered a special judgment in the terms of the act that the fence be removed by the defendant within five days, and, in default of his so doing, that the same be destroyed by the United States marshal.

Defendant thereupon appealed to the supreme court of the territory, by which the judgment was affirmed. 21 Pac. Rep. 177. Defendant was then allowed an appeal to this court.

Rochester Ford and Jas. C. Carter, for appellant. Sol. Gen. Aldrich and Wm. H. Barnes, for the United States.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case was originally dismissed upon the ground that the question at issue between the parties being the fact whether defendant had claim or color of title to the lands in question, acquired in good faith, there was no evidence of the value of such claim or color of title, even if the same were capable of pecuniary estimation, of which the court expressed a doubt. 146 U. S. 533, 13 Sup. Ct. Rep. 184.

The case was subsequently reinstated upon it being made to appear that the inclosed tract contained 1,200 acres; that defendant had been engaged since 1883 in the busi

ness of grazing cattle upon this grant and the lands adjacent thereto; that his fence inclosed and controlled the only unappropriated water in a section of grazing country embracing not less than 100 square miles; that without such fence the use and control of the inclosed land and water would be of no use to him; that if he had not the ability to maintain the fence, the land and water would be at once seized and appropriated by other persons, and defendant's cattle driven and kept away; that he would be unable to conduct his cattle business in this section; and that the possession, use, and occupation of such inclosure exceeds the value of $10,000. These facts make a wholly different showing, and the case is, therefore, properly before us on its merits.

1. A preliminary objection is made by the appellee to the consideration of the case upon the ground that the proceeding is in the nature of a common-law action; that it was tried without the intervention of a jury, and without a stipulation waiving a trial by jury; that the supreme court of Arizona could not properly consider any of the matters raised by the bill of exceptions, nor can this court do so; that all the supreme court could do was to affirm the judgment of the district court; and that all this court can do is to affirm the judgment of the supreme court of Arizona. By section 2 of the act of February 25, 1885, under which this prosecution was commenced, the district attorney was given authority "to institute a civil suit in the proper * * * territorial district court in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any * * * territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act. * * * In any case, if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court."

It is a sufficient answer to this objection of the government to say that this is not a common-law action, but a summary proceeding, more in the nature of a suit in equity, and that the decree provided by the act for the abatement of the inclosure is unknown to an action at common law as administered in this country. Proceedings by assize of nuisance and by writ quod permittat prosternere have been abolished by statute in England, and are now obsolete, if ever used, in this country. 3 Bl. Comm. 221. In cases like the present the only common-law remedy available to the United States would be an action of ejectment or trespass to oust the intruders. The proceeding contemplated by this act is more nearly analogous to the summary remedies provided for the enforcement of mechanics' liens, considered by this court in Implement Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. Rep. 177, or the special proceedings under the territorial statutes of Utah, discussed in Stringfellow v. Cain, 99 U. S. 610; Cannon v. Pratt, Id. 619; Neslin v. Wells, 104 U. S. 428; Gray v. Howe, 108 U. S. 12, 1 Sup. Ct. Rep. 136; and in Ely v. Railroad Co., 129 U. S. 291, 9 Sup. Ct. Rep. 293, appealed from the supreme court of Arizona. In these cases the validity of special statutory proceedings of this description was sustained, and in Hecht v. Boughton, 105 U. S. 235, it was held that under the act of April 7, 1874, (18 St. pt. 3, p. 27,) an appeal was the only proceeding by which this court could review the judgment or decree of a territorial court in a case where there was not a trial by jury.

The practice pursued in this case conformed to the territorial statutes of Arizona, which provide for a waiver by oral consent in open court of a trial by jury in actions arising upon contract, and, with the assent of the court, in other cases. The case is not governed by section 649 of the Revised Statutes.

2. The act of congress which forms the basis of this proceeding was passed in view of a practice which had become common in the western territories of inclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession under a bona fide claim or color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defense to such a proceeding to show that the lands inclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States. As the question whether the lands inclosed by the defendant in this case were public lands of the United States depends upon the question whether he had claim or color of title to them, the two questions may be properly considered together.

Defendant justified under an expediente of the Mexican government which appears to have been obtained in the following manner: On July 19, 1821, Don Manuel Bustillo applied to the governor intendente of Sonora

and Sinaloa, to purchase at auction four square leagues of land for the raising of stock at the placed named "De la Zanja," "three square leagues of land (tres sitios de tierra) in the same presidio in which I reside, and outside of the boundaries thereof, and on the side of the north, and one square more (un sitios mas) for an 'estancia' in the place of the 'cajoncito' on the side of the east;" and prayed for a measurement of the lands by the proper officers, and for a valuation of the same. Upon this petition the intendente ordered a measurement of the lands, summoning the adjacent landowners, and appointing appraisers for the valuation of the land, publication to be made for 30 days for the purpose of soliciting bidders. The measurements were made (the details of which are fully set forth) from a a central point, named "San Rafael," two leagues in each direction, i. e. to the four points of the compass, and monuments were put up on the four corners of the square as well as in the center of the four exterior lines. All these monuments were placed at the time the lands were measured under the authority of the government. The monuments included 4 leagues square, or 16 square leagues.

Upon the completion of this survey the lands were valued at $60 each for the three square leagues, for the reason that they contained permanent water, and the remaining square league at $30, for the reason that it contained no water except such as was furnished by wells. The land was thereupon put up at auction, and, after some *307 spirited bidding between *Bustillo and Romero, was struck off to the latter at $1,200, and the grant made to him by the proper officer in the name of the Mexican republic, in which the land is described as four square leagues for the raising of cattle, (cuatro sitios de tierra para cria de ganado mayor,) included in the place called "San Rafael de la Zanja," situated in the jurisdiction of the presidio of Santa Cruz, to Don Ramon Romero and other citizens (vecinos) interested. The grantees were also required to confine themselves within their respective limits, "which are to be designated by monuments of lime and stone," (mojoneras de cal y canto,) and were guarantied the free enjoyment and quiet and peaceful possession of said lands.

A petition to the surveyor general of the territory of Arizona was filed February 28, 1880, by the heirs of Romero for the confirmation of this grant, under an act of congress of July 22, 1854, (10 St. p. 308,) as marked by the survey and monuments. See, also, act of July 15, 1870, (16 St. p. 304.) The surveyor general reported that the grant should be confirmed to the extent of four square leagues, and no more.

The court found that the fence maintained by the defendant was within the exterior boundaries of the grant, as said boundaries were recited as measured in the expediente, and outside the four square leagues measured by the surveyor general; that the defendant had succeeded to all the rights of Romero in the grant, and was and had been in possession of all the buildings on the four square leagues surveyed by the surveyor general, and claimed, and had always claimed, title to the possession of all the land within the exterior boundaries as measured in the expediente, claiming title thereto; "that the report of the said surveyor general upon said grant has never been finally acted upon by congress; and that said claim and said report are still pending before congress."

Upon proof of the foregoing facts, we think it clear that defendant established a color of title to the lands in question. In Wright v. Mattison, 18 How. 50, 56, it was said by Mr. Justice Daniel: "The courts have concurred, it is believed, without any exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title. The inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith. * * * A claim to property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title." In that case a tax deed was held to convey a colorable title. And in Gregg v. Sayre, 8 Pet. 244, a deed purporting to convey a title in fee, which was fraudulent as to the grantor, but which the grantee had accepted in good faith, was held to have the same effect. In Bryan v. Forsythe, 19 How. 334, it was held that under an act of congress making a general grant of land to the inhabitants of a village, when the survey was made and approved, by which the limits of the lot were designated, the title was such as to sustain an action of ejectment even before a patent was issued. To the same effect are Pillow v. Roberts, 13 How. 472; Meehan v. Forsyth, 24 How. 175; Gregg v. Forsyth, Id. 179; Hall v. Law, 102 U. S. 461; Deffeback v. Hawke, 115 U. S. 392, 407, 6 Sup. Ct. Rep. 95.

It is true there are cases to the effect that color of title by deed cannot exist as to lands beyond what the deed purports to convey; but where the deed is fairly open to construction as to what it does purport to convey, and at the time it was executed the land was officially surveyed according to the theory of the party claiming under such deed, it is manifest these authorities

have no application. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title.

*309 While a grant of four square leagues of land in the place *called "San Rafael de la Zanja," standing alone, would appear to have been a grant of a certain quantity of land, when it appears by the same instrument that the limits of the grant were to be designated by monuments of lime and stone, that such designation was actually made, and that juridical possession of the land was delivered in pursuance thereof, it is at least open to doubt whether it does not fall within the class of concessions by specific boundaries, as these grants are distinguished in U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177. Under the view taken by the court below, that the grant was of only four square leagues of land, it was evidently a mere float, and defendant would have no color of title to any specific land, until the same was designated, and would have no authority to maintain a fence around any part of the tract. In the case of Fremont v. U. S., 17 How. 542, a grant of a tract of land known as "Mariposas," to the extent of 10 square leagues within the limits of the Sierra Nevada and certain rivers, was held to convey a present and immediate interest to so much land to be afterwards laid off by official authority. As no survey in that case was made, it was held to be a grant of quantity only. The same ruling was made with regard to the Moquelamos grant, which was described as "bounded on the east by the adjacent sierra." U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177. See, also, U. S. v. Armijo, 5 Wall. 444; Higueras v. U. S., Id. 827; Alviso v. U. S., 8 Wall. 337; Hornsby v. U. S., 10 Wall. 224.

It is evident that the lands in question were not public lands of the United States within the meaning of that term as used in the acts of congress respecting the disposition of public lands. As early as 1839 it was held by this court in Wilcox v. Jackson, 13 Pet. 498, that whenever a tract of land had once been legally appropriated to any purpose, it became from that moment severed from the mass of public lands. In that case there was a reservation of lands for a military post, for an Indian agency, and for the erection of a lighthouse, and it was held *310 that the lands so reserved were not subject to entry at the land office. So in Leavenworth, etc., *Ry. Co. v. U. S., 92 U. S. 733, the doctrine of the former case was reaffirmed and held to apply to Indian reservations. And in Newhall v. Sanger, Id. 761, lands within the boundaries of an alleged Mexican or Spanish grant, which were sub judice at the time the secretary of the interior ordered a withdrawal of the lands along the road of a certain railroad, were held not to be embraced in a grant to the company. Speaking of such claims, it was said by Mr. Justice Davis "that claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until the opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of congress, no mode of separating them from those which were valid, without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Mexican or Spanish claim, until it was barred by lapse of time or rejected." It was urged in that case that the reservation could only be of lands "lawfully" claimed, but it was said expressly that there was no authority to import the word "lawful" into the statute in order to change its meaning, and that the act in question expressly excluded from pre-emption and sale all lands covered by any foreign grant or title. In Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, it was held that, if the grant was of a specific quantity within designated outboundaries containing a greater area, only so much land within the outboundaries as was necessary to cover the specific quantity granted was excluded from the grant to the railroad companies. Indeed, the cases in which these rules have been applied to lands reserved for any purpose whatever are too numerous even to require citation. In this case there is an express finding that the report of the surveyor general, limiting the grant to four square leagues, has never been finally acted upon by congress, and that the claim *and report are still pending before congress; in other words, that the claim is sub judice.

It is true that in the act of July 22, 1854, (10 St. p. 308,) establishing the office of surveyor general for New Mexico, (then including Arizona,) there is a provision, which is omitted in the act of July 11, 1870, (16 St. p. 230,) establishing the same office for Arizona, that "until the final action of congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act;" but as the sundry civil appropriation act of that year (16 St. p. 304) provides that the surveyor general of Arizona shall have all the powers and perform all the duties enjoined upon the surveyor general of New Mexico, there could

have been no intention to change the settled policy of the government in this particular.

We do not wish to be understood as intimating an opinion as to the validity of defendant's title. There is an apparent discrepancy between the terms of the grant and the survey that was made in pursuance of it which may perhaps be susceptible of elucidation.

But we think that defendant has shown color of title to the land inclosed, and the judgment of the supreme court of Arizona must therefore be reversed, and the case be remanded, with directions to dismiss the petition.

Mr. Chief Justice FULLER dissented from the opinion and judgment.

(143 U. S. 293)

WASATCH MINING CO. v. CRESCENT MINING CO.

(March 27, 1893.)

No. 135.

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

1. An objection to a decree, that it was made in the complainant's favor on grounds not stated in his bill, cannot be raised for the first time on appeal.

2. Objections that a bill asks a form of relief inconsistent with the terms of a contract alleged, and that complainant's evidence exhibits a different case from that asserted in the bill, cannot be raised for the first time on appeal, where defendant neither demurred to the bill nor objected to the evidence in the trial court.

Appeal from the supreme court of the territory of Utah. Affirmed.

Statement by Mr. Justice SHIRAS:

The record discloses that the Crescent Mining Company filed its complaint against the Wasatch Mining Company in the district court of the third judicial district of Utah territory; that an answer, denying the allegations of the complaint, was duly filed; that evidence was taken on behalf of the respective parties; that the action was tried by the court sitting without a jury; and that the court made the following findings of fact:

"In July, 1886, said plaintiff contracted to buy of defendant, and defendant agreed to sell to plaintiff, for a valuable consideration, *294 the following-described mining property and premises, situated in Uintah mining district, Summit county, Utah territory, bounded, with magnetic variation at 17 deg. and 20 min. east, as follows, to wit:

"Beginning at corner No. 1 of the Walker & Walker Extension mine, and running thence N., 44 deg. 35 min. west, 220 feet, to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears south, 46 deg. 10 min. west, at a distance of 158 feet; thence south, 21 deg. 15 min. west, 196 feet, to corner No. 3; thence south, 68 deg. 5 min. west, 2,804 feet, to corner No. 4; thence south, 44 deg. 35 min. east, 216 feet, to corner No. 5; thence north, 68 deg. 5 min. east, 1,410 feet, to corner No. 3 of the Buckeye mine; thence south, 44 deg. 35 min. east, along the southerly end line of said Buckeye mine, 130 feet, to corner No. 4 thereof; thence north, 68 deg. 5 min. east, 1,400 feet, to corner No. 1 of said last-mentioned mine; thence north, 44 deg. 35 min. west, 130 feet, to corner No. 2 of said Buckeye mine, the same being also corner No. 6 of said Walker & Walker Extension mine; thence north, 21 deg. 15 min. east, 190 feet, to the place of beginning,—together with all dips, spurs, and angles, and also all metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, or appurtenant, or therewith usually had and enjoyed, and all the estate, rights, title, interest, and property, possession, claim, and demand of said party defendant in or to the same.

"(2) In pursuance of said contract a deed was made by defendant to plaintiff, bearing date September 1, 1886, wherein and whereby, by mistake and inadvertence in describing the property so contracted for and to be deeded, there was omitted therefrom so much of said property and premises as had been patented by the United States to James Lowe and others as part of lot 42, called the 'Pinyon & Pinyon Extension Mining Claim.'

"(3) That, in making said contract and said deed, it was the intention of parties plaintiff and defendant to include the premises and property omitted as last aforesaid, and the purchase price thereof was paid and secured with that of the property deeded." *295

* From the facts so found the court drew the conclusion that the plaintiff was entitled to have its deed from defendant so reformed as to embrace and include in its description of the property to be conveyed all that which was described in the first finding of fact.

From this judgment of the district court an appeal was taken to the supreme court of the territory, and from the judgment of that court, affirming the decree of the district court, [19 Pac. Rep. 198,] an appeal was taken to this court.

Chas. W. Bennett, A. T. Britton, and A. B. Browne, for appellant. R. N. Baskin and Thos. Marshall, for appellee. *296

* Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

This was a suit brought in the district court of the territory of Utah, by the Crescent Mining Company against the Wasatch Mining Company, for the reformation of a deed made by the latter to the former, so as to make it embrace and include a certain piece or parcel of land claimed to have been wrongfully omitted from the deed.

Under the act entitled "An act concerning the practice in territorial courts, and appeals therefrom," approved April 7, 1874, (18 St. pt. 3, p. 27,) if the findings of the district court are sustained by the supreme court, such findings furnish a sufficient statement of the facts for the purposes of an appeal to this court, and our inquiry is whether, upon such facts, the judgment appealed from was right. Stringfellow v. Cain, 99 U. S. 610.

If the plaintiff below contracted to buy of defendant, and the defendant agreed to sell to plaintiff, for a valuable consideration, several pieces or parcels of land, and if, in pursuance of said contract, a deed was made by the defendant to the plaintiff, "wherein and whereby, by mistake and inadvertence in describing" the property conveyed, there was omitted therefrom an important part of the property contracted to be sold, and if the purchase price, being a round sum for all the tracts, has been paid, a case for a reformation of the deed was clearly made out, unless, indeed, the defendant should be able to show some good reason why such admitted or established facts are not entitled to their apparent weight.

In the effort to do so, the appellant points to what he contends is a fatal variance between the allegations of the bill of complaint and the findings of fact on which the court below based its judgment. The bill, as he reads it, is restricted to the case of an alleged fraud and conspiracy between the defendant company and one E. P. Ferry, a director and representative of the Crescent Mining Company, whereby the defendant company delivered, and Ferry accepted, with a view to cheat and defraud the plaintiff company, a deed not conforming with the contract, but omitting an important part of the land sold; and as the court finds, in terms, that the omission was by "mistake and inadvertence in describing the property so contracted for and to be deeded," the contention is that the case is within the scope of well-settled cases, which hold that no decree can be made in favor of a complainant on grounds not stated in his bill.

If this objection is well taken, the complainant was in fault in another very important particular. He omitted to make Ferry a party.

But we think this omission to make Ferry a party really shows that the complainant was not proceeding on a case of fraud and conspiracy between the defendant company and Ferry, as the principal ground for relief. The allegations respecting Ferry were to show reasons why the deed was accepted by the plaintiff company, and how the delay to institute proceedings was accounted for. The word "fraud," as a term in legal proceedings, generally, is rather a legal conclusion than an independent fact.

In equitable remedies given for fraud, accident, or mistake, it is the facts as found that give the right to relief; and it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud, or by mere inadvertence or mistake. Indeed, upon the very same state of facts, an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced person might be entitled to a more charitable view. Yet the injury to the complainant would be the same in either case.

The substantial meaning of the cases cited by the appellant is that the matters alleged in the bill, as injurious to the complainant, must be those proved on the trial, and relied on by the court in awarding relief; and we think that the appellant has no reason to complain of the language of the court below in attributing the appellant's misconduct to mistake and inadvertence, rather than to intentional fraud.

The appellant was too late in making this objection, even if it had been well founded. No such objection was taken in the district court, when there would have been an opportunity for the plaintiff to amend his complaint, and such an objection was out of place and time when urged as a ground of appeal in this court.

Another assignment of error asks us to reverse the court below because the complaint does not state a case entitling the plaintiff to any relief. The claim is that by the terms of the contract between the parties, as set forth in the complaint and shown in evidence, the plaintiff was not entitled to a deed at the time of bringing the action; that the conditions upon which the deed was to be delivered had not yet been performed.

Such a contention seems quite inconsistent with the allegations of the answer of the defendant in the court below, averring the delivery of a proper deed by the defendant to the plaintiff, and with the finding of the court that a deed had passed, and the payment of a portion of the purchase money, and the security of the rest by a mortgage upon the property so conveyed. 299

The argument, however, discloses that the plaintiff seeks to overturn the decree below because the agreement which was set up in the complaint, and which recited the execution of the deed, does show that the deed was not to be delivered until a certain controversy pending between the defendant, the Wasatch Mining Company, and third parties, and affecting the title to the lands in dispute, should have been determined in favor of the Wasatch Mining Company, when the entire purchase money should be paid, and because it appears from the complaint that said suit was not yet determined, nor said purchase money paid, at the time this action was commenced.

The proceedings in the district court, and the findings, show that, without awaiting the

determination of the outstanding controversy, the deed in question was delivered and accepted, and the unpaid portion of the purchase money, instead of being paid in cash, was secured to be paid by a mortgage given by the Crescent Mining Company to the Wasatch Company.

This was plainly a fulfillment of the contract, in a modified form, agreed to by both the parties; and the assignment of error resolves itself into a contention that the bill of complaint did not, in terms, allege the modification of the agreement in the particulars mentioned, and did not aver a waiver of the condition that the deed was not to be delivered until the pending suit with third parties should be determined, and that, therefore, the case made and found was different from the one alleged.

The same answer is applicable to this objection that was made to the one first considered. It came too late. In the district court the defendant did not demur to the complaint as asking a form of relief inconsistent with the terms of the contract alleged, but by an answer and cross bill brought all the facts before the court; nor did the defendant object to plaintiff's evidence as exhibiting a different case from that asserted in the bill.

The supreme court of the territory rightfully held that the defendant should have raised the question in the trial court, where ample power exists to correct and amend the pleadings, and not having done so, but having gone to trial on the merits, the defendant was precluded from assigning error for matters so waived.

The doctrine on this subject is well expressed in the case of Tyng v. Warehouse Co., 58 N. Y. 313: "No question appears to have been made during the trial in respect to the production of evidence founded on any notion of variance or insufficiency of allegation on the part of the plaintiff. Had any such objection been made, it might have been obviated by amendment in some form or upon some terms under the ample powers of amendment conferred by the Code of Procedure. It would therefore be highly unjust, as well as unsupported by authority, to shut out from consideration the case, as proved, by reason of defects in the statements of the complainant. Indeed, it is difficult to conceive of a case in which, after a trial and decision of the controversy, as appearing on the proofs, when no question has been made during the trial in respect to their relevancy under the pleadings, it would be the duty of a court, or within its rightful authority, to deprive the party of his recovery on the ground of incompleteness or imperfection of the pleadings."

No injustice is done the appellant by thus disposing of this objection, because the facts conclusively show that the written contract between the parties was not annulled, or a new one substituted, but that it was substantially executed; the defendant simply accepting other conditions than those stipulated in its favor, and delivering a deed, as averred in the complaint.

Upon the facts as found, we are satisfied that the court below committed no error in its decree, and it is accordingly affirmed.

(148 U. S. 390)

OGDEN et al. v. UNITED STATES.

(March 27, 1893.)

No. 1,184.

FEDERAL COURTS — SUPREME COURT — CIRCUIT COURT OF APPEALS—JURISDICTION.

Under the judiciary act of March 3, 1891, an appeal from a decree of a circuit court in a suit by contractors, against the United States, to recover for materials furnished for the construction of a levee, must go in the first instance to the circuit court of appeals, and not to the supreme court. Bank v. Peters, 12 Sup. Ct. Rep. 767, 144 U. S. 570, and Hubbard v. Soby, 13 Sup. Ct. Rep. 13, 146 U. S. 56, followed.

Appeal from the circuit court of the United States for the eastern district of Louisiana.

In Equity. Bill by James N. Ogden and Columbus S. Jones, copartners under the style of Ogden & Jones, against the United States, to recover $10,000 for an excess of material furnished under a contract for the construction of the Kempe levee, in Louisiana; such excess being rendered necessary by the sinking of the ground under the weight of the levee. The circuit court dismissed the bill on the ground that the contract made the United States engineer supervising the work the final judge of the quantity and quality of materials furnished. Complainants thereupon appealed both to the circuit court of appeals and to this court. Heard on motion by respondent to dismiss the appeal. Granted.

Sol. Gen. Aldrich, for the motion.

* THE CHIEF JUSTICE. This appeal is dismissed upon the authority of Bank v. Peters, 144 U. S. 570, 12 Sup. Ct. Rep. 767; Hubbard v. Soby, 146 U. S. 56, 13 Sup. Ct. Rep. 13, and cases cited.

(148 U. S. 389)

WOLFE v. HARTFORD LIFE & ANNUITY INS. CO.

(March 27, 1893.)

No. 162.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF PARTIES—PLEADING.

An averment showing diverse "residence" is not sufficient to give a federal court jurisdiction. Diverse "citizenship" must positively appear, either from the pleadings, or from other parts of the record.

In error to the circuit court of the United States for the southern district of New York.

Action by Nathaniel H. Wolfe against the Hartford Life & Annuity Insurance Company

of Hartford, Conn. Judgment for defendant. Plaintiff brings error. Reversed for want of jurisdiction below.

Robert S. Green, for plaintiff in error. Herman Kobbe, for defendant in error.

THE CHIEF JUSTICE. The complaint in this case avers that the plaintiff was at the several times mentioned therein, "and ever since has been, and still is, a resident of the city, county, and state of New York," but his citizenship is nowhere disclosed by the record.

It is essential, in cases where the jurisdiction depends upon the citizenship of the parties, that such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. Brown v. Keene, 8 Pet. 112, 115; Insurance Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. Rep. 193; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. Rep. 873.

Judgment reversed, at the costs of plaintiff in error, and the cause remanded for further proceedings.

(148 U. S. 270)

HUBER et al. v. N. O. NELSON MANUF'G CO.

(March 27, 1893.)

No. 143.

PATENTS FOR INVENTIONS — FOREIGN PATENTS — REISSUES — WATER-CLOSETS.

1. Under Rev. St. § 4887, which provides that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," etc., no patent can be issued in the United States for an invention after the foreign patent has lapsed and become void for the patentee's failure to comply with the laws; and hence letters patent No. 260,232, granted June 27, 1882, to Henry Huber, for an improvement in water-closets, are void, because not applied for until after the British patent, No. 1,207, granted April 7, 1874, to his assignors, had lapsed and become void by their failure to pay the stamp duty. 38 Fed. Rep. 830, affirmed.

2. Letters patent No. 291,139, granted January 1, 1884, to James E. Boyle, for an improvement in water-closets, was for a flushing device, wherein the water flowing from the reservoir to the bowl exhausted the air from the space between two traps in the soil pipe below the bowl, by means of an injector in the flushing pipe and a suction pipe connecting with such air space, thus accelerating the flow of the flushing water by means of air pressure. In each of the six claims of the patent a flushing tank connected with the reservoir was made an essential element of the combination. The patentee, on April 9, 1887, procured these letters to be reissued as No. 10,826, on the ground that the original claim, inadvertently and by mistake, was unduly restrictive of the invention in claiming the flushing tank as an element of the invention, it not being essential, and this element was accordingly omitted from the reissue. It appeared from the affidavits of the patentee and his solicitor that they believed the flushing tank to be essential to produce an "after-wash,"— i. e. to fill the bowl with water after the flushing was completed,— and that it was embodied in the claims of the original patent, because a closet without some device to produce this after-wash would be unsalable. *Held*, that there was no such mistake as to warrant the reissue, which, as it merely enlarges the claims of the original patent, is void. 38 Fed. Rep. 830, affirmed.

Appeal from the circuit court of the United States for the eastern district of Missouri. Affirmed.

Paul Bakewell, A. S. Browne, Anthony Pollok, and Philip Mauro, for appellants. S. N. Taylor and B. F. Rex, for appellee.

*271 Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a bill in equity, filed October 3, 1887, in the circuit court of the United States for the eastern division of the eastern district of Missouri, by Henry Huber and James E. Boyle, as plaintiffs, against the N. O. Nelson Manufacturing Company, a Missouri corporation, for the alleged infringement of two patents.

The first patent sued upon was granted June 27, 1882, No. 260,232, for an "improvement in water-closets," to Henry Huber, one of the plaintiffs, as assignee of Stewart Peters and William Donald, of Glasgow, Scotland. That patent sets forth that Peters and Donald had presented a petition for the grant of a patent for such improvement, and had assigned their right, title, and interest in it to Huber, and that a description of the invention was contained in the specification annexed to the patent, and the patent granted to Huber, his heirs or assigns, for 17 years from June 27, 1882, the exclusive right to make, use, and vend the invention *272 throughout the United States and the territories thereof, "subject to the limitation prescribed by section 4887, Rev. St., by reason of English patent, dated April 7, 1874, No. 1207."

The answer of the defendant avers that although the British patent, No. 1207, was granted to Peters and Donald on April 7, 1874, for 14 years from that date, it was subject to the provisions and conditions of section 2 of chapter 5 of the act of 16 Vict., approved February 21, 1853, and to the condition thereunder that if Peters and Donald, their executors, administrators, or assigns, did not pay a stamp duty of £100 on the patent before the expiration of seven years from its date, it should become void; that such duty was not paid, but the patentees voluntarily allowed the patent to expire at the end of seven years from its date; and that it became void thereby, and since April 7, 1881, has been of no force or effect.

The English patent covered the same invention which is covered by United States patent No. 260,232. Peters and Donald assigned all their interest in the invention to

James E. Boyle, October 27, 1881. The application for the United States patent was filed November 29, 1881; and, after the patent was granted, Boyle assigned his interest to Huber, November 26, 1881. Thus it appears that the application for No. 260,232 was filed more than seven months after the English patent to Peters and Donald had become void, and that the invention was assigned by Peters and Donald to Boyle more than six months after that patent had become void.

Sections 4886 and 4887 of the Revised Statutes, which were taken from sections 24 and 25 of the act of July 8, 1870, (chapter 230, 16 St. p. 201,) read as follows:

"Sec. 4886. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for *273 more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor.

"Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

It was contended for the defendant in the circuit court, and was so held by that court, that patent No. 260,232 was void, under section 4887 of the Revised Statutes, because it was granted after the English patent to Peters and Donald had ceased to exist. The opinion of Judge Thayer, who held the circuit court, is reported in 38 Fed. Rep. 830. The facts above set forth are undisputed. Judge Thayer held that, under the decision of this court in Refrigerating Co. v. Hammond, 129 U. S. 151, 9 Sup. Ct. Rep. 225, patent No. 260,232 was void.

In Refrigerating Co. v. Hammond, a United States patent had been granted November 20, 1877, for 17 years, on an application filed December 1, 1876. A patent for the same invention had been grated in Canada, January 9, 1877, to the same patentee, for five years from that day, on an application made December 19, 1876. On a petition filed in Canada by the patentee, December 5, 1881, the Canada patent, on December 12, 1881, was extended for five years from January 9, 1882, and on December 13, 1881, for five years from January 9, 1887, under section 17 of the Canada act assented to June 14, 1872, (35 Vict. c. 26.) On those facts, this court held, under section 4887 of the Revised Statutes, that as the Canada act was in force when the United States patent was applied for and issued, and the Canada extension was a matter of right, at the option of the patentee, on his payment of a required fee, and the 15-years term of the Canada patent had been continuous and without interruption, the United States patent did not expire before the end of the 15-years duration of the Canada patent. Of course, the Canada patent was in force when the United States patent was granted, and the question presented in the present case did not distinctly arise. Judge Thayer held that it was a logical conclusion from the decision in Refrigerating Co. v. Hammond that a United States patent which was issued subject to the provisions of section 4887 remained in force no longer than the foreign patent having the shortest term; and that the omission to do an act required by the foreign law, which worked an absolute forfeiture of the foreign grant, extinguished the United States patent.

The circuit court also held that, as section 4887 enacted that the United States patent granted for an invention which had been previously patented in a foreign country should be so limited as to expire at the same time with the foreign patent, it presupposed that, at the date of the United States patent, there was in force a foreign patent for the invention; and that, if there was no such foreign patent in force when the United States patent issued, but only one which had lapsed and become void, although theretofore granted for the invention, there was no authority in law for the United States grant. In other words, the moment patent No. 260,232 was granted, section 4887 took effect upon it, and caused it to expire in the same instant in which it was created, or to be strangled in its birth.

The final decree of the circuit court in the present case was entered May 25, 1889. It decreed, among other things, that No. 260,232 was issued without authority of law, and was null and void. Since that time, and on March 24, 1890, this court decided the case of Pohl v. Brewing Co., 134 U. S. 385, 10 Sup. Ct. Rep. 577, in which we held that a United States patent ran for the term for which the prior foreign patent was granted, without reference to whether the latter patent became lapsed and forfeited, after the grant of the United States patent, by reason of the failure of the patentee to comply with the requirements of the foreign patent law. But that case did not distinctly cover the present one, because in that case the foreign patent was in force when the United States patent was

granted, and it became lapsed or forfeited thereafter, in consequence of the failure of the patentee to comply with the requirements of the foreign patent law.

We are of opinion that, as in the case at bar the foreign patent was not in force when the United States patent was issued, the latter patent never had any force or validity. The delay in applying for the United States patent, until after the foreign patent expired, amounted to an abandonment of the right to a United States patent. This is in accordance with the view of the commissioner of patents in Mushet's Case, Com. Dec. 1870, p. 106.

The other patent sued on in the present case is reissued letters patent No. 10,826, granted to James E. Boyle, April 19, 1887, for an improvement in flushing apparatus for water-closets, claims 1 and 2 of which are alleged to have been infringed. The original patent, No. 291,139, was granted to Boyle, January 1, 1884, and the application for the reissue was filed January 2, 1885.

The answer sets up the invalidity of such reissue, and avers that the original patent was not inoperative or invalid by reason of an insufficient or defective specification, but was surrendered, after unreasonable delay, solely for the purpose of enlarging the specification and claims, and to cover improvements not within the contemplation of Boyle when he filed his original application and received his original patent; that the claims of the reissue unduly broadened the original patent; that the further design of Boyle in asking for the reissue was to cover apparatus placed upon the market before such reissue was applied for, by Frank B. Hanson, under letters patent No. 308,358, issued to Hanson, November 25, 1884, but applied for June 12, 1883; that said reissue No. 10,826, and especially claims 1, 2, and 4 thereof, were not for any invention described, indicated, or suggested in the original patent No. 291,139; that the commissioner of patents exceeded his authority in granting such reissue; and that said claims and such reissue were void from the beginning.

The circuit court, in its decree entered May 25, 1889, adjudged that claims 1 and 2 of such reissue were granted without authority of law, and were null and void; that the defendant had not infringed any of the remaining claims of such reissue, (the whole number of claims being six;) and that the bill be dismissed, with costs. The plaintiffs appealed to this court from the entire decree. James E. Boyle having died during the pendency of the appeal, his administrator has been substituted as a party.

Judge Thayer, in his opinion, (38 Fed. Rep. 830,) goes very fully into the question of the validity of the reissue. In order that the claims of the original and reissue patents may be more readily compared, they are here produced in parallel columns, the italicized words in each claim of one patent showing wherein it differs from the corresponding claim in the other patent:

Original Patent.	*Reissue Patent.*
	(1) *A water-closet consisting of a bowl, with the soil passage leading therefrom and two successive traps in said passage, in combination with a flushing pipe for conveying water to the bowl, a suction injector arranged in connection with said pipe and to be traversed by the flushing water, and an air pipe leading from the air space between said traps and communicating with said injector, substantially as set forth, whereby the flow of water through said injector serves to draw air from said air space.*
(1) A flushing apparatus for water-closets, consisting of a reservoir tank, a flushing *chamber adapted to be filled therefrom, a* valve controlling *the admission of water from said tank to said chamber*, a suction injector arranged *beneath the outlet from said chamber*, a flushing pipe *leading from said injector*, and a suction *or air* pipe *communicating* with said injector, *all combined and arranged substantially as set forth*, whereby the water in *escaping* from said *chamber into* the flushing pipe traverses said injector, and sucks the air from said suction pipe.	(2) A flushing apparatus for water-closets, consisting *of the combination of a* reservoir tank, a flushing valve controlling *the outlet thereof*, a flushing pipe *for conveying water therefrom to the bowl of the closet*, a suction injector arranged *in connection with said pipe, and to be traversed by the descending flushing water*, and a suction pipe *in connection* with said injector, whereby the water in *flowing* from said *tank downward through* the flushing pipe traverses said injector and sucks the air from said suction pipe.
(2) The combination of a reservoir tank, a flushing chamber, a valve controlling the admission of water from said tank to said chamber, a suction pipe *terminating at the upper part* of said chamber, an injector beneath the outlet from said chamber, a flushing pipe leading downward from said injector, and a suction passage affording communication from said injector to said suction pipe, substantially as and for the purposes set forth.	(3) The combination of a reservoir tank, a flushing chamber, a valve controlling the admission of water from said tank to said chamber, a suction pipe, *communicating with the interior* of said chamber, an injector beneath the outlet from said chamber, a flushing pipe leading downward from said injector, and a suction passage affording communication from said injector to said suction pipe, substantially as and for the purposes set forth.
(3) A flushing apparatus for water-closets, consisting of a reservoir tank, a flushing *chamber*, a valve controlling the *admission of water from said tank to said chamber*, a suction injector *beneath the outlet from said chamber*, a flushing pipe *leading downward from said injector*, a suction *or air* pipe *opening into the upper part of said chamber, and a suction passage extending from said pipe to said injector*, whereby the passage of water through said injector *into the flushing pipe* will *develop a suction in* said *suction passage and* suction pipe, *in combination with means, substantially as described, for admitting air to said suction passage or pipe, and so breaking the vacuum therein before all the water has escaped from the chamber, whereby an after-wash is secured, all combined and arranged to operate* substantially as set forth.	(4) A flushing apparatus for water-closets, consisting of a reservoir tank, a flushing valve controlling the *outlet thereof*, a flushing pipe *for conveying water therefrom to the bowl of the closet*, a suction injector *arranged in connection with said pipe and to be traversed by the descending flushing water, and* a suction pipe *in connection with said injector*, whereby the passage of water through said injector will *suck the air from* said suction pipe, *all combined together, and with a trapped air passage communicating with the said suction pipe and arranged to be unsealed, and thereby to admit air to the suction pipe and break the vacuum therein before the cessation of the flow of flushing water*, substantially as set forth.
(4) *In* combination, the tank, E, the chamber, F, provided with inlet orifice, *h'*, and outlet orifice, *i*, the valve, *h*, the suction injector, I, the flushing pipe, *l*, the air pipe, *e*, the suction passage, *i*, and the air bell, *n*, substantially as set forth.	(5) *The* combination *of* the tank, E, the chamber, F, provided with inlet orifice, *h'*, and outlet orifice, *i*, the valve, *h*, the suction injector, I, the flushing pipe, *l*, the air pipe, *e*, the suction passage, *i*, and the air bell, *n*, substantially as set forth.

(5) A flushing apparatus for a water-closet, consisting of the combination of a reservoir tank, a flushing chamber provided with an inlet orifice of large area communicating with said tank, and with an outlet orifice of contracted area proportioned to the area of said inlet orifice, substantially as specified, a valve adapted to close said inlet orifice, an air pipe opening into said flushing chamber, and a flushing pipe leading from said outlet orifice, all arranged and adapted to operate substantially as set forth.

(6) A flushing apparatus for a water-closet, consisting of the combination of a reservoir tank, a flushing chamber provided with an inlet orifice of large area, communicating with said tank and with an outlet orifice of contracted area proportioned to the area of said inlet orifice, substantially as specified, a valve adapted to close said inlet orifice, an air pipe opening into said flushing chamber, and a flushing pipe leading from said outlet orifice, all arranged and adapted to operate substantially as set forth.

(6) *The combination, with tank, E, and chamber, F, of the valve, h, thereof, its stem consisting of an overflow tube, m, and a sealing cup, m', below the valve, in which cup the lower end of the overflow tube is immersed, substantially as set forth.*

In each of the six claims of the original patent, the flushing chamber, F, is made an element of the combination. Claim 6 of the reissue is substantially identical with claim 5 of the original, claim 5 of the reissue with claim 4 of the original, and claim 3 of the reissue with claim 2 of the original. Claim 4 of the reissue is in some respects similar to claim 3 of the original, but it omits the flushing chamber, F, and mentions in its place a flushing valve, thus making a different combination. Neither the specification of the original nor any of its claims corresponds with or suggests the first two claims of the reissue.

Parts of the two specifications are here placed by us side by side, in order that the additions in the reissue to what was in the original may be distinctly seen, the additions in the reissue being printed in italics:

Old Specification.	*New Specification.*
The diagram, Fig. 6, is designed to illustrate the essential principle of my present invention even more clearly than the preceding figures. The air pipe, *e*, does not enter the chamber, F, but is connected by a branch with the flushing pipe, *l*, below the chamber, the injector, I, being arranged at their junction. The valve, *g'*, is shown merely to prevent water setting back and flowing down the pipe, *e*, since the top of this pipe is below the water level, *x*, *x*, instead of above it, as before.	The diagram, Fig. 6, is designed to illustrate the essential principle of my present invention even more clearly than the preceding figures. The air pipe, *e*, does not enter the chamber, F, but is connected by a branch with the flushing pipe, *l*, below the chamber, the injector, I, being arranged at their junction. The *check* valve, *g'*, is shown merely to prevent water setting back and flowing down the pipe, *e*, since the top of this pipe is below the water level, *x*, *x*, instead of above it, as before. *When the flushing valve, h, is lifted, the water from the tank, E, flows down the flushing pipe, l, and through the injector, I, thus drawing air from the pipe, e, during the whole time that the water continues to flow through the injector. In this construction the chamber, F, has no function of its own, and constitutes essentially a mere enlargement of the upper portion of the flushing pipe, to the same effect as the ordinary "service box" commonly used by plumbers.*
No provision for securing an after-wash is here shown, but the bowl may be refilled after the flushing by any suitable means, as by water admitted by a valve through an independent flushing pipe.	No provision for securing an after-wash is here shown, but the bowl may be refilled after the flushing by any suitable means; as, *for instance*, by water admitted by a valve through an independent flushing pipe *as shown in the patent of Peters and Donald, No. 260,232, dated June 27, 1882.*

In the opinion of Judge Thayer, it is correctly said: "In the construction of the 'flushing apparatus' or water-closet covered by the original letters, Boyle, the inventor, employed what is commonly called an 'injector' to exhaust the air confined between two traps located beneath the bowl or seat of the 'flushing apparatus.' The apparatus was so arranged that, when in use, water falling through a pipe from the water tank or reservoir into the bowl passed by the mouth of the 'injector,' which was connected by a pipe with the confined air chamber between the traps, and by the operation of a well-known principle tended to exhaust the air and to create a vacuum in such chamber, the purpose of creating a vacuum being to induce a more powerful outflow of water from the bowl through the traps and into the soil pipe, by the aid of atmospheric pressure on the surface of the water in the bowl. The idea of constructing a water-closet or flushing apparatus with double traps underneath the seat, and a confined air chamber between the same, from which the air might be withdrawn when the closet was used, so as to induce a more powerful outflow, was not novel. The same method of construction was shown in the Peters and Donald patent before mentioned, but Peters and Donald employed a different device to exhaust the air between the traps. Although injectors and the principle upon which they were operated were well known, and although they were in use for various purposes, it may be conceded that Boyle was the first to employ them in the construction of a flushing apparatus or water-closet. Being an old device, he could not claim the injector independently, or otherwise than in combination with other devices forming a part of his improved sanitary water-closet. The first and most important claim in the original letters patent was for 'a flushing apparatus consisting of a reservoir tank, a flushing chamber adapted to be filled therefrom, a valve controlling the admission of water from said tank to said chamber, a suction injector arranged beneath the outlet from said chamber, a flushing pipe leading from said injector, and a suction or air pipe communicating with said injector, all combined, * * * substantially as set forth, whereby the water, in escaping from said chamber into the flushing pipe, traverses said injector, and sucks air from said suction pipe.' It will thus be seen that the 'injector' was one of six elements in the combination covered by the first claim of the original letters, No. 291,139."

In the affidavit made by Boyle, on December 27, 1884, to accompany his application

for the reissue, he states that he believes his patent No. 291,139 "to be inoperative to fully protect the invention intended to be covered by it, for the following reason, namely: That the principal claims in said patent are defective or insufficient, in that they are, or appear to be, limited to combinations embodying the 'flushing chamber, F,' as an essential element, whereas that chamber is not essential to his invention in its generic features;" that, as stated in the specification of the original patent, his invention introduced "a new principle for operating double-trapped or siphon water-closets,—namely, that of producing the requisite vacuum by causing the falling flushing water to act as an injector and draw air along with it,"—and that, through inadvertence or mistake of judgment, his claims were drawn with less breadth than his specification, and do not, as they should, cover broadly the application of such principle; that such inadvertence or mistake arose by and in consequence of a misunderstanding between him and his attorney, Mr. Arthur C. Fraser, of the firm of Burke, Fraser & Connett, who prepared the application for the patent, and also by reason of Boyle's want of familiarity with the technical meaning of the language used in patent claims, and that the same arose without any fraudulent or deceptive intention; that, in his early experiments with the invention, he devised and tested various forms and modifications of mechanism, and among others the three constructions shown by sketches which he annexed to the affidavit, and which sketches he describes as each showing a water tank with an outlet valve, a flushing pipe extending down to the closet bowl, an injector therein, a suction or air pipe extending to the air space between the two traps below, and a lever for working the valve; that in one of such sketches the suction or air pipe joined the flushing pipe by an elbow, their point of junction constituting the injector; that in another there was the same construction, except that the end of the suction or air pipe entered the flushing pipe, and turned down therein, forming a more perfect injector; that, in the third, the suction or air pipe extended over the top of the tank, and was connected by a rubber tube with the tubular valve stem of the outlet valve, the bottom of the stem extending below the valve and into the flushing pipe far enough to constitute an injector; that those constructions were all made and operated by him before January 1, 1882; that they all worked satisfactorily in siphoning the closet, but embodied no means for giving an "after-wash" for filling the bowl after the flushing; that in supplying such means he modified the construction, and adopted those constructions which are shown in Figs. 1, 4, and 5 of his original patent; that, in describing his invention to his said attorney, he did not describe the first constructions devised by him and shown in the said three sketches, but only the preferred constructions; that on or about November 28, 1884, he observed in the Patent Office Gazette the report of a patent, No. 308,358, granted November 25, 1884, to Frank B. Hanson, showing Boyle's said invention in a form almost identical with one of the said constructions originally invented by Boyle; that he thereupon consulted with his attorney to ascertain how such a patent came to be issued to Hanson; that his said attorney, in the course of a few days, advised him of the defect or insufficiency in his said original patent; that, prior to being so advised, Boyle had no suspicion that his said patent was in any wise defective or insufficient; that he thereupon instructed his attorney to prepare an application for reissue of his said patent; that, believing that he, and not Hanson, was the original inventor of the subject-matter thereof, he demanded of the commissioner of patents the declaration of an interference with Hanson's patent; that, so far as he was aware, no interest had arisen adverse to the grant of the reissue which he applied for, either in favor of Hanson or of any other person; and that, so far as he was aware, his patent had not been infringed, nor had any attempt been made to imitate or evade the same, except by Hanson.

One of the claims of the patent issued to Hanson covers a flushing apparatus substantially the same as that described in claim 1 of the original patent to Boyle, omitting only the "flushing chamber."

The view taken by Judge Thayer was that the sole purpose of Boyle in asking for a reissue was to eliminate the "flushing chamber," as a constituent element of the combination covered by certain claims of the original patent to Boyle, particularly of claim 1, and to obtain a patent for a flushing apparatus like that described in said claim 1, less the flushing chamber, and so claim 2 of the reissue was granted in the terms above set forth, omitting the flushing chamber from the combination. It was omitted also from claim 1 of the reissue. The effect of this was to expand the claims of the original patent, because they had been limited by including the "flushing chamber" as an element of the combination.

It is contended for the plaintiffs that the main feature of Boyle's flushing apparatus consisted in the use of an injector operated by falling flushing water, to pump air from between the two traps; that that fact was shown and spoken of in the original specification; that the flushing chamber was not essential to the operation of that device, a single reservoir tank being sufficient for the purpose; that by inadvertence or mistake a nonessential limitation was put upon such claims of the original patent as covered the injector device; that in consequence thereof the original patent was inoperative to secure the invention intended to be claimed; and that the patent, therefore, was properly re-

issued, the claims having simply been altered to cover more accurately the invention described in the original specification.

The opinion of the circuit court, in speaking of the contention that the original patent was inoperative to protect the invention intended to be covered by it, said that such patent certainly protected the flushing apparatus that was claimed as a whole in the first claim, and carefully described in the specification; that it protected also all the combinations which were claimed in its several claims; that it was not necessary to change the specification or the drawings to secure fully the apparatus claimed in the several claims of the original patent; that that was the identical apparatus which Boyle intended to manufacture; that, therefore, it could not be said that the original patent was "inoperative or invalid" in the sense that Boyle could not hold what he claimed and intended to manufacture, because his original specification was either defective or insufficient; that what Boyle meant by asserting that the original patent was inoperative was only that a particular combination of parts might have been claimed originally that was not claimed, and that his original patent was inoperative to protect such particular combination, because no right to the protection of it had been asserted; that, even conceding that the original patent was "inoperative" in the sense in which that word is used in section 4916 of the Revised Statutes, the question remained whether the failure to claim what the original patent did not protect, because it was not claimed therein, was due to "inadvertence, accident, or mistake," in the sense of the statute; that all of the evidence which was before the commissioner of patents tending to show inadvertence or mistake (that is, the affidavit of Boyle, that of Fraser, and other documents) was offered by the plaintiffs in the present suit, supplemented by some additional testimony; and that, under those circumstances, the circuit court
*256 could review the finding of the commissioner on the point that the original patent was inoperative by reason of inadvertence and mistake, at least to the extent of determining whether, as a matter of law, what was alleged to be a mistake was such a mistake as warranted a reissue.

Mr. Fraser, the attorney who obtained the original patent, as well as the reissue, said in his affidavit presented to the patent office, with the application for the reissue, that he clearly understood "that the invention in question introduced a new principle in water-closet flushing apparatus,—that of exhausting the air by means of an injector,—and so described the invention in the specification, but that in drawing the claims he inadvertently incorporated the flushing chamber as an element therein, being at the time under the impression that the said flushing chamber was essential to the operation of the invention, whereas, in fact, the said chamber is essential only to the operativeness of the devices for producing the 'after-wash' for refilling the bowl, which devices are claimed specifically in claim 4 of said patent;" that he was not then aware that Boyle had used the flushing apparatus with a single tank, from which the flushing pipe led directly, thereby omitting the flushing chamber beneath the tank, nor did it occur to Fraser at that time that the invention was susceptible of being so modified; that he drew the first three claims of the original patent, as granted, through a misapprehension of the essentials of the invention, arising from a misunderstanding between himself and Boyle, without any fraudulent or deceptive intention on the part of either; that Fraser was not aware of the defect or insufficiency in the patent until after he saw the patent of Hanson, No. 308,358; and that, after examining that patent and ascertaining the circumstances of its grant, he advised Boyle that Hanson had secured a patent covering Boyle's prior invention, and counseled Boyle to apply for a reissue of his patent, and to demand an interference with the patent of Hanson.

The circuit court further observed that Mr. Fraser's explanation showed that he understood that the falling flushing water traversing the injector would perform its function of pumping air from between the traps equally well, whether the water proceeded from a reservoir having one compartment or one having a dozen; that such fact was obvious to any observer who had any knowledge of the principle upon which an injector acts; that Fraser, therefore, must be understood as asserting merely that he incorporated the flushing chamber as an element in the several combinations claimed in the original patent, because he intended to describe and claim an operative flushing apparatus or water-closet, which would prove a marketable invention; that it was manifest from other statements made by Fraser in the course of his testimony that, in his opinion, a flushing apparatus minus the flushing chamber with its attendant devices for securing an after-wash would be practically useless; that some provision for refilling the bowl after the injector had ceased to act was essential to the successful operation of the flushing apparatus or water-closet, considered as a whole; and, that, in drafting the several claims of the original patent, he intentionally, and, as it would seem, with great care, included the flushing chamber, for the reason that it was one of the essential parts of the flushing apparatus, without which the latter would not be serviceable.

The opinion also states that Boyle's affidavit, filed with the application for the reissue, describes no mistake, inadvertence, or accident; that Boyle contents himself with the general statement that a misunderstanding existed between him and his attorney,

but what it was does not appear; that, from his testimony in the present suit, it was manifest that Boyle, as well as Fraser, was of the opinion, when the original patent was granted, that a flushing apparatus, constructed according to Boyle's design, but without the flushing chamber to secure an after-wash, would be valueless, because it would command no sale; that Boyle admitted that he had made a flushing apparatus minus the flushing chamber, which was not satisfactory, was not intended to be operative, and was not intended as a design for a water-closet that he expected to manufacture or sell; that if Boyle and Fraser made any mistake, or labored under any misapprehension, when the original patent was taken out, it consisted in the assumption that the omission of a flushing chamber on which the after-wash devices depended, and without which there was no means (so far as Boyle had then discovered) of securing an after-wash automatically, would leave a valueless combination, and hence that there was no need of claiming such a combination; and that, when the statements of Boyle and Fraser were fairly analyzed, such appeared to be all that could reasonably be said in support of the contention that the claims of the original patent were due to inadvertence and mistake.

The opinion further states that the testimony showed, to the entire satisfaction of the court, that Fraser was right in supposing that Boyle's flushing apparatus, without the flushing chamber, would be incomplete, and therefore practically valueless; that Hanson, whose patent covered a water-closet having a single water reservoir and an injector, but no flushing chamber or provision for an after-wash, and who caused Boyle to apply for the reissue in question, to invalidate Hanson's patent, admitted that a water-closet constructed according to the specification of the Hanson patent was defective and unsalable, and for that reason had never been put upon the market; that Boyle, Fraser, and Hanson substantially agreed in their testimony that some mechanism to secure automatically an after-wash—that is, to flush the closet and refill the bowl at the end of the flushing by a single pull at the lever—was essential to the successful operation of a flushing apparatus; that, without such mechanism, an apparatus constructed with double traps and an injector to exhaust the air between the traps would be useless, in the sense that there would be no demand for such an apparatus; and that it would seem that Boyle displayed as much ingenuity, if not more, in devising the mechanism to produce an after-wash, as in employing an injector, which was an old device, to pump air from between the traps.

The opinion then cites the cases of Miller v. Brass Co., 104 U. S. 350, 355; Mahn v. Harwood, 112 U. S. 354, 359, 5 Sup. Ct. Rep. 174, and 6 Sup. Ct. Rep. 451; and Coon v. Wilson, 113 U. S. 268, 277, 5 Sup. Ct. Rep. 537,—to the effect that a patent for an invention could not be lawfully reissued for the mere purpose of enlarging the claim, unless a clear mistake had been inadvertently committed in the wording of the claim.

The opinion of the circuit court further said that the testimony did not tend to establish that either Boyle or Fraser acted so inadvertently or under such misapprehension of either law or fact, when the claims of the original patent were formulated, as to justify a reissue of the patent; that it was obvious to them, as to any one, that the injector would perform its function as well with a single tank as with a tank and flushing chamber combined; that both of them believed that a water-closet constructed according to Boyle's design, but without provision for an after-wash, would be valueless in the market; that in that belief they were right; that Boyle had discovered no method of producing an after-wash automatically by using a single water tank, and hence both he and Fraser regarded the flushing chamber as one of the essential features of the flushing apparatus intended to be manufactured, and accordingly claimed it industriously in all of the important claims; that even though they claimed the injector in combination with a part which was nonessential to its operation, and thereby limited the claim, yet they did so in pursuance of a well-defined purpose, not based upon a misconception of matters of fact or ignorance of law, so far as the records before the commissioner of patents or the proof in this case showed; that the injector was an old device when Boyle adopted it; that it could be claimed only in combination with other parts which would together produce a new result or effect, or constitute a new machine; that Boyle placed the injector in combination with certain other old parts or devices which he deemed it necessary to employ, to make a new flushing apparatus that would be operative and useful; that by so doing he made each element of the combination material, and was entitled to be protected in the use of the combination so formed and claimed; that his sole purpose in asking for a reissue was to slough off one element of the combination, and so reduce the parts embraced in the claim that it would be impossible for any other person to use an injector in the construction of a double-trapped water-closet, without paying tribute to his patent; and that, as the claims are enlarged in the reissue, it would be unlawful for a mechanic to use an injector in the construction of a flushing apparatus, even if he should succeed in doing what Boyle failed to accomplish,—that is to say, produce an after-wash automatically by the use of a single tank,—because the parts with which the injector has been combined in the

claims of the reissue are so few that they must necessarily all be used to work the injector.

The opinion further observed that if the injector were new with Boyle, and had not been claimed in the original patent, it might be proper to interpret the law liberally in favor of Boyle, to enable him to realize the full benefit of his invention; that an injector is an old device, and Boyle merely adopted it and applied it to a new use; and that he ought to be limited to that combination in which he deliberately placed and claimed it.

The conclusion of the opinion was that the reissue, being granted merely to enlarge the claims, could not be sustained, citing Burr v. Duryee, 1 Wall. 531, and Gill v. Wells, 22 Wall. 1; that the failure to claim the particular combination not claimed in the original patent, but claimed in the reissue, was not due to any such inadvertence or mistake as would authorize the claiming of it in the reissue; and that the failure to claim such combination originally occurred under such circumstances, and was accompanied with such full knowledge of all material facts, as to amount to an abandonment of that particular combination to the public.

We are unanimously of the opinion that these views of the circuit court are sound, and that it is unnecessary to consider the point made by the defendant that the reissue was invalid because it lacked novelty and invention. It is not contended that the defendant has infringed any other claims of the reissue than claims 1 and 2; and we think it entirely clear that the defendant has not infringed any of the claims of the original patent. The defendant had no flushing chamber in any flushing apparatus made by it; and such flushing chamber was an essential element in the specification and drawings of the original patent, and was one of the necessary elements in each of the six claims of the original patent, as made. It is impossible to examine the drawings of the original patent and see that the flushing chamber could be dispensed with in the structure. The original specification says that the invention of Boyle "has for its principal object to cheapen and simplify the overhead flushing apparatus." If the idea of constructing an apparatus without the flushing chamber had occurred to Boyle, he would have set forth such a construction in one of the figures of his drawings, because the omission of the flushing chamber would have promoted both cheapness and simplicity. The drawings, however, contradict the possibility of making the structure without a flushing chamber. The entire text of the original specification shows nothing but the invention of a structure containing both a tank and a flushing chamber. That chamber is referred to in the text of the original specification 31 times.

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We think that, on all the facts of this case, no one of the claims of the reissue can be construed as valid in leaving out the flushing chamber as an element of the combination, inasmuch as every claim of the original patent contained it. Prouty v. Ruggles, 16 Pet. 336, 341; Brooks v. Fiske, 15 How. 212, 219; Burr v. Duryee, 1 Wall. 531; Reckendorfer v. Faber, 92 U. S. 347, Fuller v. Yentzer, 94 U. S. 288; Railway Co. v. Sayles, 97 U. S. 554; Water-Meter Co. v. Desper, 101 U. S. 332.

Moreover, the matter above printed in italics, in the right-hand column, taken from the new specification, is new matter, inserted evidently for the purpose of laying a foundation for the two expanded claims in the reissue, which it is alleged the defendant infringes. In the reissue, the flushing chamber forms an element in the combination claimed in each claim, except claims 1, 2, and 4; and, to lay the foundation for leaving out the flushing chamber as an element in claims 1, 2, and 4 of the reissue, the statement is made in the specification of the reissue of the new matter that the flushing chamber "has no function of its own, and constitutes essentially a mere enlargement of the upper portion of the flushing pipe, to the same effect as the ordinary 'service box' commonly used by plumbers."

In the specification of the original patent, the flushing chamber had been made an essential element in each of the six claims. The application for the Hanson patent was filed in the patent office, June 12, 1883, although the patent was not granted until November 25, 1884, and it was pending in the patent office during more than six months before Boyle's original patent, No. 291,139, was granted, January 1, 1884. The Hanson patent shows a flushing apparatus wherein the injector principle is used for exhausting the air in the confined space between the two traps, by the use of one tank containing water for flushing the basin. It was not until Boyle obtained knowledge of the Hanson patent that he conceived the idea of claiming such a construction as had been patented to Hanson. Then, and not until then, he announced the idea that it was of value to do away with the flushing chamber, although the specification of his original patent, in its text and drawings and claims, emphasized the importance of the flushing chamber as an element in every one of his combinations. The specification, drawings, and claims of the original patent do not suggest the idea that the flushing chamber "has no function of its own." There is nothing in the original patent which suggests any such combination as is claimed in claims 1, 2, and 4 of the reissue, or which suggests the possibility that Boyle's invention could be operated by a combination which omitted the flushing chamber as an element thereof. Every one of the elements which is made

a part of the several combinations claimed in the original patent is thereby made material to such combinations. Eames v. Godfrey, 1 Wall. 78; Burr v. Duryee, Id. 531; Case v. Brown, 2 Wall. 320; Gould v. Rees, 15 Wall. 187; Gill v. Wells, 22 Wall. 1; Fuller v. Yentzer, 94 U. S. 288; Powder Co. v. Powder Works, 98 U. S. 126; Leggett v. Avery, 101 U. S. 256; James v. Campbell, 104 U. S. 356; Coon v. Wilson, 113 U. S. 268, 5 Sup. Ct. Rep. 537; Parker & Whipple Co. v. Yale Clock Co., 123 U. S. 87, 8 Sup. Ct. Rep. 38; Electric Gas Lighting Co. v. Boston Electric Co., 139 U. S. 481, 11 Sup. Ct. Rep. 586; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. Rep. 825.

Decree affirmed.

(148 U. S. 228)

GAINES et al. v. CALDWELL, as Judge of the United States Circuit Court, and GEORGE G. LATTA.

GAINES et al. v. CALDWELL, as Judge of the United States Circuit Court, and D. C. RUGG.

(March 20, 1893.)

No. 12 Original.

No. 13 Original.

APPEAL—DECISION—REVERSAL AND MODIFICATION—DUTY OF TRIAL COURT—MANDAMUS.

1. A circuit court has no power to modify its decree, when the cause is remanded after an appeal to the supreme court, otherwise than is provided for by the opinion and mandate so remanding the cause, although subsequent cases in the supreme court may have established principles inconsistent with those on which such opinion and mandate were founded.

2. A circuit court entered a decree that complainant recover possession of certain land, and have an accounting. On appeal the supreme court held that there was no error in the proceedings below in respect to the title and possession of the lands, but reversed the decree for error in certain items of the accounting, and remanded the cause for further proceedings in conformity with the opinion. *Held*, that the decree on appeal amounted to an affirmance on all questions except the accounting, and that its construction was not a matter for the discretion of the circuit court, which should enter a decree accordingly. Ex parte Washington & G. R. Co., 11 Sup. Ct. Rep. 673, 140 U. S. 91, followed.

3. A change in the decree of the circuit court, in the matter of the distribution of costs, is not permissible, under such a mandate and opinion.

4. Although an appeal might be taken from the circuit court because of its error in treating the decision of the supreme court as a reversal in all respects, and in admitting new testimony on questions other than the accounting, yet where such remedy is inadequate, because of the unavoidable delay, the supreme court may correct the error by mandamus to the circuit court.

Petitions by William H. Gaines and others for a writ of mandamus against Henry C. Caldwell, United States circuit judge, and others, to compel the entry of decrees in conformity with the mandate and opinion of the supreme court in the case of Goode v. Gaines, 12 Sup. Ct. Rep. 839, 145 U. S. 141. Granted.

N. M. Rose and G. B. Rose, for petitioners. John McClure and A. H. Garland, opposed.

*229 *Mr. Justice BLATCHFORD delivered the opinion of the court.

These cases grow out of what is known as the "Hot Springs Litigation," phases of which are reported in Hot Springs Cases, 92 U. S. 698; Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. Rep. 605; Lawrence v. Rector, 137 U. S. 139, 11 Sup. Ct. Rep. 33; and Goode v. Gaines, 145 U. S. 141, 12 Sup. Ct. Rep. 839. Goode v. Gaines covered also 14 other cases, one of which, Rugg v. Gaines, is involved in No. 13 original, and another of which, Latta v. Gaines, is involved in No. 12 original.

The case involved in No. 13 original was a bill in equity filed by William H. Gaines and Maria, his wife, in the circuit court of the United States for the eastern district of Arkansas, against D. C. Rugg and George W. Barnes, in which a decree was entered by that court on November 11, 1887, on the report of a special master. The decree overruled the exceptions of the defendant Rugg to the report, and decreed that there was due to the plaintiffs for rent, according to the terms of a certain lease, from the date of the award to the date of the filing of the bill, $1,016.38. That there was due to them since that date, and until the filing of the master's report, for the rental value of the property, and interest, $811.68; and for the amount of rent to the date of the decree, $245; amounting in the aggregate to $2,073.06; from which were to be deducted the amount due the defendant Rugg for taxes paid, and interest, $298; the amount of purchase money paid by him to the United States for the land, and interest, *230 $158.40; and the present value of the improvements, $500. Those sums amounting in the aggregate to $956.40, which taken from the $2,073.06, left the sum of $1,116.66, which the court found to be the balance due to the plaintiffs; and it decreed that the plaintiffs recover from Rugg $1,116.66 and all costs of suit, and have execution therefor: that the plaintiffs recover from the defendants the possession of lot 14 in block 77 in the Hot Springs reservation, Garland county, Ark.; that a writ of possession issue; that serving a copy of the decree should be the writ; and that the special master be allowed $100 for his services as such. The decree further declared that the defendant Rugg prayed an appeal to the supreme court of the United States, which was granted, and it ordered that on his filing a bond in $3,616.66, and a bond for costs for $250, the decree be superseded pending the appeal. Maria Gaines, one of the appellees, subsequently died; and it was ordered that Albert B. Gaines, her executor, and seven other persons, her sole devisees and legatees, be made appellees.

The case was argued in this court on April 18, 1892, and decided May 2, 1892; and the decree of this court was that the decree of the circuit court be reversed, each party to pay one half of the costs in this court. The mandate of this court, dated May 24, 1892, recited its decree, and ordered that the cause be remanded to the circuit court "for further proceedings to be had therein in conformity with the opinion of this court," and commanded the judges of the circuit court "that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

The bill of complaint of Gaines and his wife, which was filed May 23, 1884, against Barnes and Rugg and two other defendants, alleged, in substance, that under the laws of the United States governing the entry and sale of lands in the reservation at Hot Springs, Ark., they were entitled to enter and purchase lot 14, in block 77, in Hot *231 Springs; that the Hot Springs commission, through a mistake of law, permitted Barnes, assignee of Mary Waldron, who had entered upon and held said lot as tenant of the plaintiffs, to enter the lot in his own right, over the application to enter it lawfully made by the plaintiffs; that, by virtue of that error, Barnes, as assignee of the tenant, had procured a patent for the lot from the United States; and that Rugg had succeeded to the title of said tenant and Barnes. The bill prayed that the defendants might be held to be trustees for the benefit of the plaintiffs; that an account be had of the rents received by the defendants on the lot, and a decree be made for such rents, and for the possession of the lot; and for all other proper relief. On December 6, 1884, Rugg filed his answer to the bill, setting up various defenses. On November 10, 1886, the bill was dismissed as to the defendants other than Barnes and Rugg.

On the hearing of the case the circuit court found and decreed that the commissioners, by error and mistake of law, had awarded the right to purchase the lot to Barnes, who had sold it to Rugg, who had notice of the plaintiffs' claim to it; that under such erroneous ruling a patent had issued to Barnes. And the circuit court decreed that the title of Rugg to the lot be divested out of him, and be vested in the plaintiffs, and their heirs and assigns, forever; that a reference be made to a master to take an account of the rents on said lot, the taxes paid and improvements placed on it, with directions to report an account of the same; and that the plaintiffs recover all costs of suit. On a hearing on the report of the master, the final decree of November 11, 1887, was made, in the terms before stated. This court, in each of the 15 cases, including the two involved respectively in No. 13 original and No. 12 original, held that no error was committed by the circuit court in any matter relating to the title or possession of the lands, but that error had been committed in allowing to the plaintiffs, according to the account taken by the master, for rents which accrued before the bills were filed. It therefore reversed the decrees below, and remanded the several causes, with a direction for further proceedings in conformity *232 with the opinion of this court, the costs in this court to be equally divided. The opinion is reported as Goode v. Gaines, 145 U. S. 141, 12 Sup. Ct. Rep. 839.

On the 1st of June, 1892, the mandates of this court in the two cases were presented to the circuit court, and were filed there and entered of record. On the same day, the plaintiffs in the Rugg Suit presented to the circuit court a petition accompanying the mandate, and praying for the entry of a decree that all the right, title, claim, and interest of the defendants in and to lot 14, in block 77, in the city of Hot Springs, be divested out of them, and be vested in the plaintiffs; that an account between the defendants and the plaintiffs be stated in accordance with the directions contained in the mandate; that, in taking the account, the defendants be charged with the rental value of the lot from May 23, 1884, (the day the bill was filed,) or during such portions of that time as they had kept the plaintiffs out of the possession thereof, down to the date of the proposed decree, with interest on the same from the end of each year at 6 per cent. per annum,—no additional rent, however, to be charged to the defendants by reason of any improvements placed upon the lot by them; that the plaintiffs be charged with all taxes paid by the defendants on the lot from the day the bill was filed, with interest on the same from the time of such payments until the date of the decree at 6 per cent. per annum, and also with the present value of all improvements placed by the defendants upon the lot, as the same might appear at the date of the decree, and with the sum of $120 paid by the defendants to the United States for the lot, with interest on the same at 6 per cent. per annum from January 1, 1882; that the defendants pay all the costs of the plaintiffs in the cause in the circuit court; that the plaintiffs have execution therefor as at law; and that the special master proceed to state an account between the parties according to the terms of the decree, and, to that end, take testimony, in writing, of all witnesses produced, and report the same, with his proceedings and findings, to the court. On the 21st of December, 1892, the plaintiffs filed in the circuit court a petition praying for a writ of possession, commanding the marshal to put them in possession of the land mentioned in the decree.

On the 6th of January, 1893, Rugg filed in the circuit court his exceptions to the pro-

posed decree filed by the plaintiffs on June 1, 1892. Those exceptions embraced the propositions which are set forth in the margin.[1] On a hearing on the petition and exceptions, before the court, held by Judge Caldwell, one of the circuit judges, an order was entered on January 7, 1893, which stated that "the court is of the opinion that said exceptions are well taken, and that the defendant herein should be allowed, if he so elects, to take further testimony in support of his said exceptions, by way of defense to the title to the land in controversy, and that this cause should be set down upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands. It is, therefore, ordered, that said exceptions be sustained, and that said decree prepared as aforesaid be not entered; but, as the plaintiffs announce their purpose to apply to the supreme court of the United States for a writ of mandamus to compel the entry of said decree as prepared by the plaintiff's solicitors, and the court being willing to expedite the said proposed proceeding, it is further ordered that said proposed decree and the petition of the plaintiffs for the entry thereof be made a part of the record herein. And it is further ordered, that the petition for writ of possession filed herein by said plaintiffs be, and the same is hereby, overruled; and said plaintiffs except to said several rulings, and ask that their exceptions be noted of record, which is accordingly done."

Thereupon, the plaintiffs made an application to this court, on January 23, 1893, for leave to file a petition for a writ of mandamus commanding Judge Caldwell, as judge of the circuit court, to grant the petition for a decree, filed by the plaintiffs in that court, on June 1, 1892, and to order the issue of a writ of possession as prayed by the plaintiffs, or to make such other orders and decrees as might be deemed proper in carrying out the decree heretofore made in this cause by this court, and for all other proper relief.

On the 30th of January, 1893, this court made an order, returnable March 6, 1893, requiring the circuit judge to show cause why the writ of mandamus should not be issued. A return to the order has been filed, made by Judge Caldwell, and the case has been argued before this court. In his return to the order to show cause, in case No. 13 original, Judge Caldwell makes the statement which is set forth in the margin.[2] In Goode v. Gaines, 145 U. S. 141, 12 Sup. Ct. Rep. 839, this court adhered to its decision in Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. Rep. 605, touching titles to land in

[1] (1) That said proposed decree did not reverse the former decree.

(2) That it appeared by the proofs in the cause that just after the award, and many times afterwards, appellees declared themselves satisfied with the awards made by said commission, and that by various acts and declarations they had estopped themselves from setting up any title or right to said lot as against said Rugg.

(3) That said lot includes a piece of land not embraced in the lease made by Gaines to Waldron.

(4) That there were four heirs of Ludovicus Belding, under whom appellees claim, of whom said Maria Gaines was one, and that there is no proof in the record that the appellees ever acquired the title of two of said heirs, by name Henry and Albert Belding.

(5) That on the former hearing in the circuit court the court was of the opinion that one holding under a quitclaim deed could not be held to be an innocent purchaser for value, but that since that time the supreme court of the United States has held otherwise, and that there is no proof in the record to show that Rugg had such notice as would bind him.

(6) That in the absence of proof of the identity of lot 14, block 77, no final decree should be rendered.

(7) That there is no proof in the record that the lot described in the lease is identical with lot 14.

(8) Because there is no proof in the record that appellees ever acquired the interest of Albert and Henry Belding in said lot.

(9) Because there is no proof in the record that Rugg bought with notice of plaintiffs' claim, and because there is proof that he bought without such notice, and when plaintiffs were publicly proclaiming that they were content with the awards made.

(10) Because there is no proof in the record on which a decree for plaintiffs can be based.

(11) Defendant prays for a decree for one half of the costs of transcript used on the appeal.

(12) No judgment for costs should be rendered until the cause is finally disposed of.

[2] Among other exceptions to the proposed decree is the fifth, which is as follows: "(5) That one of the defenses relied upon by the appellant in this cause, at the hearing in which the former decrees were rendered, was, that he was a purchaser, for full value, from a person to whom the Hot Springs commission had awarded the lot in controversy, without notice of the claim or contention of the appellees, and exhibited a quitclaim deed showing such conveyance and purchase in good faith and as evidence of his title; that this honorable court was of the opinion at the former hearing of this cause that one holding under a quitclaim deed could not be regarded as a bona fide purchaser for value without notice, and that such a deed was not sufficient to put appellees to proof of notice; that one holding under a quitclaim deed could not avail himself of such a defense; that the supreme court of the United States, at the October term, 1891, (since the decision and ruling of this honorable court as aforesaid,) has held in the case of McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, that the question of whether one was a bona fide purchaser for value, without notice, was one that was not to be determined by a mere inspection of the muniments of title, and that one could as well be a bona fide purchaser for value, without notice, under a quitclaim deed, as one of warranty; that such a question was one to be settled by proof. Appellant states that there is no proof in the record showing that appellant had notice of the claim of the appellees, and now denies, as is already denied by answer, that he had such notice, and submits that no decree ought to be rendered on the mandate herein in favor of the appellees, as to do so would not be according 'to right and justice, and the laws of the United States,' in the absence of proof that the appellees had such notice as is averred in the bill of complaint."

Case No. 379, McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, and cases No.

*237 the Hot Springs reservation, and held that there were no facts in the 15 cases then before it (all being appeals from the circuit court of the United States for the eastern district of Arkansas) which took those cases out of the operation of that decision; but in view of the delay in commencing the suits, and the previous acquiescence of the plaintiffs in the possession by the defendants, this court limited the right of an account in equity of the rents of the premises to the date of the filing of the bills. It

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227, Goode v. Gaines; No. 302, Smith v. Gaines; No. 303, Dugan v. Gaines; No. 304, Cohn v. Gaines; No. 305, Allen v. Gaines; No. 306, Madison v. Gaines; No. 307, Rugg v. Gaines; No. 308, Garnett v. Gaines; No. 309, Garnett v. Gaines; No. 310, Rugg v. Gaines; No. 311, Granger v. Gaines; No. 312, Neubert v. Gaines; No. 313, Sumpter v. Gaines; No. 314, Latta v. Gaines; and No. 315, Latta v. Gaines,—12 Sup. Ct. Rep. 839, were all cases growing out of what is known as the "Hot Springs Reservation Litigation." There were some questions common to all the cases. The question as to whether the action of the Hot Springs commissioners was final (Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. Rep. 605) was common to all of them. The question as to the rights of those parties who had purchased and paid value without notice of any defect in the title, but who accepted quitclaim deeds from their grantors, was not common to all the cases, but was raised in several of the cases upon pleadings and proofs identical in substance and legal effect. Among the cases in which that question was raised upon substantially the same pleadings and proofs was case No. 379, McDonald v. Belding, and case No. 314, Latta v. Gaines, and case No. 307, Rugg v. Gaines. In the circuit court, most, if not all, of these cases were tried at the same time, and treated very much as one case. On appeal in this honorable court it appears that the cases were all submitted and heard together, with the exception of case No. 379, McDonald v. Belding, which was argued, submitted, and decided by itself. Why this case was separated from the others in the argument and submission in this honorable court, respondent is not advised. It appears from the report (145 U. S. 141, 12 Sup. Ct. Rep. 839) that cases numbered 227, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, and 315 were argued April 18, 1892, and decided May 2, 1892, and that case No. 379, McDonald v. Belding, was submitted April 26, 1892, and decided May 16, 1892. In the case of McDonald v. Belding this honorable court said: "Under all the circumstances it cannot be held that McDonald, although taking a quitclaim deed, was chargeable, when he purchased, with notice of any existing claim to the property upon the part of the plaintiffs or of either of them," and reversed the decree of the circuit court, and remanded the cause, with directions to the circuit court to dismiss the bill. The same pleadings, the same proofs, and the same "circumstances," in substance and legal effect, are present in the case of Latta v. Gaines and others, and Rugg v. Gaines and others. On this point the pleadings and proofs in the last two cases may fairly be said to be identical with the pleadings and proofs in the case of McDonald v. Belding.

The contention of the petitioners is that, while the mandate of this honorable court apparently reverses the decree of the circuit court, that this honorable court did not intend so to do, but only intended to reverse so much of said decree as related to the mode of stating the account of rents and profits between the parties. Such an intention could have been made perfectly clear by affirming so much of the decree as vested title in the petitioners, and directing how the account should be stated. Instead of doing that, it reversed both the interlocutory and final decrees, and remanded the cause to be proceeded in according to law and justice, and the laws of the United States, in conformity to the opinion of this honorable court.

If the supreme court has not in fact reversed that portion of the decree of the circuit court which vested title in the petitioners, then there is no necessity for entering any portion of the proposed decree, save that which directs the manner of stating the account. If it has reversed that portion of the decree vesting title in the petitioners, and remanded the cause to be proceeded in in accordance with the opinion of this honorable court, the determination of what the opinion directs calls for the exercise of judicial functions and discretion, and it is submitted that such discretion cannot be controlled by mandamus.

In the McDonald-Belding Case it appears that one Flynn leased a lot in the Hot Springs reservation from Belding and made some improvements thereon; that, after the appointment of the Hot Springs commission, Flynn, on the ground that he had made the improvements on the lot, made claim to it, and Belding claimed that he was entitled to it by reason of previous occupation and possession, and that he held continuous possession through Flynn, his tenant. The commission awarded the lot to Flynn, who afterwards, and before the commencement of suit by Belding, sold and conveyed the same to McDonald by a quitclaim deed. After the sale to McDonald, Belding commenced suit against both of them, seeking to charge them as trustees and to compel them to convey to him, alleging that McDonald purchased with full knowledge of his (Belding's) equities. McDonald denied notice of the alleged equities of Belding, and claimed to be an innocent purchaser for value. The circuit court held that one holding under a quitclaim deed could not be regarded as an innocent purchaser for value, and rendered a decree in favor of Belding. This honorable court, on appeal, held that McDonald, under the quitclaim deed, could be, and was, an innocent purchaser for value, and reversed the decree of the circuit court, and directed that the bill should be dismissed.

In view of the uniform character of the Hot Springs litigation, and the customary mode and manner of hearing and deciding what are known as the "Hot Springs Cases," respondent believes that the circuit court, in the disposition of said cases reversed by this honorable court, and remanded to the circuit court with instructions to proceed therein "according to right and justice, and the laws of the United States," should give effect to the several decisions of this honorable court in the Hot Springs Cases, and that, where the pleadings and proofs are identical with the pleadings and proofs in McDonald v. Belding, the circuit court should apply the doctrine of that case, and that the opinion in that case should be read into, and treated as if it were a part of, the opinion in the consolidated case reported under the title of Goode v. Gaines, in such of the cases embraced therein as are on all fours with the case of McDonald v. Belding.

Respondent respectfully submits to the judgment of this honorable court, and will enter and enforce, by proper decree, any order or decree made by this honorable court in and about the matters complained of; and respondent respectfully refers to the brief of the counsel for George G. Latta and D. C. Rugg, which will be filed in this cause, and the authorities therein referred to, to show why a peremptory writ should not issue.

appears from the opinion of this court in Goode v. Gaines that the only matter with which it was dissatisfied in the decrees of the circuit court was the direction to the master in the interlocutory decrees in respect of the accounting, and the result finally adjudged thereon. This court said that, *238 in its opinion, the measure of relief awarded and allowed by the circuit court in respect of the accounting would operate harshly and oppressively upon the defendants; that the account between the parties should be stated, as to both debit and credit, from the day the bills were filed, with the exception of the credit for the amounts paid to the government for the lots, of which payments this court regarded the plaintiffs as getting the entire benefit; that no increased rent should be allowed on account of the improvements, as the plaintiffs were to be held to their value only as of the date of the decrees; and that, in other words, the defendants should be charged with rental value from the date of the filing of the bills to the rendition of the decrees, with interest, and should be credited with taxes, etc., paid after the date of the filing of the bills, with interest, and also with the amounts paid the government for the different parcels, with interest from the dates of payments, as well as with the value of the improvements in each instance at the time of the rendition of the decrees. Because this court was dissatisfied with the decrees in respect of the accounting, and only for that reason, it reversed the decrees; but it remanded the causes to the circuit court with a direction, as the opinion and the mandate explicitly state, for further proceedings to be had therein in conformity with the opinion of this court. It did not disturb the findings and decrees of the circuit court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion, taken together, although they used the word "reversed," amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects.

It is contended for the respondent that the construction of the intent and meaning of the opinion of this court in Goode v. Gaines was a matter for the exercise of judicial discretion by the circuit court. But we are of opinion that it is proper for this court, on this application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the circuit court has erred, or acted beyond its province, in construing the mandate and *239 opinion, to correct the mistake now and here, and to do so by a writ of mandamus.

*Obeying the mandate of this court, and proceeding in conformity with its opinion, in the present case, were not matters within the discretion of the circuit court; and therefore the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised do not apply to the present case. The opinion of this court proceeded distinctly upon an approval by it of the action of the circuit court in respect to the title and the possession, and a disapproval only of the method of accounting. As to the account to be taken under the directions given by this court in its opinion in Goode v. Gaines, the circuit court had a certain discretion; and its further proceedings under such accounting could be reviewed only on appeal. But the circuit court had no right to empower the defendant, as it undertook to do by its order of January 7, 1893, to take further testimony in support of his exceptions, by way of defense to the title to the land in controversy, or to set down the cause for hearing upon the issues formed by the pleadings and such exceptions as to the title to the land, or to sustain the exceptions, or to refuse to enter the decree proposed by the plaintiffs, or to refuse to grant to the plaintiffs a writ of possession. What the proposed decree of the plaintiffs contained was a direction that the right, title, claim, and interest of the defendants to the lot in question be divested out of them, and vested in the plaintiffs; that an account between the parties be taken in accordance with the directions contained in the mandate; and that the account be taken on certain principles stated, which agree entirely, so far as we can see, with the directions contained in the opinion of this court in Goode v. Gaines, in respect to the accounting.

It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the circuit court; that the circuit court had a right, therefore, to proceed in the case, in the language of the mandate, not merely "in conformity with the opinion and decree of this court," but also "according to right and justice;" and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, "by *240 way of defense to the title to the lands in controversy," and to set down the cause "upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;" in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court.

As the decree of the circuit court, made November 11, 1887, directed that the plaintiffs recover the possession of the lot from the defendants, and have a writ of possession, and that was a determination that the title of Rugg to the lot in question be divested out of him, and be vested in the

plaintiffs, it was perhaps unnecessary to insert that provision again in the new proposed decree. But, in view of the language of the opinion and mandate in regard to a reversal of the decree, it can do no harm, for in fact it was what was decided both by the circuit court and by this court.

The order made by the circuit court on January 7, 1893, states that the plaintiffs excepted to the several rulings of the court made in that order, and that such exceptions were entered of record.

It is, we think, very plain that so much of the decree of the circuit court of November 11, 1887, as was not disapproved by this court still stands in full force. Whatever there is to impair that decree must be sought for only in the opinion, decree, and mandate of this court. This court held that no objection could be sustained to the provisions of the decree of the circuit court as to the title. It found error only in the rules prescribed by the circuit court for the taking of the account, and the decree of that court was reversed only for the purpose of taking an account according to the principles laid down by this court. As the decree of the circuit court in regard to the title was not invalidated by the action of this court on the appeal, the circuit court had no right to set aside that decree, as respected the title, nearly five years after it was rendered. The decree was beyond the control of the circuit court, unless on a bill of review duly filed; *241 and the time for filing a bill of review had long ago elapsed. The circuit court could do nothing to affect the decree, except in obedience to the mandate of this court. Chaires v. U. S., 3 How. 611, 620.

What remained for the circuit court to do was only the taking of the account in the manner indicated by this court. This court, in its opinion, overruled all the objections taken to the title; and to say that its decree virtually reversed the whole decree of the circuit court is to say that it has done that which it said, in its opinion, ought not to be done. Under its opinion, it intended to reverse only a part of the decree, and that is all that it did. It substantially affirmed that part of the decree below which related to the title, and virtually only modified the entire decree, and that only in respect to taking the account.

In Skillern's Ex'rs v. May's Ex'rs, 6 Cranch, 267, this court had reversed the decree of the circuit court and remanded the cause for further proceedings; and, after the mandate of this court had been received by the circuit court, that court discovered that the cause was not within its jurisdiction. The question being certified to this court as to whether the circuit court could then dismiss the case for want of jurisdiction, this court held that, as the merits of the case had been finally decided by it, and its mandate required only the execution of its decree, the circuit court was bound to carry that decree into execution, although the jurisdiction of the circuit court was not alleged in the pleadings. This court has even gone so far as to say, in Bridge Co. v. Stewart, 3 How. 413, that after a case has been here decided upon its merits, and remanded to the court below, and is again brought up on a second appeal, it is too late then to allege that this court had not jurisdiction to try the first appeal.

To allow the exceptions filed in the circuit court on January 6, 1893, is substantially to allow the filing of a bill of review of the decree of the circuit court made November 11, 1887, as to the title to the land, and of the decree of this court, which found that there was no error in that respect in the decree of the circuit court, and this without consent of the court. Southard v. Russell, 16 How. 547; Purcell v. Miner, 4 Wall. 519; Kingsbury v. Buckner, 134 U. S. 650, 671, 672, 10 Sup. Ct. Rep. 638. It has been distinctly held that a final judgment of this court is conclusive on the parties, and cannot be re-examined. Martin v. Hunter's Lessee, 1 Wheat. 304, 355.

In Ex parte Dubuque & Pac. R. Co., 1 Wall. 69, 73, a case where this court had reversed a judgment of a circuit court, and remanded the cause, with a mandate to that court to enter judgment for the other party, and the court below had thereafter received affidavits showing new facts, and granted a new trial, this court, by mandamus, ordered it to vacate the rule for a new trial, saying that the court below had no power to set aside the judgment of this court, "its authority extending only to executing the mandate." This principle was applied, also, in Ex parte Story, 12 Pet. 339; Sibald v. U. S., Id. 488; West v. Brashear, 14 Pet. 51; Bank v. Moss, 6 How. 31, 40; Corning v. Nail Factory, 15 How. 451; Noonan v. Bradley, 12 Wall. 121, 129; Tyler v. Maguire, 17 Wall. 253, 283; Stewart v. Salmon, 97 U. S. 361; Durant v. Essex Co., 101 U. S. 555; Mackall v. Richards, 112 U. S. 369, 5 Sup. Ct. Rep. 170, and 116 U. S. 45, 6 Sup. Ct. Rep. 234; Hickman v. City of Ft. Scott, 141 U. S. 415, 12 Sup. Ct. Rep. 9.

But we have had this matter before us very recently. In Railroad Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044, this court affirmed a judgment of the supreme court of the District of Columbia, which had, in general term, affirmed a judgment awarding to the plaintiff $6,195 as a recovery in an action of tort for damages for personal injuries sustained through the negligence of the defendant. Neither the special term nor the general term had said in its judgment anything about interest. This court, in its judgment, merely affirmed, with costs, the judgment of the general term, but said nothing about interest. The mandate of this court contained its judgment, and then commanded the court below that such execution and proceedings be had in the cause "as, according to right and justice, and the laws

of the United States, ought to be had," notwithstanding the writ of error. The court below, on the presentation to it of the mandate, entered up a judgment against the defendant for interest on the judgment of the special term from the date of that judgment as originally entered. The defendant took exception to such action, and then applied to this court for a writ of mandamus to command the court below to vacate its judgment entered on the mandate of this court, so far as it related to interest. This court held that the mandamus must be granted, irrespectively of the question whether a judgment founded on tort bore, or ought to bear, interest in the supreme court of the district from the date of its rendition; and it issued the mandamus commanding the court below to vacate its judgment so far as it related to interest, and to enter a judgment on the previous mandate of this court, simply affirming, without more, with costs, the original judgment of the general term. Ex parte Washington & G. R. Co., 140 U. S. 91, 11 Sup. Ct. Rep. 673. This court held that it was the duty of the court below to have entered a judgment strictly in accordance with the judgment of this court, and not to add to it the allowance of interest, and that the language of the mandate of this court, "that such execution and proceedings be had in said cause as, according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding," did not authorize the court below to depart in any respect from the judgment of this court. It further held that a mandamus would lie to correct the error, where there was no other adequate remedy, and where there was no discretion to be exercised by the inferior court, citing Sibald v. U. S., 12 Pet. 488; Ex parte Bradley, 7 Wall. 364, 376; Virginia v. Rives, 100 U. S. 313, 329; and, also, Perkins v. Fourniquet, 14 How. 328, 330; Ex parte Dubuque & Pac. R. Co., 1 Wall. 69; Durant v. Essex Co., 101 U. S. 555, 556; Boyce's Ex'rs v. Grundy, 9 Pet. 275.

In the present case, as we have before observed, there was no discretion to be exercised by the circuit court; and although it might have been admissible to raise the question by a new appeal to the proper court, yet, in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper.

*As to the suggestion that the views adopted by this court in its decision in McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, (decided by this court after the present cases were decided,) would, if applied to the present cases, have caused a different result in them, we are of opinion that, without conceding that such would have been the result, this court cannot, on well-established rules and principles, permit the circuit court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present cases.

As to the provision in the decree presented to the circuit court, June 1, 1892, that the defendants pay all the costs of the plaintiffs in the circuit court, it is sufficient to say that the decree of November 11, 1887, awarded to the plaintiffs a recovery from Rugg of all costs of the suit.

We therefore direct that a writ of mandamus be issued, in the terms prayed for in the petition. It is proper that the decree presented to the circuit court on June 1, 1892, should be entered. So far as it directs that the title to the land be divested out of the defendants, and be invested in the plaintiffs, it corresponds with the terms of the decree of the circuit court of November 11, 1887. So far as the petition for a mandamus asks that the judge of the circuit court be commanded to order the issue of a writ of possession, it corresponds with the decree of the circuit court of November 11, 1887, which ordered a writ of possession to issue, and that a service of a copy of the decree should be the writ. So far as the decree presented to the circuit court on June 1, 1892, ordered that the account be stated in accordance with the directions contained in the mandate, and directed the terms in which the account should be taken, and as to the rental value of the lot, the interest, taxes, value of improvements, and the amount paid by the defendant to the United States, with interest, the directions in such proposed decree correspond with the terms of the opinion of this court.

In all the particulars which we have above considered, case No. 12 original is also embraced. The same rulings are made as to that case as have been made in regard to No. 13 original, and a writ of mandamus in the same terms will be issued.

Writs of mandamus accordingly.

(148 U. S. 345)

ANKENY v. CLARK.

(March 27, 1893.)

No. 64.

ASSUMPSIT—PLEADING—DEPARTURE—VENDOR AND VENDEE—RESCISSION OF CONTRACT—RENT—APPEAL—REVIEW.

1. Plaintiff declared in assumpsit for the value of a quantity of wheat. The answer set up a note and chattel mortgage to secure the same, and alleged that the wheat was delivered and received in payment for such note. The replication stated a contract by the terms of which defendant was to convey certain land to plaintiff, who was to pay for the same by such note; that the wheat had been delivered, but that, by reason of defendant's inability to make title to the land, plaintiff had rescinded the contract. *Held*, that plaintiff might recover upon the complaint; the new matter in the replication not constituting a departure from the cause of action set forth in the complaint, within the provisions of the Code of Washington Territory. 20 Pac. Rep. 583, affirmed. Distler v. Dabney, (Wash.) 28 Pac. Rep. 335, distinguished.

2. An objection that a replication set up matter which was a departure from the original cause of action cannot be taken by defendant on appeal, when he failed to raise the question by demurrer or motion below, but, on the contrary, agreed to a change of venue after the pleadings had been perfected, entered into a stipulation as to the facts, and went to trial on the issues as made up.

3. The objection that plaintiff in his replication failed to plead rescission of the contract would, if demurrable, be curable by amendment, and could not, in a court of error, operate to invalidate the trial below.

4. A judgment of a territorial court on a question of practice should not be reversed by the supreme court of the United States because of the decision of the state courts in subsequent cases while the former cases are pending on appeal in the supreme court, the territory having been in the mean time admitted to the Union. Stutsman Co. v. Wallace, 12 Sup. Ct. Rep. 227, 142 U. S. 293, distinguished.

5. Act July 15, 1870, (16 St. at Large, p. 305,) requires the Northern Pacific Railroad Company, before it shall be entitled to a conveyance of the lands thereby granted, to pay into the treasury of the United States the cost of surveying, selecting, and conveying such lands; and, where it does not appear that such costs have been paid, a grantee of the company has not such title to the land as a vendee in a contract for the sale thereof can be compelled to accept. 20 Pac. Rep. 583, affirmed.

6. When a complaint to rescind such a contract alleges want of title in defendant, failure to aver such payment in the answer, or to admit the same in a stipulation as to the facts, is sufficient to warrant the holding that the title was defective.

7. When a contract for the sale of several parcels of land does not apportion the purchase money, on failure of title as to one parcel thereof, the purchaser may rescind as to the whole.

8. One who, after occupying land under a contract to purchase it, rightfully rescinds the contract, and abandons the land, because of the vendor's inability to make a good title, is not chargeable with rent. 20 Pac. Rep. 583, affirmed.

In error to the supreme court of the territory of Washington.

Action by Van Buren Clark against Levi Ankeny to recover the value of certain wheat delivered. Judgment for plaintiff. 20 Pac. Rep. 583. Defendant brings error. Affirmed.

*346 *Statement by Mr. Justice SHIRAS:

It appears from the record in this case that on October 20, 1882, at Walla Walla, in Washington Territory, Levi Ankeny, the plaintiff in error, entered into a contract with Van Buren Clark, the defendant in error, by which Ankeny agreed to sell and convey to Clark two quarter sections of land in Walla Walla county, in consideration of 12,000 bushels of wheat, to be delivered in three annual installments of 4,000 bushels each, and of the assumption by Clark of a mortgage of $3,000 on the land. This contract was evidenced by three written instruments as follows:

(1) A bond from Ankeny to Clark in the penal sum of $10,000, conditioned to convey the land to Clark upon his paying the consideration according to agreement.

(2) A "wheat note" from Clark to Ankeny, which reads as follows:

"Walla Walla, W. T., Oct. 20, 1882. For value received I promise to pay to Levi Ankeny, or order, twelve thousand (12,000) bushels of good, merchantable wheat, said wheat to be delivered to the owner of this note at any railroad station in Walla Walla county, Washington Ty., and payments to be made as follows: On or before Oct. 15th, 1883, four thousand (4,000) bushels; on or before Oct. 15th, 1884, four thousand (4,000) bushels; and on or before Oct. 15th, 1885, four thousand (4,000) bushels; the owner of this note to furnish sacks for said wheat."

(3) A chattel mortgage from Clark to Ankeny to secure the payment of the wheat note.

Under this agreement, Clark entered into possession of the land, and continued in possession of it until the fall of 1886.

In performance of this contract, Clark, in December, 1883, delivered to Ankeny 4,167 bushels of wheat, and in September, 1885, he delivered 8,600 bushels, making 767 bushels more than the contract called for. Ankeny accepted this wheat in fulfillment of the contract.

After the delivery of the wheat to Ankeny, Clark demanded a deed for the land. This Ankeny neglected to give, putting Clark off from time to time upon one pretext or another, until Clark, becoming impatient, finally insisted either upon a deed to the land or payment for his wheat. Clark was then referred by Ankeny to the latter's attorneys, who informed him that he could have a warranty deed to the quarter on the even section and a quitclaim deed to the quarter on the odd section, or the "railroad land," as it was called, and they further informed him that if the Northern Pacific Railroad Company should not get title to the odd section, and he should be obliged to procure title from the government, Ankeny would pay the necessary expenses of obtaining title in that way. This does not seem to have satisfied Clark, and on November 16, 1886, he served upon Ankeny the following notice:

"Walla Walla, W. T., Nov. 16, 1886. Levi Ankeny, Esq., Walla Walla, W. T.—Dear Sir: I have performed my part of the contract in the purchase of the land described in your bond to me. I have learned that you have no title to one hundred and sixty acres of it. You have refused to give me anything more than a quitclaim deed to this part of the land. I cannot accept such a deed. It was not what the contract called for. Unless within five days from this date you convey a perfect title to me to the whole of the land described in the bond by a good and sufficient conveyance, I will, at the end of that time, abandon this land, and surrender the possession to you, and look to you for such compensation as the law allows me on account of violation of the contract. Respy, V. B. Clark."

Ankeny seems to have paid no attention to this notice, and Clark, several days thereafter, taking a witness with him, went to Ankeny's bank, and formally surrendered

possession of the land to Ankeny. Clark then abandoned possession of the land, and has not occupied it since.

Subsequently to all this, and on the 19th day of March, 1887, Clark brought this action in the district court of the first district to recover from Ankeny the value of 12,767 bushels of wheat delivered under the contract. The case was tried before a jury, who, upon the direction of the court, brought in a verdict for the plaintiff, and judgment was given upon the verdict.

The defendant took the case in error to the supreme court of the territory of Washington, which affirmed the judgment of the district court. The case is now before this court on error to the supreme court of the territory of Washington.

John H. Mitchell, for plaintiff in error.
John B. Allen, for defendant in error.

*Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

Numerous errors have been assigned to the rulings of the court below. The first has to do with a question of pleading. The plaintiff declares in assumpsit for the value of a certain amount of wheat by the plaintiff sold and delivered to the defendant. To this the defendant answered, setting up the execution of a so-called "wheat note" and a chattel mortgage to secure it, and alleging that "all the wheat delivered to defendant by plaintiff was delivered and received as payment on said note, and not otherwise." In this answer no mention was made of any contract for the sale of land. The plaintiff, by way of replication, made a full statement of the contract for the sale of the land, alleging performance on his part, and default on the part of the defendant. He averred that, after he (the plaintiff) had so performed said contract by the delivery of the wheat to the defendant, he duly demanded that defendant should convey the land to the plaintiff, as by his bond he had undertaken to do; that the defendant neglected and refused so to do, and still neglected and refused to grant and convey said land to the plaintiff by any good and sufficient deed; and that said defendant had no title to one parcel of the land described in the bond; and that, since the making of the contract, defendant was not the owner or seised in fee or at all of said land. He further alleged that the wheat mentioned in his complaint or declaration, except an excess thereof over the requirements of said bond, was the purchase price of the land; and that, by reason of defendant's neglect and refusal and inability to perform the said contract, the defendant became and was indebted to plaintiff for the reasonable value of said wheat; and that such demand constituted the cause of action in the complaint pleaded.

In disposing of the contention of the plaintiff in error that the pleadings disclose a departure by the plaintiff below from the cause of action set forth in his complaint, and a resort to a new and different cause of action in his replication, we are, of course, entitled to regard the allegations of fact contained in the complaint and replication as true.

It would therefore appear that there was a contract whereby the defendant below was to grant and convey unto the plaintiff certain tracts of land by a good and sufficient deed of conveyance, in consideration whereof the plaintiff was to deliver to the defendant 1,200 bushels of wheat; that the plaintiff performed his part of the contract by delivering the said wheat which was received by the defendant; that the plaintiff thereupon demanded of the defendant a conveyance of the land; that defendant neglected and refused to grant and convey said tracts of land by any good or sufficient deed; and that, as to one of the tracts, the defendant had no title to convey.

Upon such a state of facts it seems plain that the plaintiff had a right to treat the contract as at an end, and to bring an action to recover the value of the wheat he had delivered to the defendant, and such other damages as he might have suffered by reason of that failure of the latter to perform his part of the contract; and, a fortiori, that he might waive any demand for consequential damages, and confine his claim to a demand for the value of the wheat. In the latter event he might well assert his claim by a count alleging the delivery and receipt of the wheat, a consequent duty on the defendant to pay its value, and a demand for the same.

Under the ordinary system of pleadings, an action of assumpsit would lie to recover back purchase money paid upon a contract of sale which had been rescinded.

Smith expresses the doctrine, in his note to Cutter v. Powell, 2 Smith, Lead. Cas. (7th Amer. Ed.) 30, thus:

"It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the rescission."

The learned author sustains his proposition by citing Withers v. Reynolds, 2 Barn. & Adol. 882; Planche v. Colburn, 8 Bing. 14; Palmer v. Temple, 9 Adol. & E. 508.

Well-considered American cases are to the same effect. Eames v. Savage, 14 Mass. 425; McCrelish v. Churchman, 4 Rawle, 26; Baston v. Clifford, 68 Ill. 64; Stahelin v. Sowle, 87 Mich. 134, 49 N. W. Rep. 529.

It is, however, contended that, under the Code of Washington, a different rule prevails, and the case of Distler v. Dabney, 28 Pac. Rep. 335, decided by the supreme court of

that state, is cited. That decision was made after the trial of the present case, and while the appeal from the supreme court of the territory of Washington was pending in this court; but it is claimed that, under the doctrine of Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. Rep. 227, when, pending an appeal from a territorial court to the supreme court of the United States upon a question of local law, the territory is admitted as a state, and the supreme court of the new state reaches an opposite conclusion upon the same question, the latter decision will be followed by the supreme court of the United States.

It does, indeed, appear that, in the case of Distler v. Dabney, the supreme court of the state of Washington has construed the Code of that state as meaning that the plaintiff's complaint must contain his real cause of action, and that he cannot be permitted to meet matter set up in the answer by resorting, in his replication, to a new cause of action, inconsistent with the statement made in the complaint. The facts of that case were not dissimilar to those of the case in hand, and it must be conceded that if we are bound to adopt the construction put by the supreme court of the state on the Code of the state as applicable to the Code of the territory, notwithstanding an opposite view of the supreme court of the territory, it would lead to a reversal of the judgment in this case, unless, indeed, the objection was waived by the subsequent conduct of the defendant.

It would seem to be altogether unreasonable that the judgments of territorial courts, in mere matters of procedure, should be subject to reversal, because of decisions made by the courts of the state in subsequent cases, while the former cases were pending on appeal in this court. Nor do we understand the case of Stutsman Co. v. Wallace to so hold. In that case there were involved a substantive right to an estate and a construction of the tax laws of the state and territory, and it was pointed out, in the reasoning of this court, that our mandate must be issued to the supreme court of the state, which, in its turn, directs the state court succeeding to the district court of the territory to proceed in conformity to our judgment; and it would seem to irresistibly follow that, in the enforcement of a law common to the territory and to the state, this court must, in pursuance of the well-settled rule, adopt the construction put upon the local statute by the highest court of the state.

The distinction between that and the present case is obvious. The question before the territorial courts, in the particular we are now considering, involved no substantive right, but a mere matter of orderly procedure in the trial court, and we are satisfied with the ruling of the supreme court of the territory that the district court did not err in regarding the facts set up in the replication as properly pleaded to the matters alleged in the answer, and as not, in substance, a departure from the complaint.

The course of the district court at the trial was approved by the supreme court of the territory, and surely cannot now be impugned because, in a later and different case arising in the courts of the new state, the supreme court of the state declares the methods to be followed by the courts of the state. Even if, as a matter of technics, the replication was a departure from the complaint, it is not easy to see how the defendant could have availed himself of such a defect in a court of error. His proper course, if he wished to invoke the rigor of the law, was to raise the question either by a demurrer or by a motion; but his conduct in agreeing to a change of venue, after the pleadings had been perfected, in entering into a stipulation as to the principal facts of the case, and in going to trial upon the issue as made up, ought to preclude him from opening the pleadings at the trial.

These views also dispose of the further objection that the plaintiff did not, in his replication, plead a rescission of the contract. But the reply did allege facts that gave a right to rescind, and the plaintiff's evidence, if true, sustained those allegations. Such a defect, if it were one, would, if demurred to, have been curable by amendment, and cannot operate in a court of error to invalidate the trial below.

Assuming the sufficiency of the pleadings, we are brought to consider the second question in the case, and that is whether, upon the evidence, the plaintiff was entitled to a verdict and judgment. The trial court having thought fit to peremptorily direct the jury to find a verdict for the plaintiff in a stated amount, the defendant is obviously entitled to the benefit of every fact and presumption which might have justly controlled the jury in his favor, or, in other terms, the plaintiff must be able to sustain his judgment as the proper conclusion of the law upon the uncontradicted or admitted facts of the case.

There were three principal matters of contention in the trial court:

(1) Did Ankeny have a good title to the northeast quarter of section 19, being part and parcel of the lands which he agreed to sell to Clark?

(2) Did Ankeny make an efficient tender of a good and sufficient deed of conveyance?

(3) Supposing that Ankeny failed in one or both of these particulars, was Clark disabled from availing himself of such failure by having himself failed to pay the mortgage for $3,000 upon the land contracted for, and which he had agreed to pay as part of the purchase money, and did he waive tender of a deed?

We shall briefly consider these subjects in their order. And, first, as to Ankeny's title to the northeast quarter of section 19. It

was conceded, in the stipulation filed, that the main line of the Northern Pacific Railroad Company was completed in the year 1880, on the route and line shown by certain maps of definite location attached to the stipulation, and that after examination and report by commissioners, as provided in the act of congress, the road was accepted by the president of the United States; that on May 30, 1881, the Northern Pacific Railroad Company executed and delivered to one Peter Huff a warranty deed for said northeast quarter of section 19; and that on December 13, 1881, the said Peter Huff, together with his wife, executed and delivered to Ankeny a warranty deed for the said northeast quarter of section 19. Upon this state of facts it was contended by the plaintiff, Clark, that there was nothing to show that the Northern Pacific Railroad Company had paid into the treasury of the United States the cost of surveying, selecting, and conveying the same, as prescribed by the act of July 15, 1870, nor to show that any patent had been granted to the railroad company; and that hence, within the cases of Railway Co. v. Prescott, 16 Wall. 603, Railway Co. v. McShane, 22 Wall. 444, and Northern Pac. R. Co. v. Traill Co., 115 U. S. 600, 6 Sup. Ct. Rep. 201, the Northern Pacific did not have and hold the legal title to the tract in question; and, therefore, that the conveyance by the railroad company to Huff and that by Huff to Ankeny, did not operate to vest a good legal title in the latter.

On the part of the defendant, Ankeny, it was claimed that by force of the original grant to the Northern Pacific Railroad Company, and the filing of its map of definite location, and by reason of the construction and completion of its road, and the acceptance thereof by the president of the *357 United States, there was vested in the railroad company a good legal* title; and that it was not necessary to show affirmatively the payment of the cost of the survey, nor to show that a patent had been granted to the railroad company; and, to sustain this position, he cited the case of Deseret Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. Rep. 158.

Whether the reasoning and language of the cases so cited by the respective parties can be satisfactorily reconciled, we do not feel called upon to determine, because we think that, at any rate, there is doctrine common to the cases that warranted the plaintiff in refusing to accept the defendant's deed.

The opinions in the earlier cases, in treating of the effect attributable to the nonpayment by the railroad companies of the cost of surveying, selecting, and conveying the lands, as prescribed by the act of July 15, 1870, (16 St. p. 305,) speak of the title remaining in the United States until such payment shall be made; and the court below seized on this language as establishing, in the present case, a want of legal title in the Northern Pacific Railroad Company, and consequently in its grantee, and hence held that the plaintiff was justified in rejecting the defendant's title.

In the case of Deseret Salt Co. v. Tarpey, the court, per Mr. Justice Field, regarded the failure or omission to pay the survey charges as operative to "preserve to the government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold its patents from the parties entitled to them until such payment," and thus to give the government a lien for said costs.

We therefore conclude that Ankeny, the defendant below, if he held only a title derived from the Northern Pacific Railroad Company, and if that company had not paid the costs of surveying, and had not received a patent, did not hold such a title as it was obligatory on the plaintiff to accept, and that the plaintiff below had a right to refuse the tender of defendant's deed, declare the contract off, and maintain his action for the recovery of the purchase money.

But it is contended that the record does not disclose that the costs of survey and conveyance had not been paid, and that it may be presumed that they had been paid, and *358 even* that the lands had been actually patented to the railroad company, in which event the question whether the costs of survey had been paid would be immaterial.

Turning to the pleadings and to the stipulation as to the facts, we find that the defendant did not aver in his answer, nor was it admitted in the stipulation, that the railroad company had complied with the necessary conditions as to payment of costs of survey, nor was it alleged or admitted that a patent had been issued to the railroad company for the lands in question. The plaintiff having alleged want of title in the defendant, and the latter having met that allegation only by the admission in the stipulation that the railroad company had filed its map of definite location, and had constructed its road to the satisfaction of the president, we think that the court below was warranted in holding that the defendant's title was imperfect, and that there was no question of fact to submit to the jury.

If we are right in the conclusion that the defendant's title to the land in dispute was imperfect, and subject to be defeated by the United States in asserting their right to be paid the costs of survey, it is not necessary to consider whether the defendant made a proper tender of a deed of conveyance, or whether the deed was in the form called for by the contract, or whether the plaintiff waived a tender of the deed.

If the questions of tender and of waiver actually confronted us, it might be difficult to show that they ought not to have been

submitted to the jury. But if the defendant had no title which he could insist on the plaintiff's accepting, then those questions have no legal significance.

An argument is made that, as the failure of title was only as to part of the land, the plaintiff could not elect to rescind as to all. But the contract was an entire one. The purchase money was not apportioned among the several tracts. The plaintiff's right to refuse to accept was therefore clear. Duke of St. Alban's v. Shore, 1 H. Bl. 270.

Again, it is contended that the plaintiff was in no position to rescind, because he had not himself fully complied with his part of the contract, in that he had not paid the mortgage of *$3,000 that was on the land, and the payment of which he had assumed. If, however, the defendant had no sufficient title to the land, that would relieve the plaintiff from the duty of paying the incumbrance. It cannot be plausibly maintained that, before a vendee can decline to accept an imperfect title, he must pay off a mortgage whose payment was to constitute part of the purchase money.

Another assignment of error is to the refusal of the court to charge the plaintiff and credit the defendant with the rent of the land during the period while the plaintiff was in possession. But the plaintiff was not in possession as a tenant, or under any agreement that he should pay rent. Nor does the law, under the circumstances of the case, raise any obligation to pay rent. Bardsley's Appeal, (Pa. Sup.) 10 Atl. Rep. 39, 40, is directly in point: "It may be conceded, if one occupy the land of another by the consent of the latter, without any agreement, that assumpsit for use and occupation will lie. Such, however, is not this case. Here the possession was taken and maintained under an express contract, by which the appellant, in consideration of $8,000 to be paid therefor, agreed to convey to the vendee a certain house free and clear of all incumbrances, and title to be perfect. At the date of the agreement the vendee paid $500, and was at all times ready to pay the residue of the purchase money on a deed being delivered to him according to the agreement. The vendor was not able to execute a deed according to his contract. These facts show the vendee was not in possession under such circumstances as to create the relation of landlord and tenant. There was neither an express nor an implied contract to pay rent, and no action could be maintained to recover for the use and occupation of the premises."

The authorities are uniform on this subject, and we content ourselves with a reference to a few cases: Patterson v. Stewart, 6 Watts & S. 527; Williams v. Rogers, 2 Dana, 374; Gillet v. Maynard, 5 Johns. 86; Guthrie v. Pugsley, 12 Johns. 126; Cook v. Doggett, 2 Allen, 439.

None of the errors assigned having been sustained, the judgment of the court below is affirmed.

(148 U. S. 312)

MONONGAHELA NAVIGATION CO. v. UNITED STATES.

(March 27, 1893.)

No. 722.

EMINENT DOMAIN — COMPENSATION — CONSTITUTIONAL LAW—FRANCHISES—VESTED RIGHTS.

1. The question as to what is "just compensation" for private property taken for public use is a judicial, and not a legislative, question; and the provision in the act authorizing the condemnation of a lock and dam belonging to the Monongahela Navigation Company, (25 St. at Large p. 411,) "that in estimating the sum to be paid by the United States the franchise of said corporation to take tolls shall not be considered or estimated," does not preclude the court from giving compensation for such franchise.

2. The only authority which the United States has to condemn a lock and dam belonging to a corporation chartered by a state is derived from the power to regulate interstate and foreign commerce; and such power must always be subject to the obligation imposed by the fifth amendment to make "just compensation" for private property taken for public use.

3. The power of congress over water ways connected with the great rivers of the country is supreme whenever it chooses to exercise the same, but before it has acted the legislative power of the state within whose borders the stream flows is competent to charter a corporation to improve the same, and to give it a franchise to collect tolls. A franchise thus granted is a vested right, and if congress thereafter, by condemnation, takes such improvements, it is bound to make just compensation for the value of the franchise, as well as for the physical property taken. Bridge Co. v. U. S., 105 U. S. 470, distinguished.

4. The fact that congress possesses supreme power does not cause a grant of such a franchise by the state to be a mere license which is revoked or annulled when congress, in the subsequent exercise of its power, takes possession of the improvement.

Appeal from and in error to the circuit court of the United States for the western district of Pennsylvania.

Proceedings by the United States to acquire a lock and dam of the Monongahela Navigation Company, situated on the Monongahela river. From the judgment awarding compensation the navigation company appeals. Reversed.

Statement by Mr. Justice BREWER:

By the act of August 11, 1888, (25 St. p. 411,) congress, among other things, enacted:

"The secretary of war be, and is hereby, authorized and directed to negotiate for and purchase, at a cost not to exceed $161,733.13, lock and dam number seven, otherwise known as the 'upper lock and dam,' and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of Pennsylvania, which lock and dam number seven and its appurtenances constitute a part of the improvements in water communication in the Monongahela river, between Pittsburgh, in the state of Pennsylvania, and a point at or near Mor-

guntown, in the state of West Virginia. And the sum of $161,733.13, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated for consummating said purchase, the same to be paid on the warrant of the secretary of war, upon full and absolute conveyance to the United States of the said lock and dam number seven, and its appurtenances, of the said Monongahela Navigation Company.

"In the event of the inability of the secretary of war to make voluntary purchase of said lock and dam number seven and its appurtenances for said sum of $161,733.13, or a less sum, then the secretary of war is hereby authorized and directed to institute and carry to completion proceedings for the condemnation of said lock and dam number seven and its appurtenances, said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of Pennsylvania, approved February 19, 1849, and its supplements, except that the United States shall not be required to give any bond, and except that jurisdiction of said proceedings is hereby given to the circuit court of the United States for the western district of Pennsylvania, with right of appeal by either party to the supreme court of the United States: provided, that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, to pay the necessary costs of said condemnation proceedings; and upon final judgment being entered therein, the secretary of war is hereby authorized and directed to draw his warrant on the treasury for the amount of said judgment and costs, and said amount for the payment thereof is hereby appropriated out of any moneys in the treasury not otherwise appropriated. And when said lock and dam number seven and its appurtenances shall have been acquired by the United States, whether by purchase or condemnation, the secretary of war shall take charge thereof, and the same shall thereafter be subject to the provisions of section 4 of an act entitled 'An act making appropriations for the construction, repair, and preservation for certain public work on rivers and harbors, and for other purposes,' approved July 5, 1884."

The effort at a voluntary purchase failing, on December 1, 1888, proceedings of condemnation were commenced in the circuit court of the United States for the western district of Pennsylvania. Viewers were appointed, who reported the value of the lock and dam number seven to be $209,393.52. Such valuation did not take into account the franchise of the company to collect tolls. An appeal was taken, as provided by the statutes of Pennsylvania, which appeal gave the right to a trial de novo, according to the course of the common law. A jury having been waived, the matter was tried before the court, the navigation company being the plaintiff, as to the question of amount of compensation. These facts appeared on the trial.

"In 1836, the state of Pennsylvania incorporated and by acts in that and subsequent years granted to the Monongahela Navigation Company the right 'to enter upon the said river Monongahela and upon the lands on either side, and to use the rocks, stone, gravel, or earth which may be found thereon in the constructions of their works, * * * and to form and make, erect and set up any dams, locks, or any other device whatsoever which they shall think most fit and convenient, to make a complete slack-water navigation between the points herein mentioned, to wit, the city of Pittsburgh and the Virginia state line.'

"The Monongahela river rises in the mountains of West Virginia, flows northwardly through Pennsylvania to Pittsburgh, where it forms a junction with the Allegheny and Ohio rivers.

"In pursuance of its charter, the navigation company, between 1841 and the present time, has constructed in said river seven locks and dams, which together now carry the slack-water navigation as far as the West Virginia state line.

"Prior to the construction of said company's works,—that is to say, prior to the year 1841,—the navigation of the Monongahela river was conducted altogether in small vessels, including small steamboats of not exceeding a tonnage of fifty tons, which could not ascend the river at all seasons, but only during limited periods, depending on the rise of the river. The trade or commerce on said river, prior to its improvement by said company's works, was small, particularly in the article of coal, for which the river in its natural condition did not furnish sufficient harbors or places of shipment at all seasons of the year; but by the construction and maintenance of said company's works there has been created an existing navigation for large steamboats at all seasons of the year, and facilities for a large commerce, particularly in the article of coal, of which there is now transported in a single day as much as was before the construction of the company's works transported in an entire year.

"The construction of the lock and dam No. 7, the property attempted to be appropriated in this proceeding, by the Monongahela Navigation Company, was begun in the year 1882 and completed in 1884, being the last one built, and completing the company's improvements in the state of Pennsylvania.

"The work was commenced under the following circumstances:

"It was provided by an act of the legislature of Pennsylvania, constituting a supple-

ment to the company's charter, approved April 8, 1857, that whenever the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania state line to Morgantown, in Virginia, shall have been commenced, it shall be the duty of the Monongahela Navigation Company to commence the construction of lock and dam No. 7 in such manner and on such plan as will extend the navigation from its present terminus to the Virginia state line, and complete the same simultaneously with the completion of the work extending to Morgantown."

On March 3, 1881, congress passed an act, (21 St. p. 471,) among other things appropriating $25,000 for improving the Monongahela river in West Virginia and Pennsylvania, with this proviso:

*316 "But this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven at Jacob's creek, and until said company shall, in manner satisfactory to the secretary of war, give assurance of their ability and purpose to complete the same."

After the passage of this act, and on March 24, 1881, Col. William E. Merrill, the engineer and officer in charge of the public works of the United States on the river Monongahela, addressed this letter to the navigation company:

"U. S. Engineer's Office, Customhouse, Cincinnati, O., March 24, 1881.

"Hon. J. K. Moorhead, President Mon. Nav. Co., Pittsburgh, Pa.—Sir: The last river and harbor bill contains the following appropriation: 'Improving Monongahela river, West Virginia and Pennsylvania, $25,000, but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, at Jacob's creek, and until said company shall, in manner satisfactory to the secretary of war, give assurance of their ability and purpose to complete the same.' You will, therefore, see that my work on number eight is wholly dependent on your work on number seven. I have, therefore, to urge on your company that you will, at the earliest date possible, 'undertake in good faith the building of lock and dam number seven,' and that you will give the secretary of war satisfactory assurance of your ability and purpose to complete it. I would therefore suggest that it might be useful for your secretary to communicate at once to the secretary of war such facts as to the financial resources of the company and its intentions about number seven as will satisfy him on the points specially left to his discretion and unlock the appropriation so that it may be used this summer. Respectfully, your obedient servant, Wm. E. Merrill, *317 Maj. Eng'rs & B'v't Col."

Whereupon, and on April 6, 1881, the following resolutions were passed by the navigation company, notice of which was given to the secretary of war:

"Whereas, congress has made an appropriation for the commencement of the building of lock and dam number eight in the Monongahela river, the payment of which appropriation is made to depend upon the secretary of war being satisfied of the bona fide intention of this company to construct lock and dam number seven, and of their financial ability to complete the same; and whereas, Col. Merrill, of the United States engineers, in charge of the government improvement of the Monongahela river, has requested this company to furnish the secretary of war with satisfactory assurances in relation thereto: Therefore, resolved, that it is the bona fide purpose and intention of this company to construct lock and dam number seven in the Monongahela river in the manner and at the time required of them by the acts of assembly of the state of Pennsylvania; that is to say, so to complete said lock and dam number seven that the same shall be ready for use as soon as the requisite locks and dams above lock and dam number seven, constructed or about to be constructed by the federal government, shall also be finished and ready for use, so as to complete the slack water of said river from Pittsburgh, Pennsylvania, to Morgantown, Virginia. Resolved, that the secretary of this company be directed to forward a copy of the foregoing resolution, together with copies of the company's annual report, showing the intention of the company and their ability to complete this work, to Col. Merrill, and also to the secretary of war."

And on May 4, 1881, Col. Merrill addressed the following letter to the president of the navigation company:

"Sir: I have just received official notice from the secretary of war, through the chief of engineers, that the resolution and documents relative to the construction of lock and dam No. 7, on the Monongahela river, forwarded to this office by your company in April last, (duplicate sent to the honorable secretary of war,) have been considered as fully meeting the requirements of the proviso in the last appropriation for the improvement of the above-named river, prohibiting the expenditure of the money appropriated 'until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam No. 7 at Jacob's creek, and until said company shall, in a manner satisfactory to the secretary of war, give assurance of their ability and purpose to complete the same.'"

Thereafter, and in 1882, lock and dam No. 7 were commenced, and completed in 1884. In the course of the trial the company called a witness, and offered to prove by him and other witnesses—

"That the paid-up capital stock of the Monongahela Navigation Company consists of thirty-two thousand six hundred and thirty-

nine shares of fifty dollars; that dividends have been declared on the stock for a number of years at the rate of twelve per cent. per annum.

"That the tolls received by the said company for the use of its works, including lock and dam No. 7, have averaged for several years past not less than $240,000; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of their entire works and franchise is not less than $4,000,000; that the actual toll receipts of lock and dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of such toll receipts at lock and dam No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam.

"That by the construction and maintenance of the company's works a permanent and reliable public highway has been created on which a large and increasing carriage of coal and general merchandise takes place, and that permanent navigation for the largest vessel and steamboat now exists from the city of Pittsburgh, Pa., to or near the line between the states of Pennsylvania and West Virginia.

*316 "That, in view of the present and prospective tolls receivable *at lock and dam No. 7, the present value of said lock and dam No. 7 is not less than $450,000, said value being predicated upon said present and prospective tolls; that said lock and dam No. 7 are a portion of said company's works which consist of seven dams, each furnished with a lock or locks.

"That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the company's works.

"That a large portion of the tolls received by the company is charged upon merchandise and articles carried between points of shipment and delivery entirely within the state of Pennsylvania, and constituting internal commerce of said state, and that a portion of the tolls collectible at lock and dam No. 7, for the use of said lock and dam, is chargeable for merchandise, goods, and passengers carried between points of shipment and delivery in the state of Pennsylvania, the transportation being wholly within the state as to said portion.

"To which offer of testimony counsel for the United States objected, for the reason that the same was incompetent and irrelevant; whereupon the court sustained the objection and rejected the evidence."

The result of the trial was a finding by the court that the value of the lock and dam No. 7 was $209,000, "not considering or estimating in this decree the franchise of this company to collect tolls." Such amount was the sum adjudged and decreed to be paid by the United States to the navigation company for the property condemned. The company has brought the case to this court by both writ of error and appeal.

Johns McCleave and Wayne MacVeagh, for appellant. Atty. Gen. Miller, Sol. Gen. Aldrich, and D. T. Watson, for the United States.

*324 *Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

It appears from the foregoing statement that the Monongahela Company had, under express authority from the state of Pennsylvania, expended large sums of money in improving the Monongahela river by means of locks and dams, and that the particular lock and dam in controversy here were built not only by virtue of this authority from the state of Pennsylvania, but also at the instance and suggestion of the United States. By means of these improvements, the Monongahela river, which theretofore was only navigable for boats of small tonnage, and at certain seasons of the year, now carries large steamboats at all seasons, and an extensive commerce by means thereof. The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously this question, as all others which run along the line of the extent of the protection the individual has under the constitution against the demands of the government, is of importance, for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first 10 amendments to the constitution, adopted as they were soon after the adoption of the constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

In the case of Sinnickson v. Johnson, 17 N. J. Law, 129, 145, cited in the case of Pumpelly v. Green Bay Co., 13 Wall. 166, 178, it was said that "this power to take private property reaches back of all constitutional provisions; and it seems to have *325 been considered a settled principle of *universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but

as parts of one and the same principle." And in Gardner v. Newburgh, 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

But we need not have recourse to this natural equity, nor is it necessary to look through the constitution to the affirmations lying behind it in the Declaration of Independence, for in this fifth amendment there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in Boyd v. U. S. 116 U. S. 616, 635, 6 Sup. Ct. Rep. 524: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

The language used in the fifth amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government; the last (the one in point here) being: "Nor shall private property be taken for public use without just compensation." The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages; the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken; and this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this fifth amendment is personal. "No person shall be held to answer for a capital or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

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We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration. This is a question which may arise possibly in this case, if the seven locks and dams belonging to the navigation company are so situated as to be fairly considered one property,—a matter in respect to which the record before us furnishes no positive evidence. It seems to be assumed that each lock and dam by themselves constitute a separate structure and separate property, and the thoughts we have suggested are pertinent to such a case.

By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In Charles River Bridge v. Warren Bridge, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: "They [the legislature] provide that the new company shall pay annually to the college, in behalf of the old one, a hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do,—assess the amount of compensation to which the complainants are entitled." See, also, the

following authorities: Com. v. Pittsburg & C. R. Co., 58 Pa. St. 26, 50; Pennsylvania R. Co. v. Baltimore & O. R. Co., 60 Md. 263; Isom v. Mississippi Cent. R. Co., 36 Miss. 300.

In the last of these cases, and on page 315, will be found these observations of the court: "The right of the legislature of the state by law to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administrating right and justice, cannot for a moment be admitted or tolerated under our constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so."

We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property.

How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness,—the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts. One may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. Neighborhood to the centers of business and population largely affects values, for that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela river, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and, therefore, largely its value. So that, if this property, belonging to the Monongahela Company, is rightfully where it is, the company may justly demand from every one making use of it a compensation; and to take that property from it deprives it of the aggregate amount of such compensation, which otherwise it would continue to receive. What amount of compensation for each separate use of any particular property may be charged is sometimes fixed by the statute which gives authority for the creation of the property; sometimes determined by what it is reasonably worth; and sometimes, if it is purely private property, devoted only to private uses, the matter rests arbitrarily with the will of the owner. In this case, it being property devoted to a public use, the amount of compensation was subject to the determination of the state of Pennsylvania, the state which authorized the creation of the property. The prices which may be exacted under this legislative grant of authority are the tolls, and these tolls, in the nature of the case, must enter into and largely determine the matter of value. In the case of Montgomery Co. v. Schuylkill Bridge Co., 110 Pa. St. 54, 58, 20 Atl. Rep. 407, in which the condemnation of a bridge belonging to the bridge company was sought, the court said: "The bridge structure, the stone, iron, and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness. If they yield no money in return over expenditures, they would possess little, if any, present value. If, however, they yield a revenue over and above expenses, they possess a present value, the amount of which depends, in a measure, upon the excess of revenue. Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the jury."

So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property,—the franchise to take tolls. That, in the absence of congressional action, the state of Pennsylvania had the power, either acting itself or through a corporation which it chartered, to improve the navigation of the river by means of locks and dams, and also to authorize the exaction of tolls for the use of such improvements, are matters upon which there can be no dispute, in view of the many decisions of this court. Those very closely in point are

Willson v. Marsh Co., 2 Pet. 245; Pound v. Truck, 95 U. S. 459; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313; Sands v. Improvement Co., 123 U. S. 288, 8 Sup. Ct. Rep. 113.

In the first of these cases it appeared that the Marsh Company was incorporated by an act of the general assembly of Delaware, and authorized to construct a dam across Blackbird creek, a navigable stream within the territorial limits of the state; that, in pursuance of such authority, it did construct such dam, by which the navigation of the stream was obstructed; Wilson, with others, were the owners of a sloop, regularly licensed according to the laws of the United States, which sloop broke and injured the dam. On being sued for this injury, the owners pleaded that the dam was wrongfully erected, obstructing the navigation of the stream, and that the sloop could not, without breaking through the dam, pass over and along the stream, and that, in order to remove the said obstructions it did the injury complained of. A demurrer to this plea was sustained, and in due course the case came to this court. The opinion was delivered by Chief Justice Marshall, sustaining the ruling, and holding that the dam, in the absence of legislation by congress, was rightfully there, having been authorized by the legislature of the state in which the stream was situated. In it the chief justice said, (page 252:) "If congress had passed any act which bore upon the case,—any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states,—we should not feel much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states,—a power which has not been so exercised as to affect the question. We do *not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

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In the case of Pound v. Truck, it appeared that a dam and boom had been placed in the Chippewa river, under authority of the legislature of Wisconsin. The fact that the plaintiff suffered injury therefrom was established, and the defense was that they were rightfully there. Mr. Justice Miller, speaking for the court, on page 464, uses this language: "There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislature."

Huse v. Glover comes even nearer to this case. The state of Illinois, at an expense of several hundred thousand dollars, constructed locks and dams on the Illinois river for the purpose of improving its navigation, and prescribed rates of toll to be paid by those using the improvements. A bill was filed to enjoin the exaction of toll on vessels of complainant passing through the improved waters of the river. After referring to the clause in the ordinance for the government of the Northwest Territory, which provided that the navigable waters should be common highways, forever free, without any tax or duty, Mr. Justice Field, for the court, on page 548, 119 U. S., and page 315, 7 Sup. Ct. Rep., said: "The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost, or duty has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels. The state is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may

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interfere and control or supersede it. If, in the opinion of the state, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state,—and on that point the state must necessarily determine for itself,—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. * * * How the highways of a state, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of congress to interpose in the cases mentioned."

And in the last of these cases, where the Manistee river was improved under authority of the legislature of the state of Michigan, and tolls exacted for the use of the improved water way, we find this in the opinion, on page 295, 123 U. S., and page 116, 8 Sup. Ct. Rep.: "The internal commerce of the state—that is, the commerce which is wholly confined within its limits—is as much under *233 its control as foreign or interstate commerce is under the control of the general government; and to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in County of Mobile v. Kimball, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements the states may levy a general tax, or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. Huse v. Glover, 119 U. S. 543, 548, 7 Sup. Ct. Rep. 313. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the state."

Kindred to these are the cases of Gilman v. Philadelphia, 3 Wall. 713; Transportation Co. v. Chicago, 99 U. S. 635; Escanaba & L. M. Transp. Co. v. City of Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423; and Bridge Co. v. Hatch, 125 U. S. 12, 8 Sup. Ct Rep. 811,—in which the power of a state, in the absence of congressional action, to obstruct navigation by the construction of bridges across navigable streams, was sustained. And also the cases of Packet Co. v. Keokuk, 95 U. S. 80, and Transportation Co. v. City of Parkersburg, 107 U. S. 691, 2 Sup. Ct. Rep. 732, in which the power of a state, under like circumstances, to improve the border of streams by wharves and exact wharfage therefor was affirmed.

While in a matter of this kind it is needless to look for authorities beyond the decisions of this court, yet the cases of Kellogg v. Union Co. 12 Conn. 6, and Thames Bank v. Lovell, 18 Conn. 500, may be referred to as containing very satisfactory discussions of this question. We quote from the opinion in the latter case, page 511:

"These acts, improving rivers, constructing roads, etc., will never be complained of as interfering with the rights and powers of congress. The tolls alone are the subject of *234 complaint. But these are only the fair equivalent for privileges which the state had a right to create, and without which these privileges could never have existed. Commerce, therefore, has not been crippled by the tolls, as the defendant claims, but has been extended by them. The legislature of the state creating this corporation, with its duties and its privileges, has come in aid of the powers of congress.

"It seems to be admitted, that states may construct canals, turnpikes, bridges, etc., and impose tolls upon passengers and freight as a remuneration for the improvements; and that this may be done, without interfering with the power of congress to regulate commerce among the states, or its power to establish post offices and post roads. We have not been able to discover a sound distinction between these cases and the one we are considering. Congress has the same power to regulate commerce upon the land as upon the water. A river, to be sure, is a natural channel; but, if it is not a navigable one, it can no more be used for the purposes of commerce than the land, and therefore to convert it from the mere natural channel into a public highway, for commercial purposes, and to levy a toll to reimburse the expense, no more conflicts with the powers of congress over the commerce of the country than the construction of a canal or a turnpike for the same purposes, with the same tolls. And this, we think, is equally true of rivers, which are only navigable to a partial and limited extent, and by artificial and expensive means are rendered navigable to a greater extent, with a reasonable toll levied upon those only who receive the benefit of the extended navigation. The principle is the same in both the cases stated."

But in this case there was not only the full authority of the state of Pennsylvania, but also, so far as respects this particular lock and dam, they were constructed at the instance and implied invitation of congress. The act of March 3, 1881, making an appropriation for the improvement of the river in terms provided that no such improvement should be made until the navigation company had in good faith started upon the building of this lock and dam. This lock and dam connected the lower improvements already made by the navigation company with the upper improvements proposed to be made by congress, and the appropriation by the latter was conditioned on the company's undertaking their construction. This is something more than the mere recognition of an exist-

ing fact; it is an invitation to the company to do the work; and when, in pursuance of that invitation, and under authority given by the state of Pennsylvania, the company has constructed the lock and dam, it does not lie in the power of the state or the United States to say that such lock and dam are an obstruction, and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the navigation company.

Upon what does the right of congress to interfere in the matter rest? Simply upon the power to regulate commerce. This is one of the great powers of the national government, one whose existence and far-reaching extent have been affirmed again and again by this court in its leading opinions, and the power of congress over such natural highways as navigable streams is confessedly supreme. See, among the various cases in which this supremacy has been affirmed: Gilman v. Philadelphia, 3 Wall. 725; County of Mobile v. Kimball, 102 U. S. 691, 696; Bridge Co. v. U. S., 105 U. S. 482; Miller v. Mayor, etc., 109 U. S. 392, 3 Sup. Ct. Rep. 228; Wisconsin v. Duluth, 96 U. S. 379; Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811. In Wisconsin v. Duluth (page 383) it was said: "It is to be observed, as preliminary to an examination of the acts of the general government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government, and that, whenever it has taken charge of the matter, its right to an exclusive control has not been denied. * * * And while this court has maintained, in many cases, the right of the states to authorize structures in and over the navigable waters of the state, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity that when congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority. The adjudged cases in this court on this point are numerous."

And in Bridge Co. v. Hatch, 125 U. S. 12, 8 Sup. Ct. Rep. 817, the proposition was thus stated: "And although, until congress acts, the states have the plenary power supposed, yet, when congress chooses to act, it is not concluded by any thing that the states, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose." It cannot be doubted, in view of the long list of authorities,—for many more might be cited,—that congress has the power, in its discretion, to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words it is within the competency of congress to make such provision respecting the improvement of the Monongahela river as in its judgment the public interests demand. Its dominion is supreme.

But, like the other powers granted to congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because congress has power to take the property it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of congress to condemn whatever land may be necessary for such canal there can be no question, and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the

removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property.

And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the navigation company has been receiving. It would seem strange that if, by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls.* In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

Much reliance is placed upon the case of Bridge Co. v. U. S., 105 U. S. 470. But that was a case not of the taking, but of the destruction, of property. It is true, Mr. Chief Justice Waite, in delivering the opinion of the court, uses this language in reference to the power of congress: "But the power of congress in respect to legislation for the preservation of interstate commerce is just as free from state interference as any other subject within the sphere of its legislative authority. The action of congress is supreme, and overrides all that states may do. When, therefore, congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a state can make it lawful. Those who act on state authority alone necessarily assume all the risks of legitimate congressional interference." But such affirmation of power was not made with reference to a question like this. The facts in that case were these: The bridge company was a creature of the legislation of the states of Ohio and Kentucky, and incorporated to build a bridge across the Ohio river, between Newport and Cincinnati. The state charters authorized the construction of a bridge in accordance with the provisions of an act of congress of July 14, 1862, or any act that congress might pass on the subject. On March 3, 1869, congress passed a resolution giving its assent to the construction of this bridge. This resolution contained this reservation: "But congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." 15 St. p. 347. After the passage of this resolution the company commenced the erection of a drawbridge, and expended a large amount of money in the undertaking. *Before, however, the bridge was finished, congress passed an act—the act of March 3, 1871 (16 St. p. 572)—requiring a high bridge. The act provided that, upon the bridge company making the changes required by the act, it might file its bill in the circuit court of the United States for the southern district of Ohio, to have determined whether the bridge had been constructed theretofore, so far as the work had progressed, in accordance with the provisions of law then in existence; and, second, the liability of the United States, if any there was, by reason of the changes. The suit was brought, and on appeal to this court, by four to three, Mr. Justice Matthews taking no part in the decision, the court held that the government was not liable for any damages. The case turned in the judgment of the majority mainly upon the resolution of March 3, 1869, heretofore quoted. In the early part of the opinion (page 475) the chief justice says: "No question can arise in this case upon what the states have done, for both Ohio and Kentucky required the company to comply with the regulations of congress. Neither are we called on to determine what would have been the rights of the company if, in the original license, no power of future control by congress had been reserved." He then proceeds to consider at some length the peculiar language of that reservation. Under it, as he says, congress had the right to withdraw assent, which was equivalent to a positive enactment that a further maintenance of the bridge, as at first planned and partially constructed, was unlawful, and the mere exercise of its power under this reservation to declare the proposed structure unlawful did not expose the government to any liability for damages. We quote fully the expression of views on this subject:

"It is next insisted that if, in the judgment of congress, the public good required the bridge to be removed, or alterations to be made in its structure, just compensation must be made the company for the loss incurred by what was directed. It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation.

"In the present case the bridge company asked of *congress permission to erect its* bridge. In response to this request permission was given, but only on condition that it might be revoked at any time if the bridge is found to be detrimental to navigation. This condition was an essential element of the grant, and the company, in accepting the privileges conferred by the grant, assumed all risks of loss arising from any exercise of the power which congress saw fit to reserve. What the company got from congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of com-

merce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of congress, and this was declared in express terms on the face of the grant by which it was created. In the use of the franchise thus granted the company might, and, it was expected, would, acquire property. The property thus acquired congress could not appropriate to itself by a withdrawal of its assent to the maintenance of the bridge that was to be built, but the franchise, by express agreement, was revocable whenever, in the judgment of congress, it could not be used without substantial and material detriment to the interests of navigation. A withdrawal of the franchise might render property acquired on the faith of it, and to be used in connection with it, less valuable; but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone congress was willing to give. It was optional with the company to accept or not what was granted, but, having accepted, it must submit to the control which congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon."

It is evident, therefore, that the point decided was that congress had reserved the right to withdraw its assent to the construction of a bridge on the plan proposed, whenever, in its judgment, such bridge should become an obstruction to the navigation; that the bridge company entered upon the construction of the bridge in the light of this express reservation, and with the knowledge that congress might at any time declare that the bridge constructed as proposed *343 was an* obstruction to navigation; and that congress, exercising this reserved power, did not thereby subject the government to any liability for damages. There was no taking of private property for public uses; and while the company may have been deprived of property, it was deprived by due process of law, because deprived under authority of an express reservation of power. Even this conclusion was reached with strong dissent, Mr. Justice Miller, Mr. Justice Field, and Mr. Justice Bradley dissenting, and each writing a separate opinion. And these opinions only make more clear the fact that the case was rested in the judgment of the majority on the effect of the reservation.

In the case at bar there is no such reservation; there is no attempt to destroy property; there is simply a case of the taking by the government, for public uses, of the private property of the navigation company. Such an appropriation cannot be had without just compensation; and that, as we have seen, demands payment of the value of the property as it stands at the time of taking.

The theory of the government seems to be that the right of the navigation company to have its property in the river, and the franchises given by the state to take tolls for the use thereof, are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual.

Notice to what the opposite view would lead: A railroad between Columbus, Ohio, and Harrisburg, Pa., is an interstate highway, created under franchises granted by the two states of Ohio and Pennsylvania; franchises not merely to construct, but to take tolls for the carrying of passengers and freight. In its exercise of supreme power to regulate commerce, congress may condemn and take that interstate highway, but in the exercise of that power, and in the taking of such property, may it ignore the franchises to take tolls, granted by the states, or must it not rather pay for them, as it pays for the rails, the bridges, and the tracks? The question seems to carry its own answer. It may be suggested that the cases are not parallel, in that in the present there is a natural highway, while in that suggested, it is wholly artificial. But the power of congress is not determined by the character of the highway. Nowhere in the constitution is there given power in terms over highways, unless it be in that clause to establish post offices and post roads. The power which congress possesses in respect to this taking of property springs from the grant of power to regulate commerce, and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads, and railroads, constructed under the authority of the states, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power

is the same. There are not two clauses of the constitution, each severally applicable to a different kind of highway. The fee of the soil in neither case is in the general government, but in the state or private individuals. The differences between the two
*343 are in their origin; nature provides the one, *man establishes the other. *Mr. Justice Bradley, delivering the opinion of the court in Railroad Co. v. Maryland, 21 Wall. 456, 470, referred to this matter in these words: "Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well."

It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the navigation company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived.

Another contention is this: First, that the grant of right to the navigation company was a mere revocable license; secondly, that if it was not there was a right in the state to alter, amend, or annul the charter; and, thirdly, that there was by the eighteenth section thereof reserved the right at any time after 25 years from the completion of the improvement to purchase the entire improvement and franchise by paying the original
344 cost, together with 6 per cent. interest thereon, deducting dividends theretofore declared and paid,—a provision changed by section 8 of the act of June 24, 1839, so as to require a payment of the expenses incurred in constructing and making repairs, with 8 per cent. per annum interest. But little need be said in reference to this line of argument. We do not understand that the supreme court of Pennsylvania has ever ruled that a grant like this is a mere revocable license. The cases referred to by counsel are those in which there was simply a permit; but here there was a chartered right created,—the right not merely to improve the river, but to exact tolls for the use of the improvement; and such right, created by an act of incorporation, as long ago settled in this court in Dartmouth College Trustees v. Woodward, 4 Wheat. 518, is a contract which cannot be set aside by either party to it.

Again, the state has never assumed to exercise any rights reserved in the charter, or by any supplements thereto. So far as the state is concerned, all its grants and franchises remain unchallenged and undisturbed in the possession of the navigation company. The state has never transferred, even if it were possible for it to do so, its reserved rights to the United States government, and the latter is proceeding not as the assignee, successor in interest, or otherwise, of the state, but by virtue of its own inherent supreme power. What the state might or might not do is not here a matter of question, though doubtless the existence of this reserved right to take the property upon certain specified terms may often, and perhaps in the present case, materially affect the question of value. And, finally, there is no suggestion on the part of congress, and no proffer in these proceedings, of payment under the terms of the charter and supplementary act of 1839, and no attempt to ascertain the amount which would be due to the company in accordance therewith.

These are all the questions presented in this case. Our conclusions are, that the navigation company rightfully placed this lock and dam in the Monongahela river; that with the ownership of the tangible property, legally held in that place, it has a vested franchise to receive tolls for its use; that such franchise was as much a vested
*345 right of property as the *ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the navigation company, is subject to the limitations imposed by the fifth amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by congress of its purpose to take the property does not destroy the state franchise.

The judgment, therefore, will be reversed, and the case remanded, with instructions to grant a new trial.

Mr. Justice SHIRAS having been of counsel, and Mr. Justice JACKSON not having been a member of this court at the time of the argument, took no part in the consideration and decision of this case.

(148 U. S. 490)

SMITH v. TOWNSEND.

(April 3, 1893.)

No. 1173.

PUBLIC LANDS—HOMESTEAD ENTRIES—DISQUALIFICATION—OPENING OF OKLAHOMA LANDS.

1. In the act of March 1, 1889, (25 St. at Large, p. 757,) relating to the opening to settlement of certain Oklahoma lands, and in the Indian appropriation act of the subsequent day, (25 St. at Large, p. 980,) the provisions that any person who, prior to the time the lands are opened, "may enter upon any part of said lands," (as stated in the former act,) and "enter upon and occupy the same," (as declared in the latter,) shall never be permitted to enter any of said lands or acquire any right thereto, were applicable to the body of said lands as a whole, and not to the particular tracts which claimants desired to enter; and the disqualification therefore attached to any person who was within the boundaries of said lands prior to 12 o'clock on April 22, 1889, when the same were opened by proclamation of the president, and who attempted to make an entry without first departing therefrom. 29 Pac. Rep. 80, affirmed.

2. The fact that a person was in the employ of the railroad company whose road runs through the lands in question, and was located on its right of way prior to and at the time when the lands were opened, gave him no right superior to that of others; and he was not qualified to make an entry by simply removing from the right of way and occupying lands outside thereof, immediately after the land became subject to entry. 29 Pac. Rep. 80, affirmed.

Appeal from the supreme court of the territory of Oklahoma. Affirmed.

*491 Statement by Mr. Justice BREWER:

*On April 30, 1891, the appellant filed his complaint in the district court of Oklahoma county, territory of Oklahoma. In this complaint he alleged his citizenship, and full qualification to enter public lands under the homestead laws of the United States. That during the years 1888 and 1889 the Atchison, Topeka & Santa Fe Railroad Company was engaged in operating a railroad through the Indian Territory, having a right of way therein, granted by treaty with the Indians and acts of congress. That during those years he was employed as a section hand by said company, and resided in a station house belonging to it, on the right of way, at a place known as "Edmond Station." That he entered into the employment of the railroad company, and continued in such employment, and commenced living at said Edmond Station, without any intent to take lands within the Indian Territory, but solely to discharge his duties as an employe of the company. That when the lands surrounding said station were open to settlement under the acts of congress of March 1 and 2, 1889, and the proclamation of the president of March 23, 1889, plaintiff was at said Edmond Station, and on said right of way, and soon after the hour of noon on April 22, 1889, went upon the land in controversy, and settled upon it as his homestead, and with the intention to occupy and enter it as his homestead under the laws of the United States. That pursuant to such intention he built a house thereon, and otherwise improved the premises, and dwelt upon it as his home, and on April 23, 1889, duly made an entry at the proper land office at Guthrie, Ind. T. That on the 22d of June, 1889, the defendant filed in the local land office a contest, which contest was heard in such land office on the following statement of facts:

"Alexander F. Smith had been for a long time prior to March 2, 1889, in the employ of the A., T. & S. F. R. R. Co. as a section hand, and on January 30, 1889, came to Edmond, Oklahoma territory, in that capacity, bringing his family with him. He did not enter the territory with the expectation or intention of taking land in the Oklahoma territory. He remained in the employ of the railroad company until noon of April 22, 1889, Santa Fe R. R. time, when he removed his tent to a point about one hundred and fifty yards distant from the right of way of said railroad, and on the land in controversy, where he put it up, and moved into it. From January 30, 1889, Smith lived with his family in his tent on the right of way of the A., T. & S. F. R. R., where it passes through the land in controversy. Prior to April 22, 1889, Smith had indicated his intention to take the land in controversy by stating the fact to his fellow workmen, but had done no act towards carrying out said intention. A notice was posted at the station of Edmond by A., T. & S. F. R. R. Co., warning all employes that if they expected to take land they must leave the Oklahoma country, and this fact was called to Smith's notice. Smith has, since noon of April 22, 1889, continued to reside upon, cultivate, and improve said land, in good faith, as a homestead, and now has improvements thereon. Smith is a legally qualified homesteader, unless excluded by reason of his being in the Oklahoma country prior to April, 1889. Smith is at present in the employ of the A., T. & S. F. R. R. Co., and has been most of the time since April 22, 1889."

That on the trial of said contest the local land officers decided in plaintiff's favor, but on appeal to the commissioner of the land office he reversed their decision, which ruling of the commissioner was subsequently affirmed by the secretary of the interior; and on February 28, 1891, plaintiff's homestead entry was canceled; and that the defendant, on March 12, 1891, made a homestead entry of the land, which homestead entry was, on the 30th day of April, 1891, commuted, the land paid for at a dollar and a quarter per acre, and a final receipt issued therefor. Plaintiff claims that there was error of law in the ruling of the commissioner of the land office and of the secretary of the interior, and prays that the defendant be decreed to hold the legal title to the land in trust for his use and benefit. To this bill of com-

plaint a demurrer was filed, which, on May 16, 1891, was sustained by the district court, and the complaint dismissed. From the decree of dismissal an appeal was taken to the supreme court of the territory, which, on the 1st day of February, 1892, affirmed the decision of the district court. From that judgment of affirmance the appellant has appealed to this court.

A. H. Garland and Heber J. May, for appellant. Chas. A. Maxwell and George S. Chase, for appellee. Asst. Atty. Gen. Parker and John F. Stone, U. S. Dist. Atty.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

This case turns on the construction to be given to the acts of March 1 and 2, 1889, and the proclamation of the president of March 23, 1889. The act of March 1, 1889, (25 St. pp. 757, 759,) was an act ratifying and confirming an agreement with the Muscogee (or Creek) Indians in the Indian Territory, whereby a large body of their lands had been ceded to the United States. The second section of the act was in these words:

"That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant; and the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto."

In the general Indian appropriation act, passed the next day, March 2, 1889, (25 St. pp. 980, 1005,) was contained this provision, applicable to these lands, as well as to lands acquired from the Seminoles:

"And provided further, that each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one quarter section thereof; but until said lands are opened for settlement by proclamation of the president no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

And the proclamation of the president of March 23, 1889, contained this warning: "Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour of twelve o'clock noon of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of congress to the above effect." 26 St. p. 1546.

It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus, in Heydon's Case, 3 Coke, 7 b, it is stated that it was resolved by the barons of the exchequer as follows:

"For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: First. What was the common law before the making of the act? Second. What was the mischief and defect for which the common law did not provide? Third. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth? Fourth. The true reason of the remedy."

And by this court, in U. S. v. Union Pac. R. Co., 91 U. S. 72, 79, it was said that "courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. Aldridge v. Williams, 3 How. 24; Preston v. Browder, 1 Wheat. 120." And in Platt v. Union Pac. R. Co., 99 U. S. 48, 64, that, "in endeavoring to ascertain what the congress of 1862 intended, we must, as far as possible, place ourselves in the light that congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances." Pursuing an inquiry along this line, it will be seen that the Indian Territory lies between the state of Texas on the south and the state of Kansas on the north, and it is a matter of public history, of which we may take judicial notice, that, as these two states began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them, occupied only by Indians, and, though the territory was reserved by statute for the occupation of the Indians, there was great difficulty in restraining settlers from entering and occupying it. Repeated proclamations were issued by successive presidents, warning against such entry and occupation. Thus, on April 26, 1879, President Hayes issued a proclamation containing this warning:

"Now, therefore, for the purpose of properly protecting the interests of the Indian nations and tribes, as well as of the United States in said Indian Territory, and of duly enforcing the laws governing the same, I, Rutherford B. Hayes, president of the

United States, do admonish and warn all such persons so intending or preparing to remove upon said lands or into said territory without permission of the proper agent of the Indian department against any attempt to so remove or settle upon any of the lands of said territory; and I do further warn and notify any and all such persons who may so offend that they will be speedily and immediately removed therefrom by the agent, according to the laws made and provided; and, if necessary, the aid and assistance of the military forces of the United States will be invoked to carry into proper execution the laws of the United States herein referred to." 21 St. p. 797.

A similar proclamation was issued on February 12, 1880, (21 St. p. 798;) another by President Arthur, on July 1, 1884, (23 St. p. 835;) and a fourth by President Cleveland, on March 13, 1885, (23 St. p. 843.) This latter proclamation recited a fact, which is also a matter of public history, as follows: "And whereas, it is further alleged that certain other persons or associations within the territory and jurisdiction of the United States have begun and set on foot preparations for an organized and forcible entry and settlement upon the aforesaid lands, and are now threatening such entry and occupation." And the urgency of the situation is disclosed by these closing words of the proclamation: "And if this admonition and warning be not sufficient to effect the purposes and intentions of the government as herein declared, the military power of the United States will be invoked to abate all such unauthorized possession, to prevent such threatened entry and occupation, and to remove all such intruders from the said Indian lands."

In addition to the fact disclosed by these proclamations of the long-continued and persistent efforts to force an entry into this territory, it is well known that as the time drew near to the opening of it for occupation under and by virtue of the treaties with the Indian tribes, and in accordance with the laws of congress, there was a large gathering of persons along the borders of this territory waiting the coming of the exact moment at which it would be lawful for them to move into it, and establish homestead and other settlements. Under such circumstances as these, this legislation was passed, and what, in view thereof, was the intent of congress? As disclosed on the face of this legislation, evidently its purpose was to secure equality between all who desired to establish settlements in that territory. The language is general and comprehensive: "Any person who may enter upon any part of said lands * * * prior to the time that the same are opened to settlement * * * shall not be permitted to occupy or to make entry of such lands or lay any claim thereto." "Until said lands are opened for settlement by proclamation of the president, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto." No exception is made from the general language of these provisions, and it was evidently the expectation of congress that they would be enforced in the spirit of equality suggested by the generality of the language.

It is urged that there is a penal element in each of these sections, and that, therefore, the statute must be strictly construed. This penal element is found in those clauses which debar one violating the provisions of the sections from ever entering any of the lands, or acquiring any rights therein. But whatever of a penal element may be found in these parts of the sections does not extend to those which are simply declaratory of the conditions upon which entry and occupation may be made. Provisions of like character are frequently found in statutes and constitutions. The general homestead law gives a right of homestead to persons possessing certain qualifications, but it is in no sense, therefore, a penal statute as to those not possessing such qualifications. The constitution of the United States restricts the presidency to natural-born citizens, and such as are 35 years of age, and have been residents of the country for 14 years, but there is nothing in this of a penal nature as against those not possessed of these qualifications. If congress sees fit to impose a penalty on any individual who attempts to enter a homestead without possessing the statutory qualifications, the clause imposing the penalty may require a strict construction in a proceeding against the alleged wrongdoer, but that does not give to the residue of the statute, prescribing the qualifications, a penal character. That portion which describes the qualifications for entry is to be liberally construed, in order that no one be permitted to avail himself of the bounty of congress, unless evidently of the classes congress intended should enjoy that bounty. This idea is expressed in 1 Bl. Comm. 88, in these words:

"Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken: Where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."

Construing the statute in the light of these observations, it will be noticed, first, that the provisions apply to the land collectively. The prohibition is against entering upon "any part of said lands," meaning thereby the whole body of lands, and in this body was included the right of way of the railroad company. The company had simply an easement, not a fee in the land. Its rights sprang from

the act of congress of July 4, 1884, (23 St. p. 73,) granting the right of way to the Southern Kansas Railway Company, whose successor in interest was the Atchison, Topeka & Santa Fe Railroad Company. This act, by section 2, granted a right of way, and also provided that the land taken therefor should be used only for the construction and operation of railroad, telegraph, and telephone lines; and that whenever any portion thereof ceased to be so used it should revert to the nation or tribe of Indians from which it was taken. The act further provided (section 7) that the officers and employes might reside on the right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as might be established by the secretary of the interior in accordance therewith. And by section 10 the grant was made conditioned that neither the company, nor its successors or assigns, should aid, advise, or assist in any effort looking towards the change of the present tenure of the Indians in their lands, or attempt to secure from the Indian nations any further grant of land or its occupancy. In other words, the entire body of lands still remained Indian lands,—the fee continued in the Indians, and all that the company received was a mere right of way. So, when the treaty of cession was made between the Creek nation of Indians and the government, it was a cession of all lands lying west of a certain line, with no exceptions; and it was this body of lands which was declared by the act of March 1, 1889, to be a part of the public domain, and thereafter subject to homestead entries; and the proclamation of the president, naming the exact hour at *499 which the lands should be open to settlement, describes a body of land by metes and bounds and makes no exception of the railroad right of way, though it does of two acres, specially described and reserved for governmental use and control. Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract, subject to the easement of the company; and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land. But, whether this be so or not, it is enough that in the cession, in the acts of congress, and in the proclamation of the president the land was dealt with as an entirety, with certain metes and bounds, and it is that body of lands, thus bounded, which all parties were forbidden to enter upon who desired thereafter to enter any portion as a homestead.

Counsel contend that the words "enter" and "entry" have a technical meaning in the land laws; that the disqualification in the act of March 1, from entering upon any part of said lands, was modified by the act of March 2, so as to make it consist in entry and occupation, both being essential; and, quoting from the brief, "this was done to relieve the thousands of persons, or 'boomers,' as they were called, from the disability they may have incurred by an entry alone; but to keep them from selecting and occupying—that is, living on any tract of land prior to the time when the land should be opened to settlement and entry under the proclamation which the act of March 2d authorized the president to issue—the clause was inserted that 'any person entering upon and occupying the same' should be disqualified."

Their idea seems to be that parties might go wheresoever they pleased through this body of lands without subjecting themselves to the disqualification of the statute, providing only that before the date fixed for the opening of the lands for settlement they did not commence an actual living upon the particular tracts they desired to enter as homesteads. Under such a construction anybody might go into the territory,—every quarter section might be occupied by a resident,—and all that would *500 be necessary to prevent the operation of the statute would be that on noon of April 22d, adjoining neighbors changed their residences. Thus it would be that each party entering upon and occupying any particular tract, entered upon and occupied it for the first time after noon of April 22d, and so was entitled to perfect his homestead entry. But this is simply to emasculate the statute. It treats the act of March 2d as repealed by that of March 1st, and repeals by implication are not favored. It would destroy absolutely that equality which was evidently the intent of congress in the legislation. Two parties might rightfully, immediately after the acts of congress and the proclamation of the president, enter upon and occupy two adjoining tracts, and then change at the moment fixed, and thus create, as to those respective tracts thus changed, a prior occupation, as against all parties not reaching the territory until April 22d. "Enter" and "entry" may be technical words in the statute, but the expressions "enter upon" and "enter upon and occupy" are used in the ordinary sense of the words, and have no technical significance in this statute. The evident intent of congress was, by this legislation, to put a wall around this entire territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, every one who was not outside of that wall on April 22d. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

But is said that the appellant was rightfully on the railroad company's right of way; that he had the express sanction of congress to be there; and that when the

hour of noon of April 22d arrived he had, as an American citizen, possessing the qualifications named in the homestead laws, the right to enter upon any tract within the territory for the purpose of making it his homestead. While he may have had all the qualifications prescribed by the general homestead law, he did not have the qualifications prescribed by this statute; and there is nothing to prevent congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what congress did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there. It must also have known that many other persons were rightfully in the territory,—Indian agents, deputy marshals, mail carriers, and many others; and if it intended that these parties, thus rightfully within the territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say "any person who may wrongfully enter," etc., but "any person who may enter," "rightfully or wrongfully," is implied. There are special reasons why it must be believed that congress intended no relaxation of these disqualifications on the part of those on the company's right of way, for it is obvious that when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settlement, numbers of settlers will immediately pour into it, and large cities will shortly grow up along the line of the road; and it cannot be believed that congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities.

It may be said that, if this literal and comprehensive meaning is given to these words, it would follow that any one who, after March 2d and before April 22d, should chance to step within the limits of the territory, would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if, at the hour of noon on April 22d, when the legal barrier was by the president destroyed, he was in fact outside of the limits of the territory, it may perhaps be said that if within the letter he was not within the spirit of the law, and therefore not disqualified from taking a homestead. Be that as it may,—and it will be time enough to consider that question when it is presented,—it is enough now to hold that one who was within the territorial limits at the hour of noon of April 22d was, within both the letter and the spirit of the statute, disqualified to take a homestead therein.

The judgment of the supreme court of the territory was right, and it is affirmed.

(148 U. S. 393)

BARNUM v. TOWN OF OKOLONA.

(April 3, 1893.)

No. 154.

MUNICIPAL BONDS — VALIDITY — RESTRICTIONS OF ACT.

1. Act Miss. March 25, 1871, authorized certain counties, cities, and towns to aid in the construction of a certain railroad by subscribing for stock of the company, and provided, in section 4, that the supervisors of such counties might issue bonds payable at such times as they might deem best, but "not to extend beyond ten years from the date of issuance," for such sums as might be necessary to meet the subscriptions. Section 5 authorized the towns to issue bonds for the same purpose, "in the same manner, and with the like effect," and provided that all bonds so issued "shall be alike binding upon the towns respectively in their corporate capacity, as the bonds so issued by the said boards of supervisors shall be binding upon the counties respectively." *Held*, that bonds issued by towns, having longer than 10 years to run, are void, for the limitation contained in section 4 is made a part of section 5.

2. In determining the validity of such bonds, which came into the hands of the owner before that question had been adjudicated by the supreme court of the state, the supreme court of the United States will not consider itself bound by such subsequent adjudication, unless it regards it as intrinsically sound.

In error to the district court of the United States for the northern district of Mississippi.

Action of debt by Frank D. Barnum against the town of Okolona to recover upon certain municipal bonds issued in aid of the Grenada, Houston & Eastern Railroad Company. The court sustained a demurrer to the declaration, and plaintiff brings error. Affirmed.

Statement by Mr. Justice SHIRAS:

The act of March 25, 1871, of the state of Mississippi, authorized certain counties, cities, and towns to aid in the construction of the Grenada, Houston & Eastern Railroad, by subscribing for capital stock of the company organized to build and maintain that railroad.

The fourth and fifth sections of said act were as follows:

"Sec. 4. Be it further enacted, that it shall and may be lawful for the boards of supervisors of any county which shall have voted a tax as provided by this act, or of the act to which this act is amendatory, to issue bonds due and payable at such time or times as said boards of supervisors may deem best for the taxpayers of their respective counties, not to extend beyond ten years from the date of issuance, for such sums as said boards of supervisors may deem necessary to meet, pay off, and discharge the subscriptions of said counties respectively for capital stock in the Grenada, Houston and Eastern Railroad Company, which have been or which may hereafter be subscribed

for by said boards of supervisors, or by the boards of police, (as the case may be,) respectively, not to exceed the total sum of such stock subscriptions, which said bonds shall be signed by the president of the board of supervisors issuing the same, and be made payable to the president and directors of the Grenada, Houston and Eastern Railroad Company, and their successors and assigns, and may be assigned, sold, and conveyed, with or without guaranty of payment, by the said president and directors, or may be mortgaged in like manner at their discretion, as they may deem best for the company.

"Sec. 5. Be it further enacted, that it shall be lawful for the mayor and selectmen of any incorporated city or town who may have subscribed, or shall hereafter subscribe, for capital stock in the Grenada, Houston and Eastern Railroad Company, as authorized by this act, or the act of which this act is amendatory, to issue bonds of their respective corporations in the same manner and with the like effect, sufficient in amount to meet the total sum of their respective subscriptions for stock, as the boards of supervisors of the different counties are by this act authorized to do, and all bonds and coupons of interest issued by said mayor and selectmen shall be alike binding upon said towns respectively, in their corporate capacity, as the said bonds so issued by the said boards of supervisors shall be binding upon said counties respectively."

In pursuance of the powers so conferred, the town of Okolona subscribed for stock in the said company, and paid for the same by executing and delivering to the railroad company its bonds, bearing date September 1, 1871, with coupons attached, payable in New York city, to bearer, and maturing at from 11 to 17 years after their date. The bonds recite that they are "issued and delivered to the Grenada, Houston and Eastern Railroad Company by the town of Okolona, to meet and pay off the amount subscribed by said town to the capital stock of the railroad company aforesaid."

Frank D. Barnum, a citizen of Tennessee, brought an action of debt against the town of Okolona at the April term, 1889, of the district court of the United States for the northern district of Mississippi, and averred in his declaration that he was the holder and owner for value, and before the maturity thereof, of 16 bonds of said town, with their coupons attached, which were due and unpaid, and the amount whereof he was entitled to recover. The declaration likewise averred that said bonds recited that they had been issued in pursuance of the said act of March 25, 1871.

To this declaration the defendant demurred, and assigned for cause, among other things, that it appeared, in and by said declaration, that the bonds sued on were payable more than 10 years after their execution, and were therefore void.

Upon argument, the court below sustained the defendant's demurrer, whereupon the plaintiff sued out this writ of error to this court.

E. H. Bristow and W. B. Walker, for plaintiff in error. R. O. Reynolds, W. T. Houston, Thos. J. Buchanan, Jr., and D. W. Houston, for defendant in error.

Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act,—are propositions so well settled by frequent decisions of this court that we need not pause to consider them. Sheboygan Co. v. Parker, 3 Wall. 93, 96; Wells v. Supervisors, 102 U. S. 625; Claiborne Co. v. Brooks, 111 U. S. 400, 4 Sup. Ct. Rep. 489; Young v. Township, 132 U. S. 346, 10 Sup. Ct. Rep. 107.

Accordingly if, in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company, and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond 10 years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. Norton v. Dyersburg, 127 U. S. 160, 8 Sup. Ct. Rep. 1111; Brenham v. Bank, 144 U. S. 188, 12 Sup. Ct. Rep. 559.

It is, however, contended on behalf of the plaintiff in error that no such limitation was put, by the enabling act, on bonds issued by towns; that the restriction to a limit of 10 years, contained in the fourth section of the act of March 25, 1871, was applicable only to the case of bonds issued by counties. It is true that in the fifth section of the act, which conferred the power on towns and cities to subscribe for railroad stock and pay therefor in bonds, no express provision is found as to the length of time during which the bonds should run. As, however, the fifth section does provide that the bonds to be given by towns shall be issued "in the same manner and with the like effect, sufficient in amount to meet the total sum of their respective subscriptions for stock, as the boards of supervisors of the different counties are by this act authorized to do," and that all "bonds and coupons of interest issued by said mayor and selectmen shall be alike binding upon said towns respectively, in their corporate capacity, as the said bonds so issued by the said boards of supervisors shall be binding upon said counties respect-

ively," it seems plain that the legislative intent was that the bonds of the towns should be subject to the 10-years limitation contained in the fourth section. This is the fair and obvious import of the language used.

The question involves the construction of the statute of Mississippi, and has been decided by the supreme court of that state in the case of Woodruff v. Okolona, 57 Miss. 806, where it was held that bonds issued under that act, having more than 10 years to run, were void, and where, in order to reach that conclusion, it was necessary to hold that the limitation of 10 years for the running of the bonds contained in the fourth section was applicable to bonds issued by towns under the fifth section.

*397 As against a party who became the owner of such bonds before the decision of the supreme court of the state was rendered, which was the case here, we do not consider ourselves bound by such decision unless we regard it as intrinsically sound. Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. Rep. 358; Bolles v. Brimfield, 120 U. S. 759, 7 Sup. Ct. Rep. 736. Still, even in such a case, the construction put upon a state statute by the supreme court of such state is entitled to our respectful consideration; and we do not hesitate to adopt it as a true construction in the present case, where we have reached the same conclusion upon an independent reading of the statute.

Our conclusion, upon the whole case, is that the town of Okolona had no power to issue the bonds in suit, and that the judgment of the court below must be affirmed.

(148 U. S. 502)

BENDER v. PENNSYLVANIA CO.

(April 3, 1893.)

No. 193.

APPEAL—FINAL JUDGMENT—ORDER OVERRULING MOTION TO REMAND.

An order overruling a motion to remand a cause to a state court is not a final judgment, so as to entitle the defeated party to a writ of error.

In error to the circuit court of the United States for the northern district of Ohio.

Action in the court of common pleas of Holmes county, Ohio, by George S. Bender, administrator of the estate of Thomas Bender, deceased, against the Pennsylvania Company, operating the Pittsburgh, Ft. Wayne & Chicago Railway, for negligence causing the death of said Thomas Bender. Defendant's petition for removal to the United States circuit court was stricken from the files of the court of common pleas on plaintiff's motion. Defendant's petition for an order of removal was thereafter granted by the United States circuit court, and plaintiff's motion to set aside said order overruled. The cause nevertheless proceeded in the court of common pleas, and verdict and judgment were given for plaintiff. Defendant filed a petition in error to the Ohio circuit court for Holmes county, setting forth the removal of the cause to this court, and praying that the judgment be declared void. This petition was, on plaintiff's motion, stricken from the files. In the United States circuit court plaintiff's motion to remand was denied. Plaintiff brings error. Heard on defendant's motion to dismiss the writ of error. Granted.

Lyman R. Critchfield, for plaintiff in error.
J. R. Carey, for defendant in error.

THE CHIEF JUSTICE. This is a writ of error, brought May 29, 1889, to an order overruling a motion to remand the case to the state court. Such an order is not a final judgment on the merits, and the writ of error must be dismissed. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118; Railway Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. Rep. 123; Joy v. Adelbert College, 146 U. S. 355, 13 Sup. Ct. Rep. 186.

(148 U. S. 412)

PRESIDENT & DIRECTORS OF MANHATTAN CO. v. BLAKE, Collector of Internal Revenue.

(April 3, 1893.)

No. 163.

TAXATION—BANK DEPOSITS—MONEY DEPOSITED BY STATES.

1. Moneys placed in the Manhattan Bank by the state treasurer of New York, pursuant to the contract of July 13, 1840, between the bank and the commissioners of the canal fund, and also under the provisions of Rev. St. N. Y. pt. 1, c. 8, tit. 4, §§ 7–10, to be disbursed by the bank, as agent of the state, in discharge of the principal and interest of the state canal loan and the loan for payment of bounties to volunteers, and which moneys were held by the bank at its own risk, mixed with its general funds, and were subject to be recalled by the state, were true "deposits," and computable as such in determining the sum which was subject to the federal tax of one twenty-fourth of 1 per cent. a month, imposed by the act of June 30, 1864, § 110, (Rev. St. § 3408,) on the average amount of bank deposits subject to payment by check, draft, etc.

2. The deposit of the money by the state did not create a vested right in the creditors to whom it was to be paid, so as to make the bank a mere trustee for them; nor, on the other hand, was the money held by the bank merely as agent of the state, so as to render the tax a tax on the revenues of the state in the hands of its disbursing agent, or a tax directly upon the revenues of the state.

In error to the circuit court of the United States for the southern district of New York. Affirmed.

John W. Butterfield, for plaintiff in error.
Asst. Atty. Gen. Maury, for defendant in error.

*412 *Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action at law, brought January 31, 1883, by the president and directors of the Manhattan Company, a New York corporation, possessing banking powers, and carry-

ing on the business of banking in the city of New York, against Marshall B. Blake, in the supreme court of the state of New York, and removed by the defendant, by certiorari, into the circuit court of the United States for the southern district of New York, on the ground that the suit was brought against him on account of acts done by him under the revenue laws of the United States, and as collector of internal revenue for the second collection district of the state of New York.

The complaint in the suit, which was put in in the state court, contains six paragraphs, setting forth (1) the status of the plaintiff; (2) the status of the defendant, and an allegation that the banking house of the plaintiff was situated, and its business was carried on, in said second collection district; (3) that on December 24, 1881, the plaintiff received from the defendant a notice stating that the tax assessed against it, from July 1, 1864, to May 31, 1881, amounting to $121,215.34, was due and payable on or before the last day of December, 1881, and that, unless it was paid by that time, it would become his duty to collect it, with a penalty of 5 per cent. additional, and interest at 1 per cent. per month, the tax being one upon deposits; (4) that the plaintiff, apprehending that if it did not pay the tax on or before December 31, 1881, the defendant would levy upon its property to satisfy the tax, paid to him on that day the sum of $113,085.62, being the amount of the tax, without including any penalty, but that, before paying such amount, the plaintiff delivered to the defendant a written protest against the payment of the tax on deposits during the period from July 1, 1864, to November 30, 1879, because a portion of that tax was assessed upon moneys transmitted to the plaintiff by the treasurer of the state of New York, for the payment of debts of the state, and which were not "deposits," within the meaning of the statute of the United States, and because the remainder of such tax was assessed upon moneys deposited with the plaintiff by the United States Trust Company of New York, on which the latter company had already paid to the United States a tax as upon deposits, but that the defendant, notwithstanding such protest, insisted upon the payment of the tax, and required the plaintiff to pay it; (5) that said tax was in part unlawfully assessed against the plaintiff, and it was not legally liable to pay the same, for the reason that $31,021.25 of said tax was assessed against it on account of moneys transmitted to it by the treasurer of the state of New York, and received by the plaintiff as the agent of the state, to be applied by the plaintiff to the payment of the debts of the state, and the moneys were not "deposits," within the meaning of the revenue laws of the United States, and for the further reason that $64,518.73 of said tax was assessed against the plaintiff on account of moneys received by it from the United States Trust Company of New York, upon which the latter company paid to the United States a tax as deposits; and (6) that, before the commencement of the suit, the plaintiff appealed to the commissioner of internal revenue of the United States, and claimed that $95,539.98 of said tax was erroneously assessed and paid, for the reasons before mentioned, and that the plaintiff was entitled to have that sum refunded, and that said commissioner rejected said appeal and claim, for the reason, as stated by him, that the amount was legally assessed and collected. The complaint prayed judgment for $95,539.98, with interest from December 31, 1881.

The answer of the defendant, which was put in in the circuit court of the United States, admitted the allegations contained in paragraphs 1, 2, 3, 4, and 6 of the complaint, and put in issue the allegations of paragraph 5, and averred that the $113,085.62 had been paid to the defendant, as collector of internal revenue, as a tax on the deposits of money with the plaintiff, subject to payment by check or draft, or represented by certificate of deposit or otherwise; that that sum 416
was justly due as such tax; and that he had long since covered the same into the treasury of the United States.

The case was tried before Judge Lacombe and a jury, on the 22d of October, 1888. There is a bill of exceptions, which states that the evidence of the respective parties is set forth in the following agreed statement of facts:

"First. The first, second, third, fourth, and sixth articles of the complaint, the same being admitted by the answer.

"Second. That plaintiff has for more than forty years maintained a transfer office within its banking house in 40 Wall street, in New York, as provided by a contract made by the commissioners of the canal fund and the canal board with the Manhattan Company, and pursuant to an act passed by the legislature of the state of New York authorizing such contract, passed May 13, 1840. See Sess. Laws 1840, p. 229. Said agreement or contract is contained in document 5 of Assembly Reports of the state of New York for the year 1841, and said act and said contract as contained in said volumes may be referred to by either party herein, and are admitted to be in evidence for the purpose of this action. It has also during the period above mentioned, and long prior thereto, acted as a depositary of moneys of the state of New York committed to its keeping by the treasurer of the state of New York under the authority vested in that officer by the statute of this state, (title 4, c. 8, pt. 1, Rev. St., [1 Edm. 177,] Exhibit B, post,) and any and all acts in reference to the relations of the plaintiff to the state as a depositary of moneys of the state may be re-

ferred to by either party herein, and are admitted to be evidence for all the purposes of this action.

"Third. That in pursuance to the provisions of the said contract contained in assembly document No. 5, and between the years 1864 and 1882, the plaintiff maintained such transfer office, and paid out to various creditors of the state large sums of money received from the treasurer of the state of New York, to be applied to the payment of the interest accruing from time to time on various stocks of the state of New York, and more particularly stock of the canal loan and volunteer bounty loan, and also for the payment of the principal of the same as the same from time to time became due and payable, and gave receipts and vouchers for the same, as were required by the state, in accordance with the provisions of the act and agreement hereinbefore referred to; that such money so sent to the bank, so far as the same was to be applied to the extinguishment of the canal loan or volunteer bounty loan debts, was to be applied to the extinguishment of debts incurred by the state in the exercise of its sovereign and reserved powers.

"Fourth. That the tax assessed against the plaintiff, as stated in the third article of the complaint herein, was assessed upon deposits in plaintiff bank, which included the amounts so received by the plaintiff from the treasurer of the state of New York to satisfy the interest or principal of said stocks; that the tax upon the amounts so received from the treasurer of the state of New York by the plaintiff was the sum of $31,021.25; that the course of business between the plaintiff and the treasurer of the state of New York in reference to the money so transmitted by him, for the purpose aforesaid, to the plaintiff was as follows: The interest upon said canal loan and volunteer bounty loan and the principal thereof fall due upon the first day of certain specified months. At some time during the week preceding the first day of the month when such principal or interest would fall due, the treasurer of the state would remit by mail to plaintiff drafts drawn by various country banks upon their respective correspondents in the city of New York to an amount equal to the payments to be made on the first of the ensuing month, the receipt of which drafts would be acknowledged by mail in a letter addressed by the plaintiff to the treasurer. Upon the receipt of these drafts the amount thereof was at once credited to an account upon plaintiff's books entitled 'Treasurer of the State of New York, Account of Canal Fund,' so far as the proceeds of said drafts were to be applied for payments on account of the canal indebtedness, and to an account entitled 'Treasurer of the State of New York,' so far as the proceeds of said drafts were to be applied to the bounty indebtedness. These drafts were collected by the plaintiff through the New York clearing house, and their proceeds mixed with the general deposits of the plaintiff. Plaintiff had on hand at the close of each day's business sufficient deposits to meet all claims of the state. Upon the receipt by the treasurer of the state of a notification from plaintiff that such drafts had been received by it, the treasurer has drawn drafts upon the plaintiff to the order of the cashier of the plaintiff, inclosed and mailed in a letter addressed to the plaintiff, in which was indicated the purpose to which the funds were to be applied. The draft relating to canal loan, upon its receipt by plaintiff, was charged against the account entitled 'Treasurer of the State of New York, Account of Canal Fund,' and credited to a new account called 'Interest New York State Stocks, Canal Loan, July 2, 1881.' The draft relating to bounty loans was in like manner charged against the account entitled 'Treasurer of the State of New York,' and credited to a new account entitled 'Interest Loan for Payment of Bounties to Volunteers Due January 1st, 1877.'

"The mode in which the money was actually paid out by plaintiff was as follows: The book containing the names of the parties entitled to be paid, with receipts for them to sign, was placed in the hands of the transfer clerk of the plaintiff at its banking house, and to him the parties were directed, in the first instance, to apply. The transfer clerk, upon being satisfied of their identity and obtaining their signatures to the receipts, gave them each a paper in the following form signed by him:

"'Registered Stock.
"'N. Y. State Stock.
"'No. —. New York, ——— —, 18—.
"'Manhattan Company.
"'Charge interest New York State stock, ——— —, 18—, ——— dollars. ———.
"'$—. "'Transfer Officer.'

"The money was sent down in the same way; but when the principal became due the parties came with their certificates of stock and surrendered them and gave an assignment, and then they received from the transfer clerk a sort of a paper in this form:

"'State of New York, Transfer Office of the Manhattan Company.
"'Pay to the order of ——— ——— ——— dollars.
"'Reimbursement of loan to provide for deficiencies in the sinking fund of July 1st, 1881.
"'Registered stock.
"'Transfer office. ———.
"'Transfer Clerk.'

"The papers, of which the above is a copy, were presented to the plaintiff's paying teller by the person entitled to receive the interest or principal, and the money was paid him by such teller. The amount paid upon each was charged either to the account 'Interest New York State Stock, Canal Loan, July 2, 1881,' or to the account 'Interest

Loan for Payment of Bounties to Volunteers, Due January 1st, 1877,' according to the fact in each case, until said accounts were balanced.

"Fifth. The claim of plaintiff in this action, so far as it relates to the sum of $64,518.73, being the sum assessed and collected on amounts upon which taxes have theretofore been paid by the United States Trust Company, is hereby waived and withdrawn."

The contract mentioned in paragraph 2 of the agreed statement of facts was made July 13, 1840, between "the people of the state of New York, by their agents, the commissioners of the canal fund of the said state, of the first part," and "the president and directors of the Manhattan Company, in the city of New York, of the second part." The material parts of the contract are as follows:

"In consideration of the agreements and undertakings hereinafter contained, on the part of the said party of the second part, the said party of the first part hereby agrees to establish an office in the bank of the said party of the second part in the city of New York for the issue and transfer of certificates of any stock authorized by the laws of the state of New York for any loans made in its behalf by the comptroller or the commissioners of the canal fund, which office shall be continued and maintained in the said bank during the pleasure of the commissioners of the canal fund of the said state. * * *

"For rendering the services contemplated by this agreement the party of the first part will pay to the said party of the second part, so long as the said transfer office shall be continued in the said bank, a compensation at the rate of twelve hundred and fifty dollars annually, and to be paid quarterly, in lieu of all expenses and charges of every description, except the expense of ledgers and transfer books.

"In consideration of the aforesaid agreements the said party of the second part hereby agree and engage to maintain an office in their said bank for the issue and transfer of certificates of stock for any loan made in behalf of the people of the said state by the comptroller or by the commissioners of the canal fund, which certificates shall be issued and which transfers shall be made as hereinbefore declared; and for all transfers made and certificates issued contrary to the provisions of this agreement hereinbefore contained, the said party of the second part shall be immediately liable to the said party of the first part for the nominal amount of all certificates so transferred or issued. * * *

"And the said party of the second part further agree that they will pay and redeem such certificates of stock issued under the direction of the commissioners of the canal fund in behalf of the state of New York as shall from time to time be directed by the said commissioners, from the funds to be provided by them, at such rates as they shall prescribe; and will also pay and redeem such certificates of stock issued under the directions of the comptroller as he shall direct, out of funds to be provided by him, at such rates as he shall prescribe; and in such payments will conform to such regulations as may be prescribed by the said commissioners or the comptroller in regard to such certificates respectively, and will render accounts of such payments and vouchers for the same as shall be prescribed in such regulations.

"And the said party of the second part further agree that they will from time to time pay the interest on all loans made by the commissioners of the canal fund in behalf of the state of New York, out of funds to be provided for that purpose, on such vouchers and proofs as the said commissioners shall prescribe, and will render accounts of such payments, with such vouchers, within such time, and in such form as they shall direct, and in like manner will pay the interest on loans made by the comptroller from funds to be provided by him, at such times and on such vouchers as he shall prescribe, and will render an account to him of such payments, with the vouchers therefor, within such time and in such form as he shall direct."

The provisions of the statute of New York, referred to in paragraph 2 of the agreed statement of facts as "Exhibit B," (title 4, c. 8, pt. 1, Rev. St.,) are as follows:

"Sec. 7. The treasurer shall deposit all moneys that shall come to his hands on account of this state, except such as belong to the canal fund, within three days after receiving the same, in such bank or banks in the city of Albany as in the opinion of the comptroller and treasurer shall be secure, and pay the highest rate of interest to the state for such deposit.

"Sec. 8. All moneys directed by law to be deposited in the Manhattan Bank, in the city of New York, to the credit of the treasurer, shall remain in said bank, subject to be drawn for as the same may be required.

"Sec. 9. The comptroller may transfer the deposits in the Manhattan Bank from time to time to the bank or banks in the city of Albany in which the moneys belonging to this state shall be deposited pursuant to the foregoing seventh section of this title, so often as it will be for the interest of the state to transfer such deposits; but the comptroller may continue such deposits in the Manhattan Bank, if the said bank shall pay a rate of interest to the state for such deposits equal to that paid by the bank or banks in Albany in which the state deposits shall be made.

"Sec. 10. The moneys so deposited shall be placed to the account of the treasurer; and he shall keep a bank book, in which shall be entered his account of deposits in,

and moneys drawn from, the banks in which such deposits shall be made."

At the trial, the foregoing being all the evidence on both sides, the court directed a verdict for the defendant, to which direction the plaintiff excepted. The verdict having been rendered, a judgment was entered thereon against the plaintiff, and for costs. The plaintiff has sued out a writ of error from this court.

*423 *The statute of the United States under which the tax was assessed was section 110 of the act of June 30, 1864, c. 173, (13 St. p. 277,) afterwards embodied in section 3408 of the Revised Statutes, which latter section reads as follows: "There shall be levied, collected, and paid, as hereinafter provided: First. A tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company, or corporation, engaged in the business of banking." Although this tax on deposits in banks was repealed by the act of congress of March 3, 1883, c. 121, (22 St. p. 488,) yet the latter act expressly excepted "such taxes as are now due and payable."

It is contended for the plaintiff (1) that the contract before set forth, made July 13, 1840, under the provisions of which the money in question was sent by the treasurer of the state to the plaintiff, and the manner in which that money was credited and disbursed by the plaintiff, show that the ordinary relation of banker and depositor never arose; that congress did not contemplate the including of such money for purposes of taxation, under the general title of "deposits," as used in section 3408; and that the bank, as to the funds in question, was merely the salaried disbursing agent of the state and a trustee for the creditors of the state; (2) that the money paid by the plaintiff, which it now seeks to recover, was the proceeds of a tax collected by the agent of the United States, and levied upon all the money in the hands of the plaintiff, including money of the state of New York, then in the possession of an agent of that state, and held for immediate disbursement by that agent to the creditors of the state, such agent receiving a salary to effect such disbursement; that such tax was, to that extent, a tax upon the revenues of the state in the hands *424 of its disbursing agent; and that such money could not be included constitutionally in the term "deposits," as used in the statute of the United States.

The money in question was deposited with the plaintiff by the treasurer of the state of New York, to be afterwards disbursed by the plaintiff, as agent of the state, for certain purposes designated in the statute of the state and in the contract of July 13, 1840. The money, when so deposited, became the property of the plaintiff, and was credited by it to the treasurer of the state in account, and was thereafter drawn for by drafts made by the treasurer of the state, and sent to the plaintiff. If such money had been lost or stolen while in the hands of the plaintiff, the plaintiff, and not the state, would have borne the loss. The identical money received by the plaintiff from the treasurer of the state was not to be returned to the treasurer, or paid to his drawee, or kept distinct from the other funds of the plaintiff. It was not only a deposit of money, but was subject to payment by check or draft, and was payable either on demand or at some future day, all within the terms of the taxing statute of the United States. That statute covered general deposits, and not special deposits.

There is no foundation for the contention on the part of the plaintiff that a trust was created in its hands in favor of each creditor of the state intended to be paid through the plaintiff, as a consequence resulting from each deposit of money made by the treasurer of the state with the plaintiff. The money so deposited was not placed, by the mere fact of the deposit, irrevocably beyond the control of the state. Neither the money credited to the account called "Interest New York State Stocks, Canal Loan," nor that credited to the account entitled "Interest Loan for Payment of Bounties to Volunteers," became, by such respective credits, the property of the holders of the securities for the respective loans, so as to create a title in them to the money as interest money. If the money had been withdrawn by the state from the plaintiff, the latter could not have been liable therefor to the creditors holding such securities.

By the contract of July 13, 1840, the plaintiff agreed to act as agent of the state in paying out from the deposits made with it by the state sums of money in favor of the holders of the obligations of the state, to pay such holders the interest on such obligations. The plaintiff occupied two relations to the state,—one that of debtor as a bank for the money deposited with it by the state, and the other that of agent of the state to pay out from the money deposited, if it remained on deposit, money for certain specified purposes. The tax was assessed on deposits of money "subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day;" and the clear purpose of the statute was to tax deposits of money in the situation of those in question. There is nothing in the contract of July 13, 1840, to relieve the plaintiff from its liability as a bank for the money deposited with it by the state. The plaintiff did not hold the money as an agent of the state, but was such agent only to disburse the money. The theory

that the plaintiff was a trustee of the money deposited, for certain cestuis que trustent, on the ground that the right to the money had become vested, by the mere fact of the deposit, in the creditors of the state, would make it necessary that it should be impossible for the state to withdraw the deposit, which was not the fact.

We see nothing to affect these views in the cases cited by the plaintiff, of Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13; Sharpless v. Welsh, 4 Dall. 279; Van Alen v. Bank, 52 N. Y. 1; Martin v. Funk, 75 N. Y. 134; Machine Works v. Kelley, 88 N. Y. 234; People v. Bank, 96 N. Y. 32; National Bank v. Insurance Co., 104 U. S. 54; Libby v. Hopkins, 104 U. S. 303; Pennell v. Deffell, 4 De Gex, M. & G. 372; Frith v. Cartland, 2 Hem. & M. 417.

It is distinctly provided by section 8, tit. 4, c. 8, pt. 1, Rev. St. N. Y., that "all moneys directed by law to be deposited in the Manhattan Bank, in the city of New York, to the credit of the treasurer, shall remain in said bank, subject to be drawn for as the same may be required." This shows clearly that the money put into the plaintiff's bank by the state is "deposited" there, and is to lie there, to the credit of the treasurer of the state, and may be drawn at any time when required by the state. Section 9 also shows that the money so deposited is considered by the state as "deposits." It thus becomes "deposits of money, subject to payment by check or draft," within the meaning of the statute of the United States imposing the tax.

Nor do we perceive any soundness in the view that the money on which the tax in question was assessed was a part of the revenue of the state in the hands of its agent for immediate disbursement, and so not liable for the tax. We cannot regard the money in question as the money of the state in the hands of its agent. After it was deposited with the plaintiff, it was the money of the plaintiff, and no tax was put upon the plaintiff as respected its function as agent of the state. It might as well be said that a tax upon the business of the plaintiff would have been invalid because such business embraced transactions with the state. Even regarding the tax as a tax upon the plaintiff as a bank, it was not a tax upon it as agent of the state, but as a bank receiving deposits. The account of the state was not charged by the plaintiff with the amount of the tax, nor was that amount deducted from the deposits made by the treasurer of the state with the plaintiff. So the tax did not fall upon the state in any way.

The contention is, however, that if the tax was not on the function of the plaintiff as agent of the state, it was on the revenue of the state. It might as well be contended that a federal tax assessed on, and collected from, the money of a citizen of New York, who was in arrears to the state in respect of his taxes, was laid on the revenues of the state, and therefore illegal. The cases cited by the plaintiff in this connection, of McCulloch v. Maryland, 4 Wheat. 316; Weston v. City of Charleston, 2 Pet. 449; Dobbins v. Commissioners, 16 Pet. 435; Bank v. Fenno, 8 Wall. 533; Collector v. Day, 11 Wall. 113; U. S. v. Railroad Co., 17 Wall. 322; Bank of Commerce v. New York City, 2 Black, 620; National Bank v. U. S., 101 U. S. 1; and People v. Commissioners of Taxes, 90 N. Y. 63,—have no application to the case in hand. The plaintiff in the present case was not required to withhold, and did not withhold, from the state anything that would otherwise be due to the state. Judgment affirmed.

(148 U. S. 397)

PEOPLE OF THE STATE OF NEW YORK ex rel. SCHURZ et al. v. COOK, Secretary of State.

(April 3, 1893.)

No. 139.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—RAILROAD COMPANIES—FORECLOSURE AND REORGANIZATION.

1. The right given by the New York statute to the purchasers of railroad property and franchises at a foreclosure sale to form a new corporation with all the rights, powers, and privileges of the old one, upon filing with the secretary of state a certificate in the form therein prescribed, (Laws 1874, c. 430, as amended by Laws 1876, c. 443,) was not a contract right, but was a mere regulation of law, and the subsequent act, (Laws 1886, c. 143,) requiring, as a condition precedent to obtaining a charter, the payment of a sum equal to one eighth of 1 per cent. upon the proposed amount of capital stock of the new company, was not, as applied to purchasers at the foreclosure of a pre-existing mortgage, an act impairing the obligation of contracts, within the meaning of the federal constitution. 18 N. E. Rep. 113, 110 N. Y. 443, affirmed.

2. Even if the act of 1874, as amended by the act of 1876, should be regarded as constituting a contract, the act of 1886 did not impair the obligation thereof, for by the constitution of New York the power is reserved to the legislature to alter, change, or repeal all general laws relating to the formation of corporations.

In error to the supreme court of the state of New York.

This was an application by Carl Schurz, Clarence H. Clark, Charles M. Fry, and others to the supreme court of New York for a writ of mandamus to compel the secretary of state of New York to file a certificate of incorporation of a railroad company to be known as the Western New York & Pennsylvania Railway Company. The application was denied by the special term of the supreme court, and the judgment was affirmed by the general term, (47 Hun, 467,) whose decision was affirmed by the court of appeals, (18 N. E. Rep. 113, 110 N. Y. 443.) A judgment was then entered in the supreme court in conformity with the decision

of the court of appeals, and from that judgment the relators sued out a writ of error to this court. Affirmed.

George Zabriskie, for plaintiffs in error.
S. W. Rosendale, for defendant in error.

Mr. Justice JACKSON delivered the opinion of the court.

This writ of error is brought to review a judgment of the supreme court of the state of New York, adopting and entering a decision of the court of appeals of said state in pursuance of a remittitur therefrom, on the ground that it gave effect to and enforced a law of the state, which, in violation of the constitution of the United States, impairs the obligation of a contract. Whether there is a contract, and whether its obligation has been impaired, as claimed by plaintiffs in error, are questions which arise and are to be determined upon the following state of facts: Several railroad corporations, properly organized under the laws of New York and Pennsylvania, after duly executing mortgages upon their respective properties and franchises to secure the payment of bonds lawfully issued by them, were consolidated, under legislative authority from those states, into one company, which was incorporated February 14, 1883, under the name of the Buffalo, New York & Philadelphia Railroad Company. This new company, in pursuance of proper authority, also executed a mortgage upon its properties and franchises to secure the payment of bonds issued by it. Default was made in the payment of the bonds issued under and secured by each of these various mortgages, and foreclosure proceedings were instituted thereon, and the mortgages duly foreclosed, and the entire property and franchises of all the companies, constituent and consolidated, were regularly sold under such foreclosure proceedings, and bid in by the plaintiffs in error as the representatives of the security holders, in pursuance of a scheme of reorganization previously agreed upon. The properties and franchises so sold and purchased were duly conveyed to the purchasers September 28, 1887, who thereupon adopted and executed articles of association under and in conformity with the provisions of the reorganization acts of the state, (chapter 430, Laws 1874, as amended by chapter 446, Laws 1876,) and having prepared a certificate of incorporation, as provided by said acts, setting forth, among other things not material to be noticed, that they had associated themselves together as a corporation to be known as the Western New York & Pennsylvania Railway Company, with a maximum capital stock of $15,000,000, divided into 150,000 shares, they presented said certificate to Frederick Cook, secretary of state, with the request to file the same in his office, such filing being required before the parties forming the organization could become a body corporate. They tendered the secretary of state, at the time of applying to have the certificate filed, the sum of $45 as the proper amount of fees for recording the same. The secretary refused to permit it to be filed, basing his refusal upon the provision of an act of the legislature known as chapter 143 of the Laws of 1886, which provided that any corporation incorporated under any general or special law of the state, having capital stock divided into shares, should pay to the state treasurer, for the use of the state, a tax of one eighth of 1 per centum upon the amount of capital stock which the corporation was authorized to have. The act further provided that "the said tax shall be due and payable upon the incorporation of said corporation, or upon the increase of the capital stock thereof; and no such corporation shall have or exercise any corporate power until the said tax shall have been paid; and the secretary of state and any county clerk shall not file any certificate of incorporation or association until he is satisfied that the said tax has been paid to the state treasurer; and no such company incorporated by any special act of the legislature shall go into operation or exercise any corporate powers or privileges until said tax has been paid as aforesaid." This act took effect immediately upon its passage. When the plaintiffs in error presented their certificate of incorporation to the secretary of state for filing, the tax imposed by this act, amounting to $18,000, had not been paid or tendered to the state treasurer, and for this reason the secretary refused to file the certificate. Thereupon the plaintiffs in error applied to the supreme court of the state of New York, at special term, for a peremptory writ of mandamus to compel the secretary of state to file said certificate. The petition set out in detail the foregoing proceedings. In response to the order to show cause why the writ should not be granted, the secretary of state made return, stating, among other objections not material to this case, that the said Western New York & Pennsylvania Railway Company of New York, sought to be incorporated as a corporation, had neglected and refused to pay the incorporation tax imposed by the law of 1886, and that he could not be required to file the certificate until said tax had been paid. The special term denied the motion for a mandamus. From this order the relators appealed to the general term of the supreme court, which affirmed the action of the special term. 47 Hun, 467. The relators then appealed from the decision of the general term to the court of appeals, which affirmed the order of the former, (110 N. Y. 443, 18 N. E. Rep. 113,) and remitted the cause to the supreme court of the state, where judgment was entered in conformity with the decision of the court of appeals.

The present writ of error is prosecuted to review and reverse this judgment, on the

ground that the decision of the court of appeals, in enforcing the provisions of the law of 1886 against the relators, plaintiffs in error, and requiring of them the payment of one eighth of 1 per centum upon the amount of the capital stock of the company sought to be incorporated, as a condition precedent to the filing of the certificate and becoming a body politic and corporate under the name of the Western New York & Pennsylvania Railway Company of New York, impaired the obligation of a contract made and entered into between the state and the several corporations and mortgagees thereof, to whose rights, properties, and franchises the plaintiffs in error, under the foreclosure proceedings aforesaid, had succeeded. Their claim is that, under and by virtue of the provisions of the Laws of 1874, as amended in 1876, embodying the alleged contract with the state, they are entitled to be incorporated, and cannot lawfully be required to pay
405 any tax to the state before becoming a corporation and acquiring the right to exercise corporate functions and franchises. The act of 1874, as amended in 1876, is by its caption entitled "An act to facilitate the reorganization of railroads sold under mortgage, and to provide for the formation of new companies in such cases." The provisions of the statute, so far as material to this case, are the following:

"In case the railroad and property connected therewith, and the rights, privileges, and franchises of any corporation, except a street-railroad company, created under the general railroad law of this state, or existing under any special or general act or acts of the legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction made or given to execute the provisions or enforce the lien of any deed or deeds of trust or mortgage theretofore executed by any such company, the purchasers of such railroad property and franchises, and such persons as they may associate with themselves, their grantees or assignees, or a majority of them, may become a body politic and corporate, and as such may take, hold, and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges, and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by and upon filing in the office of the secretary of state a certificate, duly executed under their hands and seals, and acknowledged before an officer authorized to take an acknowledgment of deeds, in which certificate the said persons shall describe, by name and reference to the act or acts of the legislature of this state under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof authorizing or directing the same, together with a brief description of the property sold, and shall also set forth the following particulars:

"(1) The name of the new corporation intended to be formed by the filing of such certificate.

"(2) The maximum amount of its capital stock, and the number of shares into which 406
the same is to be divided, specifying how much of the same shall be common, and how much preferred, stock, and the classes thereof, and the rights pertaining to each class.

"(3) The number of directors by whom the affairs of the said new corporation are to be managed, and the names and residences of the persons selected to act as directors for the first year after its organization.

"(4) Any plan or agreement which may have been entered into pursuant to the second section thereof.

"And upon the due execution of such certificate, and the filing of the same in the office of the secretary of state, the persons executing such certificate, and who shall have acquired the title to the property and franchises sold as aforesaid, their associates, successors, and assigns, shall become and be a body politic and corporate, by the name specified in such certificate, and shall become and be vested with and entitled to exercise and enjoy all the rights, privileges, and franchises which, at the time of said sale, belonged to or were vested in the corporation which last owned the property so sold, or its receiver."

Now, it is contended by plaintiffs in error that the state having, by and under these provisions of law, agreed to give to the purchasers of railroad properties and franchises acquired under foreclosure proceedings, not merely the right to hold, use, and operate the same, but also to confer on them the corporate capacity necessary for that purpose, this latter branch of the contract is violated when the state thereafter either refuses to confer such corporate capacity, or imposes any condition upon the purchasers' right to be and to become a body politic and coporate. Upon this theory the claim is made that the tax imposed by the law of 1886, which was held by the state courts to apply to their case and to the corporation they proposed to form, impaired the obligation of the contract, and was, therefore, unconstitutional. This claim was disposed of by the New York court of appeals, speaking by Peckham, J., as follows:

"We think it also plain that, under the 407
reorganization acts above mentioned, when the purchasers at the foreclosure sale undertake to reorganize under those acts, and for that purpose to file in the secretary's office a certificate, upon the filing of which they become a body politic and corporate, the corporation thus formed is a new and entirely different one from that whose prop-

erty and franchises the purchasers may have bought under the foreclosure proceedings. It is true that the corporation about to be formed by the filing of the certificate has, by force of the statute, when formed, all the rights, franchises, powers, privileges, and immunities which were possessed before such sale by the corporation whose property was sold; but that does not make the corporation the same by any means. The right to be a corporation, which the old corporation had, was not mortgaged, and was not sold, and did not pass to the purchasers; and they only obtain such a right upon filing the certificate mentioned, and they then obtain it by direct grant from the state, and not in any degree by the sale and purchase of the franchises, etc., of the old corporation.

"The last ground argued by counsel is, we think, equally untenable. There has been no violation of any contract. These mortgages, it is true, were all executed, and the bonds issued, long prior to the passage of the tax act of 1886, already mentioned. The franchises of the corporations were duly mortgaged under the provisions of state laws, by which it was provided that purchasers at foreclosure sales under such mortgages could, upon compliance with the law, file certificates and become incorporated bodies. But such acts were in no sense contracts on the part of the state with persons purchasing bonds secured by such mortgages, or with future possible purchasers at foreclosure sales, that the provisions existing at the time of the mortgaging of the franchise for the incorporation of such purchasers should remain the same. I think this question has been decided in this way by the supreme court of the United States, and further discussion of it is unnecessary. Memphis & L. R. Co. v. Railroad Com'rs, 112 U. S. 609, 5 Sup. Ct. Rep. 299."

The principles and reasoning in the decision of this court in Memphis & L. R. Co. v. Railroad Com'rs, 112 U. S. 609, 5 Sup. Ct. Rep. 299, are directly applicable to the present case. The attempt to distinguish the two cases necessitates the drawing of distinctions too refined and theoretical to form the basis of sound judicial determination. It was said by this court in that case, (page 621, 112 U. S., and page 304, 5 Sup. Ct. Rep.:) "In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law, and not of contract, and are, therefore, subject to modification or repeal. Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law, and not of contract. At least, it would be construed as conferring only a right to organize as a corporation according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It cannot, we think, be admitted that a statutory provision for becoming a corporation in future can become a contract, in that sense of the clause of the constitution of the United States which prohibits state legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect as of that date, and subject to such laws as may then be in force. * * * The state does not part with the franchise until it passes to the organized corporation; and when it is thus imparted it must be what the government is then authorized to grant and does actually confer." It is further said therein that "the franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons." Page 619, 112 U. S, and page 303, 5 Sup. Ct. Rep.

But it is urged by plaintiffs in error that, under the decisions of the highest court of New York, they cannot, as private persons or as an association, so use, maintain, and operate the railroad which they have purchased. Without reviewing the New York cases cited in support of this position, we doubt whether they go to that extent. But if they so held under any law of the state passed since the execution of the mortgages under which plaintiffs in error have succeeded to the properties and franchises of the railroad sold under foreclosure, as already mentioned, then the question would be whether the impairment of the obligation of the contract would not consist in denying the purchasers the right to use the property and franchises so acquired. The fact, if it exists, that plaintiffs in error are not allowed to operate the railroad and exercise the franchises purchased without first obtaining corporate existence, in no way shows or tends to establish their contention that said act of 1874, as amended in 1876, constituted a contract on the part of the state to confer corporate capacity upon them without imposing any tax as a prerequisite to the grant of corporate existence. Again, there is nothing in the acts of 1874 and 1876 which would or could have exempted the railroad corporation to whose rights, privileges, and franchises the plaintiffs in error

have succeeded from the payment of taxes such as the state by its legislation might thereafter impose. If they were not in fact, they could constitutionally have been made, subject to the provisions of said act of 1886, and been required to pay the tax of one eighth of 1 per centum upon the amount of their capital stock. The settled rule of this court and of the courts of New York requires that exemption from taxation, so essential to the existence of government, must be expressed in the clearest and most unambiguous language, and not be left to implication or inference. Railroad Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. Rep. 625; Railroad Co. v. Guffey, 120 U. S. 569, 7 Sup. Ct. Rep. 693; Railroad Co. v. Alsbrook, 146 U. S. 279, 294, 13 Sup. Ct. Rep. 72; and People v. Davenport, 91 N. Y. 574, 586.

The plaintiffs in error acquired the properties and franchises of these corporations, which were subject to the taxing power of the state, after the act of 1886 was passed and went into effect. There is no provision of the law under which they made their purchase requiring them to become incorporated; but, desiring corporate capacity, they demanded the grant of a new charter under which to exercise the franchises so acquired without compliance with the law of the state existing at the time their application for incorporation was made. We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a claim. The provisions of that act do not constitute a contract on the part of the state with either the corporations or the mortgagees, bondholders, or purchasers at foreclosure sale. They are merely matters of law, instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon to reorganize and become a new corporation is subject to the laws of the state existing or in force at the time of such reorganization, and the grant of a new charter of incorporation. Memphis & L. R. Co. v. Railroad Com'rs, supra.

There is another difficulty in the way of sustaining the claim of the plaintiffs in error in this case. The constitution of New York, providing for the formation of corporations under general laws, reserves to the state the power to alter, change, or repeal all such general laws. The Revised Statutes of the state (volume 3, [8th Ed.] c. 18, tit. 3, § 8, p. 1724) provides that "the charter of every corporation that shall be granted by the legislature shall be subject to alteration, suspension, or repeal in the discretion of the legislature;" and by the general railroad law of New York (chapter 140, § 48, Laws of 1850) it is provided that "the legislature may at any time annul or dissolve any corporation formed under this act, but such dissolution shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liability which shall have been previously incurred."

In the case of People v. O'Brien, 111 N. Y. 1, 18 N. E. Rep. 692, cited by counsel for the plaintiffs in error, while the court held that it was not within the power of the legislature to destroy the property rights of a corporation, it was not questioned that the legislature could destroy the existence of the corporation. *411

In the still later case of Mayor, etc., v. Twenty-Third St. R. Co., 113 N. Y. 311, 21 N. E. Rep. 60, it was directly held that the right reserved to the legislature to alter or repeal the charter of a corporation included the right to tax a corporation upon its franchises as such, instead of exacting license fees, as before prescribed. Earl, J., speaking for the court there, said: "As it [the legislature] has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchises. It may enlarge or limit its powers, and it may increase or limit its burdens." This construction of the statutes of the state by its highest court is of controlling authority. Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. Rep. 974; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. Rep. 554; and Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. Rep. 227. The right being thus reserved to the legislature, under the power to alter or repeal the charter of corporation, not only to terminate their existence, but to impose upon them increased burdens, it cannot be properly asserted that the act of 1886, imposing the tax complained of, was unconstitutional, even though the act of 1874 created a contract with corporations and their mortgagees, to whose right, properties, and franchises plaintiffs in error have succeeded. The corporations, mortgagees, and bondholders, under such circumstances, acquire their rights subject to the reserved power of the legislature to enlarge or diminish the franchises conferred, and to increase or reduce the burdens thereon. Purchasers succeeding to properties and franchises of corporations thus situated cannot occupy any better position in respect to their application for a new charter of incorporation.

In Hamilton Gaslight Co. v. Hamilton City, 146 U. S. 258, 270, 13 Sup. Ct. Rep. 90, it was said by this court that "a legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract. * * * The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to *412

such reservation;" citing, in support of those views, Greenwood v. Freight Co., 105 U. S. 13, 17. This principle should be especially maintained and applied in cases like the present, where the taxing power of the state is involved.

We do not deem it necessary to consider other points made in the briefs of counsel. They are of minor importance, and do not affect or control the principal question presented. Our conclusion is that there is no error in the judgment complained of, and that the same should be affirmed.

(148 U. S. 391)

NORTHERN PAC. R. CO. v. WALKER, County Auditor, et al.

(April 3, 1893.)

No. 1,124.

CIRCUIT COURTS—JURISDICTIONAL AMOUNT—PRACTICE ON APPEAL.

1. In a suit by a railroad company against the auditors of several counties to avoid assessments and taxes levied on its lands, and to restrain the sale of the lands thereunder, the amount involved cannot be brought within the jurisdiction of the circuit court by taking the aggregate of the sums involved as to each defendant; but the jurisdiction as to each must be determined by the amount in controversy between him and the railroad company. Walter v. Railroad Co., 13 Sup. Ct. Rep. 348, 148 U. S. —, followed.

2. The supreme court will not in such case direct the dismissal of the bill, when the record fails to show whether the taxes levied by either of the counties exceeded $2,000, since by amendment the bill may perhaps be retained as to some of the defendants.

On certiorari to the United States circuit court of appeals for the eighth circuit. Reversed.

James McNaught and F. M. Dudley, for appellant. S. L. Glaspell, for appellees.

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

This was a bill filed in the circuit court of the United States for the district of North Dakota, November 21, 1890, by the Northern Pacific Railroad Company against the county auditors of 12 counties of that state, praying for a decree adjudging certain assessments and taxes levied upon lands in each of said counties to be illegal and void, and a cloud upon complainant's title, and that defendants and each of them be restrained from selling or attempting to sell said lands, or any portion thereof, or issuing any tax certificates therefor. The case proceeded to a decree, dismissing the bill for want of equity, (47 Fed. Rep. 681,) whereupon it was carried by appeal to the circuit court of appeals for the eighth circuit.

Certain questions or propositions of law, concerning which that court desired the instruction of the supreme court for a proper decision of the case, were certified to this court, and argument having been had upon the certificate, we directed a certiorari to issue requiring the whole record and cause to be sent up for consideration. This has been done, and we find upon examination that the case comes directly within Walter v. Railroad Co., 147 U. S. 370, 13 Sup. Ct. Rep. 348.

The record does not show that the amount of the assessments and taxes, forming the subject of the litigation, levied in either or all of the counties, exceeded the sum of $2,000; and even if this had been so as to the aggregate, the defendants could not have been joined in a single suit, and the jurisdiction thus been sustained. Upon the face of the record, therefore, the circuit court was without jurisdiction, (24 St. p. 552, c. 373; 25 St. p. 433, c. 866,) but as perhaps by amendment the bill might be retained as to some one of the defendants, we will not direct its dismissal.

In pursuance of section 10 of the judiciary act of March 3, 1891, (26 St. p. 829,) the decree of the circuit court is reversed at the costs of the appellant, and the cause remanded to that court, with a direction for further proceedings in conformity with this opinion.

(148 U. S. 427)

UNITED STATES v. "OLD SETTLERS." "OLD SETTLERS" v. UNITED STATES.

(April 3, 1893.)

Nos. 1,031 and 1,032.

FEDERAL COURTS — COURT OF CLAIMS — JURISDICTION — SPECIAL ACT — WESTERN CHEROKEE CLAIM.

1. Act Feb. 25, 1889, (25 St. at Large, p. 694,) conferred on the court of claims jurisdiction to try the claim of the "Old Settlers," or "Western Cherokees," set forth in the report of the secretary of the interior of February 3, 1883, "it being the intention of this act to allow the said court of claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be determined;" and provided for an appeal to the supreme court. *Held*, that the latitude conferred must be deemed the unrestricted latitude of a court of equity in stating an account, distributing a fund, and framing a decree so comprehensive and flexible as to secure to each suitor his joint and individual rights, and that the court should not be hampered by rules of procedure or by distinctions between law and equity.

2. Under the act, the evidence, as well as finidings of fact and conclusions of law, should be sent up on appeal. Harvey v. U. S., 105 U. S. 671, followed.

3. The act was not inconsistent with the Cherokee treaty of 1846, and should not be construed so as to confer jurisdiction to deal with that treaty as a private contract, by reformation or otherwise, or to proceed in disregard thereof, but was confined to the determination of what sum was due to the Indians under existing treaties or laws, conflicting provisions of which might, under the act, be held invalid. U. S. v. Arredondo, 6 Pet. 691, distinguished.

4. By the Cherokee treaty of 1828, land in the Indian Territory was granted with the express purpose of securing a home for both the Eastern and Western Cherokees. The

treaty of 1835, conveying more land, declared that such had been the purpose of those of 1828 and 1833. The patent granted December 31, 1838, ran to the "Cherokee nation," and the Indian office treated the grant as if to the whole nation as a unit. In 1843 the Western Cherokees, by memorial to congress, claimed that they had been dispossessed of two thirds of the lands thus granted by the forcible removal and settlement among them of the Eastern Cherokees. In June, 1846, they agreed to submit the question to commissioners, who decided against them. In August, 1846, they declared that they did not acquiesce in this decision, and should reassert their exclusive right to the country, "should the treaty now proposed fail from any cause." The treaty did not fail, but was duly executed on that basis August 6, 1846. An accounting was had thereunder, and payments were made and receipted for "in full of all demands under the fourth article of the treaty," in pursuance of Act Sept. 30, 1850, 9 St. at Large, pp. 544, 556. *Held*, that the question of the ownership of the lands was thoroughly set at rest by the treaty of 1846.

5. The Cherokee treaty of 1846, article 4, provided that the Western Cherokees had a claim on the United States for a third interest in the lands of the Cherokee nation lying east of the Mississippi river, and in the funds of the nation, and that the value of that interest should be ascertained for distribution among the Western Cherokees by deducting from the $5,600,000 granted by the treaty of 1835 investments and expenditures properly chargeable thereupon, (enumerated in article 15 of said treaty,) and taking one third of the residuum. This accounting was had, and the money paid accordingly. *Held*, that the act of February 25, 1889, (25 St. at Large, p. 694,) giving jurisdiction to the court of claims to adjudicate the legal and equitable claims of the Western Cherokees against the United States, waived any reliance by the United States upon lapse of time or laches, and opened the whole account for readjustment. Choctaw Nation v. U. S., 7 Sup. Ct. Rep. 75, 119 U. S. 1, distinguished.

6. A claim for $30,000, based on the resolution of the Cherokee council, November 16, 1846, for losses suffered by individual Indians forced to go to the states for safety, should not be included in the account, since the persons to whom it might be due were not parties, and it has no relation to a per capita distribution.

7. The cost of removal of both Eastern and Western Cherokees—16,957 persons in all—at $20 a head, should be deducted from the $5,600,000, but no deduction should be made for subsistence in view of the first senate resolution of September 5, 1850, that body having been agreed upon as umpire on that question.

8. The amount of the deductions for debts and claims against the Cherokee nation by citizens thereof, and by citizens of the United States for services rendered, should be limited to $60,000 under article 10 of the treaty of 1835.

9. The expenses of the committee to carry the treaty of 1835 into effect, as provided for in article 12, should not be deducted from the sums due the Cherokees.

10. The second senate resolution of September 5, 1850, decided that interest should be allowed from June 12, 1838, at 5 per cent. upon the sum found due to the Western Cherokees. The senate had been agreed upon as umpire, and interest was allowed and paid upon the accounting. *Held*, that interest at 5 per cent. from the same date should be allowed upon any sums found due the Indians upon readjusting the account, under act Feb. 25, 1889, (25 St. at Large, p. 694,) referring the Western Cherokee claims to the court of claims.

11. The sums found due should be distributed, as provided by the fifth article of the treaty of 1846, to each individual or head of family of the Western Cherokees, (those who emigrated west of the Mississippi prior to the treaty of 1835,) or his legal representatives, determined by the Cherokee law, and should not be decreed to the petitioners, styling themselves "commissioners," for distribution.

Appeals from the court of claims.

Petition by Bryan, Wilson, and Hendricks, under Act. Feb. 25, 1889, (25 St. at Large, p. 694,) for themselves, and as commissioners of the "Old Settlers," or "Western Cherokee," Indians, to recover moneys alleged to be due from the United States. A decree was given for petitioners. Both parties appeal. Modified and affirmed.

Statement by Mr. Chief Justice FULLER:

The original petition was filed March 8, 1889, and the substituted petition, January 23, 1890, and thereby the petitioners, Bryan, Wilson, and Hendricks, purporting to act for themselves, and as the commissioners of the "Old Settlers," or "Western Cherokee," Indians, represented that the latter are that part of the Cherokee race of Indians which formerly composed the Western Cherokee nation, and which subsequently became known as the "Old Settlers," and that for the purpose of prosecuting their claims against the United States government they had appointed Bryan, Wilson, and Hendricks as their commissioners to represent and in their names and for their benefit to do and perform any and all acts and things necessary and proper to be done by them in the premises. That the suit was brought under the provisions of the act of congress approved February 25, 1889, entitled "An act to authorize the court of claims to hear, determine, and render final judgment upon the claim of the Old Settlers, or Western Cherokee Indians," (25 St. p. 694,) and which is as follows:

"Section 1. That the claim of that part of the Cherokee Indians known as the 'Old Settlers,' or 'Western Cherokees,' against the United States, which claim was set forth in the report of the secretary of the interior to congress of February third, eighteen hundred and eighty-three, (said report being made under act of congress of August seventh, eighteen hundred and eighty-two,) and contained in executive document number sixty of the second session of the forty-seventh congress, be, and the same hereby is, referred to the court of claims for adjudication; and jurisdiction is hereby conferred on said court to try said cause, and to determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of treaty stipulations and acts of congress relating thereto, after deducting all payments heretofore actually made to said Indians by the United States, either in money or property; and, after deducting all offsets, counterclaims, and deductions of any and every

kind and character which should be allowed to the United States under any valid provision or provisions in said treaties and laws contained, or to which the United States may be otherwise entitled, and after fully considering and determining whether or not the said Indians have heretofore adjusted and settled their said claim with the United States, it being the intention of this act to allow the said court of claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined; and to try and determine all questions that may arise in such cause on behalf of either party thereto, and render final judgment thereon; and the attorney general is hereby directed to appear in behalf of the government; and, if said court shall decide against the United States, the attorney general shall, within sixty days from the rendition of judgment, appeal the cause to the supreme court of the United States; and from any judgment that may be rendered the said Indians may also appeal to said supreme court: provided, that the appeal of said Indians shall be taken within sixty days after the rendition of said judgment, and said court shall give such cause precedence: provided, further, that nothing in this act shall be accepted or construed as a confession that the government of the United States is indebted to said Indians.

"Sec. 2. That said action shall be commenced by a petition stating the facts on which said Indians claim to recover, and the amount of their claim; and said petition may be verified by the authorized agent or attorney of said Indians as to the existence of such facts, and no other statement need be contained in said petition or verification."

And it was thereupon averred that under the provisions of certain treaties, made and entered into in 1817 and 1819, the Western Cherokees, or Old Settlers, sold, ceded, and relinquished, and there was conveyed to the United States, all their right, title, and interest in and to all the lands belonging to them situated in the states east of the Mississippi, and in consideration thereof the United States sold them certain lands, situated in what is now the state of Arkansas. That, in consideration of the subsequent sale and cession of the lands in Arkansas to the United States, and in further consideration of the removal of the Western nation of Cherokees from the state of Arkansas, under the provisions of the treaties of May 6, 1828, and February 14, 1833, between the Western Cherokee nation and the United States, the latter bargained, sold, ceded, relinquished, and conveyed, solely and exclusively to the Western Cherokee nation, subsequently known as the "Old Settlers," all the lands situated in the now Indian Territory, and described in the treaties of 1828 and 1833, and solemnly guarantied the lands to them forever. That while in the peaceable and undisputed possession and enjoyment of the tract of land, in the now Indian Territory, the United States, under the color of a pretended treaty with the Eastern Cherokee nation in 1835, made and entered into without the knowledge or consent of the Western Cherokee nation, and to which it was not a party, and from the provisions of which it was prevented from protecting itself by force and fraud on the part of the United States, granted to the Eastern Cherokees the same lands that were sold and conveyed to the Western Cherokee nation, without the consent and against the wishes and in fraud and violation of the rights of the latter, and removed the Eastern Cherokees, against their will and by force of arms, from their homes east of the Mississippi, and located them upon the lands belonging to the Western Cherokees, thus depriving them of the sole use, right to, and interest in the lands as guarantied by treaty, and reserving to them only an interest in proportion to their numbers, they being but one third of the whole Cherokee people. That from that time, and continually thereafter, the Western Cherokees protested against and resisted this invasion of their rights, until in 1846, when, acting under duress of life, liberty, and property, advantage being also taken by the United States of the fiduciary relations existing towards the Western Cherokees, and also of the condition of extreme impoverishment, destitution, and want to which the Western Cherokees had been reduced by the United States, they were forced to make and enter into an agreement with the United States, fraudulent in character, by the terms of which the consideration they were to receive was grossly inadequate to compensate them for their right to and interest in the lands, of which they had been unjustly deprived by the United States, and for the property destroyed and lost to them through the wrongful acts of the United States, and its default to comply with its treaty obligations. It was further alleged that the land so bargained, sold, relinquished, and conveyed to the Western Cherokees by the treaties of 1828 and 1833 contained in all 13,610,795.34 acres, and that the Western nation of Cherokees formed but one third of the whole Cherokee race, the Eastern nation forming the other two thirds; and that the amount of land owned by the Western nation, which was appropriated by the United States and granted to the Eastern nation of Cherokees, under the provisions of the treaty of 1835, was the same part of the whole body of land as was the Eastern nation of the whole body of the Cherokee people; and that, therefore, the United States took from the Western Cherokees,

and deprived them of the sole use, right, title, and interest in and to two thirds of 13,610,795.34 acres, amounting to the sum of 9,073,863.56 acres, and converted the same to the public use and benefit; the land being worth at the time it was so taken and converted the sum of $5,671,164.72½.

Petitioners further alleged that after the Eastern Cherokees had been forcibly removed into the country of the Western Cherokees through the wrongful acts of the United States, and because of its failure to protect the Western Cherokees according to treaty stipulations, property of great value was lost to them, to wit, of the value of $30,000; and, further, that the only payments made to the Western Cherokees since the appropriation of their lands and the destruction of their property were the sum of $532,896.90, appropriated by act of congress of September 30, 1850, (9 St. 556;) a one-third interest in the sum of $500,000, given by the United States to the whole Cherokee people in common, by the treaty of 1835; and a one-third interest in 800,000 acres of land sold in common to the Cherokee people by the United States in the treaty of 1835, which was made exclusively with the Eastern Cherokee nation, for the sum of $500,000, at which valuation the Western Cherokees have been and still are held charged by the government for their one-third share.

It was further alleged that under the provisions of the treaty of 1846 the sum of $5,600,000, which had been provided by the treaty of 1835, and a supplementary treaty thereto of 1836, was adopted and taken by the United States as a basis of settlement of the claims of the Western Cherokees against the United States, from which amount certain sums were to be first deducted, and of the residuum thus obtained the Western Cherokees were to be paid one third, according to their numerical proportion to the whole people, and that the charges to be made against the said "treaty fund" were to be limited to "proper" and legitimate charges, "excluding all extravagant and improper expenditures." That the only legitimate charges against the treaty fund are among those enumerated in the fifteenth article of the treaty of 1835, as provided in the treaty of 1846, which proper charges were as follows, to wit: The amount invested as a general national fund, $500,000; the amount expended for 800,000 acres of land $500,000; the amount expended for improvements, $1,540,572.27; the amount expended for ferries, $159,572.12; the amount expended for spoliations, $264,894.09; and that the $600,000 forming a part of the treaty fund was provided by article 3 of the supplemental treaty of 1836, for, among other things, the removal of the Eastern Cherokees. That out of this fund there were removed in number 2,495. That of this number 295 were chattels, to wit, slaves. That for the removal of personal property there was no provision made by the treaty; and that, therefore, the only proper expenditure for removal was for 2,200 Eastern Cherokees, at $20 each, according to the terms of article 4 of the treaty of 1846, amounting to $44,000.

It was also charged that by the fourth article of the treaty of 1828 there were 3,343.41 acres reserved by the United States, which the latter agreed to dispose of and to apply the proceeds thereof to the sole interest and benefit of the Western Cherokees, together with the value of certain agency improvements on the lands, and that the United States have failed and neglected to do so, and are therefore liable for the full value of the lands and agency improvements; in all, the sum of $9,179.16¼.

It was further averred that, according to the foregoing itemized statement under article 4 of the treaty of 1846, their account with the United States should be stated as follows:

	Dr.	Cr.
By "treaty fund," under 4th article, treaty 1846		$5,600,000 00
To improvements	$1,540,572 27	
" ferries	159,572 12	
" spoliations	264,894 09	
" additional lands	500,000 00	
" invested funds	500,000 00	
" removal, 2,200 Indians	44,000 00	
	$3,009,038 48	$5,600,000 00
		3,009,038 48
Balance of "treaty fund," after proper reductions		$2,590,961 52
By one third of the above balance, under terms of said 4th article of treaty of 1846		$863,653 84
To appropriation, Act Sept. 30, 1850		532,896 90
"Principal sum due under 4th article of treaty of 1846		$330,756 94

Petitioners further alleged that under the provisions of the eleventh article of the treaty of 1846, and a resolution of the senate of the United States of September 5, 1850, in pursuance thereof, they are entitled to interest at the rate of 5 per cent. per annum upon whatever principal sum might be found due them from the 12th of June, 1838, until paid; wherefore it was prayed:

"First. That they be not held to be bound by the terms of the contract made and entered into by and between them and the defendants on the 6th day of August, 1846, and known as the 'treaty of 1846,' as fully set forth above, and that they may be relieved of the onerous, unjust, and inequitable provisions thereof, and that the defendants to this suit be decreed and adjudged to pay unto them the value of the lands belonging to them under the treaties of 1828 and 1833, as aforesaid, the sole right and title in and to and use and benefit of which were taken from them by the said treaty of 1835 with the Eastern Cherokees, at the valuation of similar lands by

the said treaty, to wit, the sum of 62½ cents per acre,—in all, the sum of $5,671,164.72½; together with the additional sums of $30,000 and $9,179.16¼, as set forth in paragraphs 8 and 11 of this petition, less one third of the amounts paid for additional lands and the permanent investment fund, and the payment, $532,896.90, as set forth in the ninth paragraph of this petition; amounting in all to $866,230.23⅓, showing a balance as follows:

	Dr.	Cr.
By value of lands		$5,671,164 72½
" property destroyed, etc.		30,000 00
" value of lands and improvements in Arkansas		9,179 16¼
To one third price additional lands	$166,666 66⅔	
" one third permanent investment fund	166,666 66⅔	
" payment, act of September 30, 1850	532,896 90	
	$866,230 23⅓	$5,710,343 88¾
		866,230 23⅓
Balance		$4,844,113 65

"For this amount, together with interest at the rate of 5 per centum per annum from June 12, 1838, until paid, your petitioners ask for a decree.

"Second. That if this honorable court should hold that they are not entitled to the relief above prayed for, that the defendants be adjudged and decreed to pay unto your petitioners the sums of $330,756.94, under the provisions of the fourth article of the treaty of 1846, and $9,179.16¼ under the provisions of the treaty of 1828, and the further sum of $30,000 for property destroyed, etc.; in all the sum of $369,936.10¼, with interest at the rate of five per centum per annum from June 12, 1838, until paid.

"Third. That this honorable court will examine this case with 'unrestricted latitude, * * * so that the rights, legal and equitable, both of the United States and your petitioners, may be fully considered and determined,' and enter such a decree as equity and good conscience may dictate in the premises."

Upon the hearing the facts disclosed by the evidence, chiefly documentary, and set forth in substance in the findings and opinion of the court of claims, (27 Ct. Cl. 1,) may be sufficiently stated as follows:

The Cherokee Indians held, under the treaty of November 28, 1785, (7 St. p. 18,) a considerable body of lands situated in the states of North Carolina, Tennesee, Georgia, and Alabama.

*On the 26th of December, 1817, a treaty between the United States and "the chiefs, headmen, and warriors of the Cherokee nation east of the Mississippi river and the chiefs, headmen, and warriors of the Cherokees on the Arkansas river, and their deputies," was proclaimed, in the preamble to which it is recited that in 1808, there being dissatisfaction on the part of a portion of the nation, who wished to continue the hunter life, and to remove across the Mississippi river on vacant lands of the United States, a representation to that effect was made to the authorities at Washington, to which the president replied January 9, 1809, that "those who wish to remove are permitted to send an exploring party to reconnoiter the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers," and that, "when this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you for the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

It was further recited that the Cherokees had explored the country on the west side of the Mississippi, and had settled down upon United States lands on the Arkansas and the White rivers, and that these emigrants, and those about to remove, were ready to relinquish their proportionate rights in the lands east, which they had left and were about to leave. Thereupon the cession of certain lands was made; a census of those Indians remaining east and of those on the Arkansas, and removing there, or declaring their intention of doing so, was provided for; the annuity for 1818 was agreed to be divided in proportion to the numbers of the two parts of the nation; and the United States bound themselves to give as much land on the Arkansas and White rivers as they had or might receive of the lands east, as the just proportion of that part of the nation on the Arkansas agreeably to their numbers; also to give to all the poor warriors who might remove, one rifle and ammunition, one blanket, and one brass kettle or beaver trap; to furnish flat-bottomed boats, and provisions to aid in removal, and to pay for improvements adding to the real value of the lands ceded. 7 St. p. 156.

About one third of the whole nation emigrated, and by the treaty of March 10, 1819, provisions were made for the payment of one third of the annuity to the Cherokees west and two thirds to those east. 7 St. p. 195. The Indians who thus emigrated, with accessions down to 1835, were known as the "Old Settlers," or "Western Cherokees."

On May 28, 1828, a treaty was made with the "chiefs and headmen of the Cherokee nation of Indians west of the Mississippi," by which it was agreed that the lands in Arkansas should be relinquished to the United States, and a new grant was made of 7,000,000 acres, with an outlet west, the whole amounting to 13,610,795.34 acres. The preamble recites: "Whereas, it being the anxious desire of the government of the United States to secure to the Cherokee nation of Indians, as well as those now living within the limits of the territory of Ar

kansas as those of their friends and brothers who reside in states east of the Mississippi, and who may wish to join their brothers of the west, a permanent home, and which shall, under the most solemn guaranty of the United States, be and remain theirs forever,—a home that shall never, in all future time, be embarrassed by having extended around it the lines or placed over it the jurisdiction of a territory or state, nor be pressed upon by the extension in any way of any of the limits of any existing territory or state."

By article 2 the United States agreed to possess the Cherokees with the land described west of the Arkansas, and by article 3 the expenses of removal are provided for.

By the fourth article the property and improvements connected with the Indian agency were to be sold under the direction of the agent, and the proceeds of the same to be applied in the erection, in the country to which the Cherokees were going, of a grist and saw mill for their use.

Article 8 stated that "the Cherokee nation west of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guaranty of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the states may be induced to join them and enjoy the repose and blessings of such a state in the future, it is further agreed on the part of the United States that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the states east of the Mississippi, who may desire to remove west, shall be given, on enrolling himself for emigration, a good rifle, a blanket, and kettle, and five pounds of tobacco, (and to each member of his family one blanket;) also a just compensation for the property he may abandon, to be assessed by persons to be appointed by the president of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support by the way, and provisions for twelve months after their arrival at the agency," etc. 7 St. p. 311.

A supplemental treaty with the Western Cherokees was proclaimed February 14, 1833, the purpose of which was to more clearly define the boundaries of the cession of 1828. By the fourth article certain corn mills were to be erected in lieu of the requisition of article fourth of the prior treaty. 7 St. p. 416.

Efforts followed the treaty of 1828 to induce the Eastern Cherokees to remove west, but the consent of all could not be obtained. The Eastern Cherokees became divided into two parties, the Ridge, or treaty party, and the Ross party, of which the latter was largely in the majority. December 29, 1835, a treaty was made with "the chiefs, headmen, and people of the Cherokee tribe of Indians," at New Echota, and proclaimed May 23, 1836, which referred in its second article to the treaties with the Western Cherokees of 1828 and 1833 as securing the conveyance of the 7,000,000 acres, and the outlet to the "Cherokee nation of Indians," and recited that, "whereas, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of five hundred thousand dollars therefor," thereby covenanted and agreed to convey 800,000 acres more.

Articles 1, 8, 10, and 15 are as follows:

"Article 1. The Cherokee nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind, for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees whether the senate, in their resolution by which they advised 'that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river,' have included and made any allowance or consideration for claims for spoliations, it is therefore agreed on the part of the United States that this question shall be again submitted to the senate for their consideration and decision, and, if no allowance was made for spoliations, that then an additional sum of three hundred thousand dollars be allowed for the same."

"Art. 8. The United States also agree and stipulate to remove the Cherokees to their new homes, and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so, and they shall be allowed in full for all claims for the same twenty dollars for each member of their family, and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it.

"Such Cherokees also as reside at present

out of the nation, and shall remove with them in two years west of the Mississippi, shall be entitled to allowance for removal and subsistence as above provided."

"Art. 10. The president of the United States shall invest in some safe and most productive public stocks of the country, for the benefit of the whole Cherokee nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee nation west of the Mississippi, the following sums as a permanent fund for the purposes hereinafter specified, and pay over the net income of the same annually to such person or persons as shall be authorized or appointed by the Cherokee nation to receive the same, and their receipt shall be a full discharge for the amount paid to them, viz.: The sum of two hundred thousand dollars, in addition to the present annuities of the nation, to constitute a general fund, the interest of which shall be applied annually by the council of the nation to such purposes as they may deem best for the general interest of their people. The sum of fifty thousand dollars to constitute an orphans' fund, the annual income of which shall be expended towards the support and education of such orphan children as are destitute of the means of subsistence. The sum of one hundred and fifty thousand dollars, in addition to the present school fund of the nation, shall constitute a permanent school fund, the interest of which shall be applied annually by the council of the nation for the support of common schools, and such a literary institution of a higher order as may be established in the Indian country. * * * The United States also agree and stipulate to pay the just debts and claims against the Cherokee nation held by the citizens of the same, and also the just claims of citizens of the United States for services rendered to the nation, and the sum of sixty thousand dollars is appropriated for this purpose, but no claims against individual persons of the nation shall be allowed and paid by the nation. The sum of three hundred thousand dollars is hereby set apart to pay and liquidate the just claims of the Cherokees upon the United States for spoliations of every kind that have not been already satisfied under former treaties."

"Art. 15. It is expressly understood and agreed between the parties to this treaty that, after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts, and claims upon the Cherokee nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds, provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee nation east according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees East, they shall also be paid for their improvements according to their approved value before their removal, where fraud has not already been shown in their valuation."

Article 11 provided for a commutation of the permanent annuity of $10,000 for the sum of $214,000.

By article 12 a committee was designated, "fully empowered and authorized to transact all business on the part of the Indians which may arise in carrying into effect the provisions of this treaty, and settling the same with the United States," and it was provided "that the sum of one hundred thousand dollars shall be expended by the commissioners in such manner as the committee deem best for the benefit of the poorer class of Cherokees as shall remove west, or have removed west, and are entitled to the benefits of this treaty."

By article 16 it was stipulated that the Cherokees should "remove to their new homes within two years from the ratification of this treaty," and by article 17, that "all the claims arising under or provided for in the several articles of this treaty shall be examined and adjudicated by * * * such commissioners as shall be appointed by the president of the United States for that purpose; and their decisions shall be final, and on their certificate of the amount due the several claimants they shall be paid by the United States." 7 St. p. 478.

A controversy arising as to the deduction of the cost of removal from the $5,000,000 purchase money, a supplemental treaty was concluded and proclaimed with the other treaty, on the same day, namely, May 23, 1836, of which articles 2 and 3 are as follows:

"Art. 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi river was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the war department by some of the senators who voted upon the question; and whereas, the president is willing that this subject should be referred to the senate for their consideration, and, if it was not intended by the senate that the above-mentioned sum of five millions of dollars should include the objects herein specified, that in that case such further provision should be made therefor as might appear to the senate to be just.

"Art. 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions, and of the sum of three hundred thousand dollars for spoliations, described in the first article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall *443 be turned over and belong to the education *fund. But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the senate, and, if they shall approve the same, then this supplement shall remain part of the treaty."

Article 4 provided: "It is also understood and agreed that the one hundred thousand dollars appropriated in article 12 for the poorer class of Cherokees, and intended as a set-off to the pre-emption rights, shall now be transferred from the funds of the nation, and added to the general national fund of four hundred thousand dollars, so as to make said fund equal to five hundred thousand dollars." 7 St. p. 488.

There was accordingly invested $714,000,—$500,000 national fund, covering the various items before mentioned, and $214,000 commutation.

The $5,600,000 was thenceforth commonly styled the "treaty fund," though the $600,000 was allowed with particular reference to the expense of removal.

The court having ruled the secretary of the interior to furnish from the official records of his department information—First, as to the number of acres of land ceded to the Cherokee Indians under the treaty of December 29, 1835, exclusive of the 800,000 acres; and, second, the number of acres of land ceded and relinquished by the Cherokee Indians to the United States east of the Mississippi river under said treaty,—the secretary furnished a letter from the acting commissioner of Indian affairs to him, from which it appeared that the land by actual survey (except the Cherokee reservation, which was estimated) amounted to 13,610,795.34 acres, and that the number of acres stated in the patent issued December 31, 1838, to the Cherokee nation for said land, the outlying boundaries of which had been surveyed, was 13,574,135.14, which included the 7,000,000 acres, and the outlet as such; and, further, that there were no data in the office of Indian affairs from which an approximate estimate could be made of the number of acres of land ceded to the United States east of the Mississippi, but that a letter to the secretary of war, dated February 27, 1833, gave an estimate of 6,730,000 *444 *acres, which was believed too large by nearly a million of acres.

The record contains a communication from commissioners appointed to settle claims under the treaty of 1835, addressed to the secretary of war, under date February 21, 1837, asking his opinion "of the true and fair construction of those provisions of the treaty which provide for claims of citizens of the United States for services rendered the Cherokee nation," and saying: "We are not able to perceive any provision whatever for the payment of claims of the above description, except what is contained in the tenth article of the treaty, and which limits the amount which may be thus allowed to the sum of sixty thousand dollars."

The treaty of New Echota was signed by persons purporting to represent the Eastern Cherokees, and assent to its provisions was given by two delegates from the Western Cherokees. John Ross and his followers were absent from the council that adopted the treaty, and disputed its validity. The authority of the Western delegates was also denied. The Ridge, or treaty party, numbered some 2,200, and they emigrated to the west, carrying with them 295 slaves; the cost of removal falling on the United States. The Eastern Cherokees, numbering 14,757, disavowed the treaty, and memorialized the president and congress. The United States authorities then, in effect, offered that if they would remove to the Indian Territory the expense of their subsistence should not be charged against the $5,600,000. Early in 1838 the removal of these Indians by military force commenced, and by act of congress of June 12, 1838, (5 St. p. 241,) $1,047,067 was appropriated to defray the expenses of their removal and subsistence. The whole of this appropriation was expended, and, in addition, the sum of $189,422.76. In August, 1838, on their way to the Indian Territory, the Eastern Cherokees last mentioned resolved in council "that the inherent sovereignty of the Cherokee nation, together with the constitution, laws, and usages of the same, are, and by the authority aforesaid, are hereby declared to be, in full force and virtue, and shall continue so to be in perpetuity, subject to such modifications as *the *444 general welfare may render expedient." Upon their arrival they refused to submit to the government of the Western Cherokees, but offered to unite in a general council, which should frame a constitution and establish a government for all. The Western Cherokees declined to make this arrangement, and insisted that the Eastern Cherokees had entered their territory without their permission, and that their character was that of aliens or immigrants, subject to the constitution and laws theretofore existing in the territory. A number of efforts followed to form a union, and at a popular conven-

tion in January, 1840, an act of union was ratified, which had been adopted in July, 1839. The validity of this act of union and of the ratification was denied, but the Cherokee nation thereby created seems to have been recognized as lawful by the United States. However, between the years 1838 and 1846, the Cherokee country was the scene of intestine disorders of the gravest character, destroying the rights and liberties of certain of the Cherokees, and endangering the peace of the frontier.

June 18, 1846, the Western Cherokees agreed to submit their claims to a board of commissioners to be appointed by the president and senate of the United States. The board was appointed, and arrived at and announced its conclusions after an elaborate presentation of the claims of the Western Cherokees.

On August 3, 1846, the delegates of the Western Cherokees informed the commissioners that they were willing to agree to the suggested basis of settlement, which they state as they understand it; and closed their letter by saying "that they will always consider whatever money may be paid their people, under the provisions of the present treaty, will be received as a payment for their country west of the Mississippi, which they now relinquish to the whole nation. They do not acquiesce in the decision of the commissioners that their country became the property of the whole Cherokee people by virtue of the treaty of 1828, or any subsequent treaty, and, should the treaty now proposed fail from any cause, it is their fixed determination to reassert their rights to the country secured to them by the treaty of 1833, and to prosecute their claim to the same by all proper and lawful means in the power of a feeble and oppressed people;" and they ask that the letter be communicated to the president and senate of the United States with the other proceedings.

August 6, 1846, a treaty was concluded between the United States, by Edmund Burke, William Armstrong, and Albion K. Parris, commissioners, the principal chief and delegates duly appointed by the Eastern Cherokees, the representatives of the treaty party, and the representatives of the Western Cherokees. 9 St. p. 871.

The preamble stated the reasons for the treaty as follows:

"Whereas, serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas, certain claims exist on the part of the Cherokee nation, and portions of the Cherokee people, against the United States: Therefore, with a view to a final and amicable settlement of the difficulties and claims before mentioned, it is mutually agreed by the several parties to this convention as follows, viz."

By article 1 lands now occupied by the Cherokee nation were secured to the whole Cherokee people. By article 2 it was provided that all differences theretofore existing between the several parties of the Cherokee nation should be settled and adjusted; that all party distinctions should cease, except so far as they should be necessary to carry out the treaty, and a general amnesty was thereby declared. Article 3 related to certain reimbursements to be made by the United States to the $5,000,000 fund, with which it was not properly chargeable.

Articles 4 and 5 read as follows:

"Art. 4. And whereas, it has been decided by the board of commissioners recently appointed by the president of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee nation in particular, that that portion of the Cherokee people known as the 'Old Settlers,' or 'Western Cherokees,' had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas, the said board of commissioners further decided that, inasmuch as the territory before mentioned became the common property of the whole Cherokee nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be: Now, in order to ascertain the value of that interest, it is agreed that the following principles shall be adopted, viz.: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars, (which investments and expenditures are particularly enumerated in the

fifteenth article of the treaty of 1835,) to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshaling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one third part of said residuum, to be distributed per capita to each individual of said party of 'Old Settlers,' *447 or 'Western Cherokees.' It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five million six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835 as commutation money in those cases in which the parties entitled to it removed themselves shall be adopted. And as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.

"In the consideration of the foregoing stipulation on the part of the United States the 'Western Cherokees,' or 'Old Settlers,' hereby release and quitclaim to the United States all right, title, interest, or claim they may have to a common property in the Cherokee lands east of the Mississippi river, and to exclusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included.

"Art. 5. It is mutually agreed that the per capita allowance to be given to the 'Western Cherokees,' or 'Old Settlers,' upon the principle above stated, shall be held in trust by the government of the United States, and paid out to each individual belonging to that party or head of family, or his legal representatives. And it is further agreed that the per capita allowance to be paid as aforesaid shall not be assignable, but shall be paid directly to the persons entitled to it, or to his heirs or legal representatives, by the agent of the United States authorized to make such payments.

"And it is further agreed that a committee of five persons shall be appointed by the *448 president of the United States from the party of 'Old Settlers,' whose duty it shall be, in conjunction with an agent of the United States, to ascertain what persons are entitled to the per capita allowance provided for in this and the preceding article."

Article 6 appropriated $115,000 for the indemnification of the treaty party. Article 7 related to the value of salines, which were the private property of individual Western Cherokees, and of which they were dispossessed. Article 8 provided for the payment to the Cherokee nation of $2,000 for a printing press, etc., destroyed; $5,000, to be equally divided "among all those whose arms were taken from them previous to their removal west by order of an officer of the United States; and the further sum of $20,000 in lieu of all claims of the Cherokee nation as a nation, prior to the treaty of 1835, except all lands reserved by treaties heretofore made for school funds."

Article 9 read thus:

"Art. 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cheorkee nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided for in the several articles of the treaty to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

*Article 10 related to Cherokees still re- *449 siding east of the Mississippi river. Articles 11 and 12 were as follows:

"Art. 11. Whereas, the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the west, of the Eastern Cherokees, is not properly chargeable to the treaty fund, it is hereby agreed that that question shall be submitted to the senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and, if by the Cherokees, then to say whether the subsistence shall be charged at a greater rate than thirty-three 33-100 dollars per head; and also the question whether the Cherokee nation shall be allowed interest on whatever

sum may be found to be due the nation, and from what date and at what rate per annum.

"Art. 12. The Western Cherokees, called 'Old Settlers,' in assenting to the general provisions of this treaty in behalf of their people, have expressed their fixed opinion that, in making a settlement with them upon the basis herein established, the expenses incurred for the removal and subsistence of Cherokees after the twenty-third day of May, 1838, should not be charged upon the five millions of dollars allowed to the Cherokees for their lands under the treaty of 1835, or on the fund provided by the third article of the supplement thereto; and that no part of the spoliations, subsistence, or removal provided for by the several articles of said treaty and the supplement thereto, should be charged against them in their settlement for their interest in the Cherokee country east and west of the Mississippi river. And the delegation of 'Old Settlers,' or 'Western Cherokees,' propose that the question shall be submitted with this treaty to the decision of the senate of the United States, of what portion, if any, of the expenditures made for removal, subsistence, and spoliations under the treaty of 1835 is properly and legally chargeable to the five-million fund. And they will abide by the decision of the senate."

The treaty was ratified by the senate August 8, 1846, after amendments to the fifth article, (which is given above as amended,) and striking out the twelfth article. The amendments to the treaty by the senate were agreed to by the representatives of the several parties of Indians, August 13, 1846.

A joint resolution of congress was approved August 7, 1848, (9 St. p. 339,) as follows:

"That the proper accounting officers of the treasury be, and they are hereby, authorized and required to make a just and fair statement of the claims of the Cherokee nation of Indians, according to the principles established by the treaty of August, 1846, between the United States and said Indians, and that they report the same to the next session of congress."

On the 8th of August, 1850, the senate committee on Indian affairs made a report, (Senate Report, 1st Sess. 31st Cong. No. 176,) setting forth, among other things, that "the statement of accounts according to the principles of the treaty of 1846 between the United States and the Western and Eastern Cherokees, respectively, was a labor of time and research, involving an examination of every item of expenditure under the treaty of 1835, through a period extending from the year 1835 to 1846. This duty was, therefore, committed by joint resolution of congress of the 7th of August, 1848, to the second auditor and second comptroller of the treasury; not only because they were 'the proper accounting officers,' but because one of those officers had acted as one of the commissioners of the United States in making the treaty of 1846, and was justly supposed to be well informed as to its true object and intent."

The officer thus referred to was Judge Parris, of Maine, and the record contains the report of the second comptroller and second auditor of the treasury, giving a statement of the account of the Cherokee nation of Indians, according to the principles established by the treaty. The items of charges against the Cherokee nation are given in detail and deducted from $6,647,067, the amount specified in article 9 of the treaty, being made up of the $5,000,000, the $600,000, and the $1,047,067.

The account as stated in the senate report was as follows:

This fund, provided by the treaty of 1835, consisted of		$5,600,000 00
From which are to be deducted, under the treaty of 1846, (4th article,) the sums chargeable under the 15th article of the treaty of 1835, which, according to the report of the accounting officers, will stand thus:		
For improvements	$1,540,572 27	
For ferries	159,572 13	
For spoliations	264,894 09	
For removal and subsistence of 18,026 Indians, at $53.33⅓ per head	961,886 68	
Debts and claims upon the Cherokee nation, viz.:		
National debts (10th article)	$18,062 06	
Claims of United States citizens (10th article)	61,073 49	
Cherokee committee (12th article)	22,212 76	
	101,348 31	
Amount allowed United States for additional quantity of land ceded	500,000 00	
Amount invested as a general fund of the nation	500,880 00	
Making in the aggregate the sum of		4,028,653 45
Which, being deducted from the treaty fund of $5,600,000, leaves the residuum, contemplated by the 4th article of the treaty of 1846, of		$1,571,346 55

—Of which amount one third was to be allowed to the Western Cherokees for their interest in the Cherokee country east, being the sum of $523,782.18, and an appropriation of that amount was recommended. The committee also considered the two questions referred to the senate in respect of whether the amount expended for subsistence should be borne by the United States or by the Cherokee funds; and whether the Cherokees should receive interest on the sums found due them from a misapplication of their funds; and recommended the adoption of the following resolutions, which were accordingly adopted, September 5, 1850, by the senate, as umpire, under article 11 of the treaty of 1846, (Senate Jour. 1st Sess. 31st Cong. 601:)

"Resolved by the Senate of the United States, that the Cherokee nation of Indians are entitled to the sum of $189,422.76 for

*453 subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the 'treaty fund' in the report of the accounting officer of the treasury.

"Resolved, that it is the sense of the senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due the 'Eastern' and 'Western' Cherokees, respectively, from the 12th day of June, 1838, until paid."

The committee gave their reasons for the first resolution at length. They stated that they entertained no doubt but that by a strict construction of the treaty of 1835 the expense of a year's subsistence of the Indians after their removal west was a proper charge upon the treaty fund, but they set forth a variety of considerations which justified the conclusion that the expense for subsistence was to be borne by the United States, including certain action by the secretary of war in 1838, and the language of the act of June 12, 1838, making the appropriation of $1,047,067. By the latter, congress provided that no part of the $600,000 or of the $1,047,067 should be taken from the treaty fund. The $1,047,067 was, said the committee, "made auxiliary to the $600,000 provided for in the third supplemental article,—a fund provided for removal and other expenditures independent of the treaty, and in full for these objects. But as respects subsistence, it was in aid of the expense for that purpose, a discharge pro tanto of the obligation of the government to subsist them, and not final satisfaction as in the case of removal. The fund proved wholly inadequate for these purposes. The entire expense of removal and subsistence amounted to $2,952,196.26, of which the sum of $972,844.78 was expended for subsistence, and of this last amount $172,316.47 was furnished to the Indians when in great destitution, upon their own urgent application, after the expiration of the one year, upon the understanding that it was to be deducted from the moneys due them under the treaty. This leaves the net sum of $800,528.31 paid for *453 subsistence, and charged to the aggregate fund. Of this sum the United States provided by the act of 12th June, 1838," for $611,105.55." This left $189,422.76 to be made up in order to cover the entire subsistence.

The second section of the act of June 12, 1838, read as follows:

"That the further sum of one million forty-seven thousand and sixty-seven dollars be appropriated out of any money in the treasury not otherwise appropriated, in full for all objects specified in the third article of the supplementary articles of the treaty of eighteen hundred and thirty-five between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: provided, that no part of the said sum of money shall be deducted from the five millions stipulated to be paid to the said tribe of Indians by said treaty."

And of this amount the committee found that only $611,105.55 had been expended for the one year's subsistence.

The act of congress of September 30, 1850, making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1851, (9 St. pp. 544, 556,) contained the following:

"For the additional amount for expenses paid for subsistence and improperly charged to the treaty fund, according to the award of the senate of fifth day of September, eighteen hundred and fifty, under the provisions of the eleventh article of the treaty of sixth day of August, eighteen hundred and forty-six, one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents, and that interest be paid on the same at the rate of five per cent. per annum, according to a resolution of the senate of fifth September, eighteen hundred and fifty: provided, that said money shall be paid by the United States and received by the Indians on condition that the same shall be in full discharge of the amount thus improperly charged to said treaty fund: provided, further, that in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due per capita.

*454 "To the 'Old Settlers,' or 'Western Cherokees,' in full of all demands, under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents; and that interest be allowed and paid upon the above sums due, respectively, to the Cherokees and 'Old Settlers,' in pursuance of the above-mentioned award of the senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six: provided, that in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due: provided, also, that the Indians who shall receive the said money shall first, respectively, sign a receipt or release, acknowledging the same to be in full of all demands under the fourth article of said treaty."

The Western Cherokees were accordingly paid per capita the amount so appropriated, principal and interest, the interest amounting to $345,583.25. They receipted, as required by the statute, but upon the occasion of

their being so paid they gave to the superintendent of Indian affairs at Ft. Gibson a protest, setting forth their reasons why the payment should not be received in full of all demands. The form of the receipt thus executed was as follows:

"We, the undersigned 'Old Settlers,' or Western Cherokees, do hereby acknowledge to have received from John Drennen, supt. of Indian affairs, the sum opposite our names respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled 'An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, one thousand eight hundred and fifty-one.' Approved September 30th, 1850."

*457 The protest, after setting forth that the condition of the *Old Settlers had been a deplorable one, and that they ought not to be deprived summarily of the right to present a claim for a larger amount than had been awarded to them, and referring to the report of the senate committee on Indian affairs, and the appropriation of the $189,422.76, and that the treaty fund should be relieved of the whole amount expended on account of subsistence as an improper charge, continued thus:

"(4) It has thus been conclusively shown that after the statement was made, under the report of the accounting officers of December 3, 18[illegible], and the 'Old Settlers' were charged with the removal and subsistence of 18,026 Indians, the senate of the United States decided that the subsistence was improperly charged, and in a subsequent appropriation for the Eastern Cherokees, or 'emigrant party,' it had been refunded, and the sum of $189,422.76, which had been charged to the treaty fund, has been declared to be an 'improper' charge, and payment thereof is assumed by the United States. The 'Old Settlers,' or Western Cherokees, are therefore entitled to one third part of the money improperly charged for the subsistence of 18,026 Indians, at $33.-33⅓ cents per head, which has been deducted from the amount due them in the act of appropriation made for their benefit September 30, 1850. There were some slight alterations made in the statement of accounts after the report of the committee was submitted, but they changed the amount very little, and are not worth noting.

"(5) The amount, then, due the 'Old Settlers,' or Western Cherokees, in accordance with the decision of the senate, is the one-third part of the charge made against them for the subsistence one year after removal of 18,026 Indians, which, at $33.33⅓ cents per head, amounts to the sum of $600,856.66, the one-third part of which is $200,285.33, (two hundred thousand two hundred and eighty-five dollars and thirty-three cents.) This sum, with the interest from June 12, 1838, is now due to the 'Old Settlers' Cherokees, (in addition to the amount appropriated by the act of September 30, 1850,) in accordance with the principle established by the senate of the United States in the resolution adopted by that honorable body. Here, in one item alone, the 'Old Settler' Cherokees are declared by an act of the United States government to be entitled, in addition to the amount they are now receiving, to upwards of three hundred and thirty thousand dollars, ($330,000.) It is known to the 'Old Settlers' that many honorable members of congress were aware that this item could have been added to the appropriation of September 30, 1850, and that a favorable report thereon would have been made from the office of Indian affairs, but that those who represented the 'Old Settlers,' with other friends, deemed it advisable not to make the effort then to change the statement already made,—it being at the close of the session, when the least delay or interference might have defeated the appropriation, even under the first statement."

The protest then concluded with objections to the number of Indians for whose removal charges had been made, and generally to the charges for improvements, ferries, depredations, and for debts and claims upon the Cherokee nation east, and other expenditures of similar character, as improperly made.

The United States acquired the reservation, improvements, and property in Arkansas referred to in article 4 of the treaty of 1828, but neither the agreement therein set forth on the part of the United States to account for and invest the proceeds thereof to the use of the Western Cherokees, nor the subsequent agreement set forth in the treaty of 1833, was ever performed. The tract of land so ceded to the United States contained 3,343.41 acres, of the value of $4,179.26.

Certain papers on file in the interior department were put in evidence, purporting to be copies of the proceedings of councils of the Western Cherokees, held in the years 1875, 1876, 1877, 1879, 1880, 1881, 1882, and 1883, at Tahlequah, Cherokee Nation. At these councils, Bryan, Wilson, and Hendricks were appointed commissioners to prosecute the claims of the Western Cherokees against the United States, and Bryan was appointed treasurer of a fund of 35 per cent. of the moneys that might be recovered against the United States, which sum was placed at the disposal of the commissioners for the prosecution of the claim. It does not appear that these councils were composed of persons who were ascertained to be Western Cherokees in the manner prescribed in the fifth article of the treaty of 1846, nor did it appear that subsequent to

the treaty the Western Cherokees had any organization or corporate existence under the laws of the United States or of the Cherokee nation. The proceedings of the council held on October 25, 1883, embodied a number of resolutions, which, in the view taken of the case, it is unnecessary should be repeated.

The record does not show that the Western Cherokees formally denied the validity of the treaty of 1835 until the immigration of the Eastern Cherokees was completed, and until after there was a disagreement as to the government that should be adopted and control the Cherokee country. The earlier immigrants, known as the "Ridge Party," and the great body of the Eastern Cherokees, known as the "Ross Party," were welcome to the country as immigrants under the existing laws. Prior to 1842 it does not appear that the Western Cherokees notified the United States that they had repudiated the action of Rogers and Smith, who signed the treaty of 1835 as delegates from the Western Cherokees. After the entry of the Eastern Cherokees, the question first at issue between them and the Western Cherokees related to the government of the country, until, in 1842, they addressed a memorial to the president, setting forth their title to 14,000,000 acres of land, and their right to the full and exclusive enjoyment of the same, of which they alleged they had been deprived by the intrusion of the Eastern Cherokees under the authority of the United States.

No action on behalf of the Old Settlers appears to have been taken from the filing of the protest September 22, 1851, until the year 1875; and in the meetings of the Old Settlers, heretofore referred to, the validity of the several treaties with the Cherokees was recognized.

456 On August 7, 1882, an act of congress was approved, making appropriations for sundry civil expenses, which contained the following clause:

"The secretary of the interior shall investigate and report to congress what, in his opinion, would be an equitable settlement of all matters of dispute between the eastern band of Cherokee Indians (including all the Indians residing east of the Mississippi river) and the Cherokee tribe or nation west; also all matters of dispute between other bands or parts of the Cherokee nation; also all matters of dispute between any of said bands, or parts thereof, and the United States arising from or growing out of treaty stipulations or the laws of congress relating thereto; and what sum or sums of money, if any, should, in his opinion, be paid under such settlement." 22 St. p. 328.

In pursuance of the authority thus given, an investigation was directed and a report made by the secretary of the interior, February 23, 1883, contained in senate documents, second session, forty-seventh congress, (Executive Document, No. 60.) This is the claim referred to in the jurisdictional act, and shows a balance of $421,653.68, in accordance with the following account:

Account with the Whole Cherokee People.

	Dr.	Cr.
By amount appropriated by act of July 2, 1836, for lands under first article treaty of 1835		$5,000,000 00
By amount appropriated under third article treaty 1836, by act of July 2, 1836		600,000 00
By amount erroneously charged for removal of 2,495 [should be 18,026] Indians, at $53.33⅓ per head		961,386 66
To amount paid for improvements	$1,540 572 27	
To amount paid for ferries	159,572 12	
To amount paid for spoliation	264,894 00	
To removal and subsistence of 18,026 Indians at $53.33⅓ per head	961,386 66	
To debts, etc	101,348 31	
To additional land purchased	500,000 00	
To amount invested as a permanent fund	500,880 00	
	$4,028,653 45	$6,561,386 66
Deduct		4,028,653 45
Balance due as of date June 12, 1838		$2,532,733 21
*Of which amount the "Old Settlers" are entitled to one third		844,244 40
"Old Settlers" account		$844,244 40
To one third of unexpended balance of $600,000 appropriated under article 3, treaty 1836, viz. $39,300	$13,100 00	
To one third of the cost of removing 2,495 Indians, at $53.33 per head, $133,058.35	44,352 78	
	$57,452 78	$844,244 40
Deduct		57,452 78
Balance due		$786,791 62
By interest on balance ($786,791.62) at 5 per cent. from June 12, 1838, to September 22, 1851		522,342 21
To appropriation by act September 22, 1851	$532,896 90	
To interest allowed under same act	354,583 25	
	$887,480 15	$1,309,133 83
Deduct		887,480 15
Balance due "Old Settlers"		$421,653 68

The principal difference between this and the prior account was in the deduction of the item of $961,386.66.

The secretary's report was accompanied by that of the commissioner of Indian affairs, going over the whole subject of the claims of the Eastern and of the Western Cherokees, with accompanying reports, and, among others, two of the senate committee on Indian affairs,—one made February 9, 1881, and another March 29, 1882; the latter being a repetition of the former. These reports considered the claim of the Western Cherokees, and announced the conclusion that the receipt by those Indians, under the act of September 30, 1850, "does not preclude them from making their claim for any other sum that may be justly due them under a fair and proper interpretation of the treaties with them," and that the facts necessary to determine the justness of the claim preferred by them "consist almost, if not wholly, of public treaties, proceedings of the senate, acts of congress, and the records

*460 of the several departments of the government, all of which are preserved." The committee were of the opinion that the case should receive a full investigation by the courts, because such an investigation involved a judicial interpretation of the several treaties, the construction of the several acts of congress, and the examination of the settlements made and accounts stated with them under these treaties and acts of congress.

On February 13, 1884, the case of the Old Settlers was transmitted to the court of claims by the senate committee on Indian affairs under the provisions of the act of March 3, 1863. Findings of fact were made by the court and transmitted to congress, February 9, 1885. These findings found the charges against the treaty fund to be the same as fixed in the report of August 8, 1850, and the report of 1883, except as to the number of Eastern Cherokees, whose removal was properly chargeable to said fund, the number being fixed at 17,252, instead of 18,026. After making the deductions, except as to removal and subsistence, the balance of the treaty fund was found to be, as according to the report of the secretary of the interior, $2,532,733.21; but if it should be determined that the cost of removing that portion of the Eastern Cherokees, who were removed in pursuance of the appropriation of $1,047,067, made by the act of 1838, should not be charged, then this balance should be reduced only by the cost of removing 2,495 Eastern Cherokees, who were removed prior to the act, at $53.33 per capita, or $133,058.35. If, on the other hand, it should be determined that the Western Cherokees were properly chargeable with those removed subsequent to the act of June, 1838, as well as before, namely, for 17,252 Cherokees, then the amount of $920,049.16 should be deducted. The account would then stand:

Treaty fund		$2,532,733 21
Deduct for removal of 2,495 Eastern Cherokees removed prior to act of June 12, 1838	133,058 35	
Residuum to be divided		$2,399,674 86
One third thereof awarded to Western Cherokees		$799,891 62
Less the payment of		532,896 90
Balance		$266,994 72

*461 Or—

Treaty fund		$2,532,733 21
Deduct for removal and subsistence of 17,252 Eastern Cherokees, at $53.33 per capita	920,049 16	
Residuum to be divided		$1,612,684 05
One third thereof awarded to Western Cherokees		$537,561 35
Less the payment of		532,896 90
Balance		$4,664 45

No action was taken by congress on these findings of the court of claims. On February 25, 1889, the act upon which this suit is founded was approved by the president. 25 St. p. 694.

The case having come on for hearing in the court of claims, and been duly argued and submitted, an elaborate opinion was delivered by Nott, J., November 30, 1891, and on January 25, 1892, findings of fact and conclusions of law were filed by that court. On that day a second opinion by Nott, J., was given, the case having been reopened so far as to hear counsel and admit documentary evidence relating to the number of the Eastern Cherokees who were removed under the treaty of 1835, and also to hear counsel with regard to the form of the decree. 27 Ct. Cl. 1, 20, 56.

The account stated by the court of claims is as follows:

The treaty fund		$5,600,000 00
Less for 800,000 acres of land	$ 500,000 00	
For investment in the general land fund	500,000 00	
For improvements of individual Cherokees	1,540,572 27	
For ferries belonging to individuals	159,572 12	
For spoliations of individual property	264,894 00	
For expenses of Cherokee committee	22,212 76	
For removal of 16,957 Cherokees, at $20 each	339,140 00	
		3,326,391 24
Giving as the true residuum to be divided		$2,273,608 76
Due to the Western Cherokees, one third of residuum		$757,869 58
Less payment September 22, 1851, under the act of September 30, 1850		532,896 90
Leaving as the balance due the Western Cherokees		$224,972 68

*The differences between this account and that of August 8, 1850, and February 3, 1883, are that the investment of the permanent land fund was found to be $500,000 instead of $500,880. The $101,348.31 for debts and claims upon the Cherokee nation, allowed in the two previous reports, and the former findings of the court of claims, was reduced to $22,212.76 by rejecting therefrom the items of national debt, $18,062.06, and claims of United States citizens, $61,073.49. An allowance for the removal of 16,957 Cherokees at $20 each, aggregating $339,140, was made, instead of for the removal and subsistence of 18,026 Indians at $53.33⅓ per capita, $961,386.66, as in the report of August 8, 1850, or the cost of removal and subsistence of 2,495 Indians at $53.33 per capita, $133,058.35, as shown by the report of February 3, 1883, and by the previous findings in this regard of the court of claims. There was added also the value of the agency reservation appropriated by the United States under the treaties of 1828 and 1833, being $4,179.26. The court of claims also found as a conclusion of law that interest at the rate of 5 per cent. should be allowed on the balance of the residuum of the treaty fund still due to the Western Cherokees from June 12, 1838, to the entry of judgment, but not upon the amount of $4,179.26, the value of the land last mentioned. It was also found as a conclusion of law that the receipts given by individual Cherokees did not preclude

them from recovering their just appropriation of the per capita fund within the intent of the act of February, 1889, referring their claims to the court.

The court also made the following ruling:

"The findings requested by the claimants to establish the alleged facts that the treaty of 1846 was procured as against the Western Cherokees by duress and fraud have been excluded from consideration by the court on the ground that it has not jurisdiction of such a cause of action."

Decree was entered as follows:

"It is ordered and adjudged that the claimants recover of the defendants the sum of ($224,972.68) two hundred and twenty-four thousand nine hundred and seventy-two dollars and sixty-eight cents, being a balance of the per capita fund provided by the fourth article of the treaty between the United States and the Western Cherokees, dated August 6, 1846, together with interest thereon from the 12th day of June, 1838, up to and until the entry of this decree, being the sum of $603,145.58, and likewise the sum of $4,179.26 for 3,343.41 acres of land in Arkansas ceded to the United States by article 4 of the treaty of May 6, 1828, amounting in the aggregate to the sum of $832,297.52. And it is at the same time ordered and adjudged that the said amount of eight hundred and thirty-two thousand two hundred and ninety-seven dollars and fifty-two cents so recovered by the claimants be held in trust by the government of the United States, and be paid by the proper agent of the United States to each individual of the claimants entitled to participate in the said per capita fund, pursuant to and in the manner provided and required by the fifth article of the said treaty of August 6, 1846."

From this decree both parties prayed an appeal to this court.

Subsequently the claimants moved that in preparing the record for transmission, the clerk of the court of claims be instrusted to include in the transcript "all of the pleadings, orders, evidence, findings of fact, opinions of the court, conclusions of law, and decree, as the same appear of record." This motion was overruled. Application was thereupon made to this court for a writ of certiorari to the court of claims to send up all of the evidence used in the trial and hearing of the case. The writ was granted, and the evidence sent up accordingly.

John Paul Jones, Reese H. Voorhees, and A. H. Garland, for "Old Settlers." Sol. Gen. Aldrich and F. P. Dewees, for the United States.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

In Harvey v. U. S., 105 U. S. 671, 691, a claim had been considered by the court of claims, and judgment rendered for a certain amount, but less than would have been awarded but for certain terms of the contract counted on, which required reformation, on the ground of accident or mistake, in order fully to express the intention of the parties; and a special act was passed again referring the claim for adjudication, and stating: "To that end jurisdiction is hereby conferred on said court to proceed in the adjustment of the account between said claimants and the United States as a court of equity jurisdiction, and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said government may require."

On appeal to this court from a decree rendered under this act it was contended on the part of the United States that the appeal could not be heard, because there was not in the record "any finding by the court of claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts." But this court held, through Mr. Justice Blatchford, that "the rule in regard to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special act; and in such a case, where an appeal lies and is taken under section 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity, appealed from other courts."

In the present case the court of claims filed findings of fact and conclusions of law, and declined to send up the evidence. We are of opinion, however, that the rule laid down in Harvey v. U. S. is applicable. The claim was referred for adjudication, and jurisdiction was conferred on the court of claims to determine the amount, if any, justly due from the United States to the Western Cherokees, in a manner involving the statement of an account upon the investigation of controverted items and complicated and involved facts, and it was declared that it was "the intention of this act to allow the said court of claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined."

We concur in the statement of Mr. Justice Nott in the opinion of the court below that the latitude conferred "must be deemed the unrestricted latitude of a court of equity in stating an account, distributing a fund, and framing a decree, so comprehensive and flexible as to secure to each suitor his joint or individual rights."

The remedy in equity in cases of account is generally more complete and adequate than it is or can be at law, (1 Story, Eq.

Jur. § 450; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. Rep. 594;) and we regard the language of the act of congress as manifestly used with the intention that equity powers should be exercised in the disposition of the case. It was upon this view that we directed the certiorari to issue; and in arriving at our conclusions, while we have had the advantage of the findings of the court of claims, we have considered and determined the case for ourselves upon an examination of the entire evidence.

The prayer of the petitioners is in the alternative: First, that they be relieved from the provisions of the treaty of 1846, on the ground of duress and fraud, and that the United States be decreed and adjudged to pay them the value of two thirds of 13,610,795.24 acres of land at 62½ cents per acre, being the sum of $5,671,164.72½, together with the sum of $30,000 for property destroyed, and $9,179.63¼ for the agency reservation and improvements in Arkansas, less one third of the amount of $500,000 for additional lands and of $500,000 permanently invested, and the payment in 1851 of $532,896.90, leaving a balance of $4,844,113.65, with interest at the rate of 5 per cent. per annum from June 12, 1838, until paid; second, that, if petitioners be not entitled to that relief, the United States be decreed to pay them the sum of $330,756.94, under the provisions of the fourth article of the treaty of 1846, together with the before-mentioned sums of $9,179.16¼ and of $30,000, aggregating the amount of $369,936.10¼, with interest as aforesaid.

*466 *The court of claims declined to go behind the treaty of 1846, upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an act of congress had been procured by duress or fraud, and declare it inoperative for that reason. Fletcher v. Peck, 6 Cranch, 130; Ex parte McCardle, 7 Wall. 506, 514; People v. Draper, 15 N. Y. 545, 555, Railroad Co. v. Cooper, 33 Pa. St. 278; Wright v. Defrees, 8 Ind. 502.

And while it was conceded that congress might confer upon that court extra-judicial powers, yet the court was of opinion that this could not be held to have been done by the act authorizing the institution of this suit, since it was therein provided that whatever judgment might be rendered, whether for the complainants or defendants, might be appealed to the supreme court, whose jurisdiction, as defined by the constitution, was strictly judicial, and could neither be enlarged nor diminished by legislative authority. Gordon v. U. S., 2 Wall. 561, Taney, C. J., 117 U. S. 697, Append.; In re Sanborn, 148 U. S. —, 13 Sup. Ct. Rep. 577.

The contention of the petitioners is that, under the act of jurisdiction, the treaty of 1846 is to be considered as a contract in every respect similar to one made between private parties, and that the United States has no other or greater privileges or advantages than a private party would have under a similar contract, and U. S. v. Arredondo, 6 Pet. 691, 710, 711, 735, is cited. That was a suit for land claimed under a Spanish grant, and came to this court on appeal from the decree of the judge of the superior court for the western district of the territory of Florida, that court having been authorized, by the act of congress of May 23, 1828, to receive and adjudicate upon such claims, upon the petition of the claimant, "according to the forms, rules, and regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in Missouri, by the act of the 26th May, 1824."

Reviewing the two statutes, this court said: "In conformity with the principles of justice and rules of equity, then, the court is directed to decide all questions arising in the case, and by a final decree to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of congress in relation thereto, and the laws and ordinances of the government from which it is alleged to be derived, and all other questions which may properly arise between the claimants and the United States, which decree shall, in all cases, refer to the treaty, law, or ordinance under which it is confirmed or decreed against. * * * By the 'stipulations of a treaty' are to be understood its language and apparent intention manifested in the instrument, with a reference to the contracting parties, the subject-matter, and persons on whom it is to operate. The laws under which we now adjudicate on the rights embraced in the treaty, and its instructions, authorize and direct us to do it judicially, and give it judicial meaning and interpretation as a contract on the principles of justice and the rules of equity. * * * The only question depending is whether the claimants or the United States are the owners of the land in question. By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man, on the same subject-matter and by the rules which congress themselves have prescribed, of which the stipulations of any treaty and the proceedings under the same form one of four distinct ones. * * * But the court are, in this case, authorized to consider and construe the treaty, not as a contract between two nations, the stipulations of which must be executed by an act of congress before it can become a rule for our decision, not as the basis and only foundation of the title of the claimants, but as a rule to which we

must have a due regard in deciding whether the claimants have made out a title to the land in controversy,—a rule by which we are neither directed by the law nor bound to make our decree upon, any more than upon the laws of nations, the acts of congress, or of Spain. The acts of 1824 and 1828 authorize and require us to decide on the pending title on all the evidence and laws before us. *468 Congress has disclaimed its decision as a political question for the legislative department to decide, and enjoined it on us as one purely judicial."

It will be perceived that that decision is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution, nor does any such question arise in the case before us. There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846, (or any other,) and nothing to indicate that congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of congress, but the power to make and unmake is essentially political, and not judicial, and the presumption is wholly inadmissible that congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference.

The claim referred to the court of claims for adjudication is the claim set forth in the report of the secretary of the interior to congress of February 3, 1883, and that report was made under the act of congress of August 7, 1882, which provided that the secretary should investigate and report to congress what, in his opinion, would be an equitable settlement of the matters in dispute between these Indians and the United States, "arising from or growing out of treaty stipulations or the laws of congress relating thereto; and what sum or sums of money, if any, should, in his opinion, be paid under such settlement." The same language is used in the act, and the court is "to determine what sum or sums of money, if any, are justly due from the United States to said Indians arising from or growing out of treaty stipulations and acts of congress relating thereto."

As a case arises under the constitution or laws of the United States whenever its decision depends upon the correct construction of either, (Cohens v. Virginia, 6 Wheat. 264, 379; Osborn v. Bank, 9 Wheat. 738, 824,) so a case arising from or growing out of a treaty is one involving rights given or protected by a treaty, (Owings v. Norwood's Lessee, 5 Cranch, 344, 348.)

The settlement of a controversy arising or growing out of these Indian treaties or the laws of congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged.

The court of claims was, indeed, to have "unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined." But this did not mean that either party was entitled to have or receive by virtue of the act anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play for the disposal of the case. The inquiry was not to be technically limited by rules of procedure, or restrained by the distinctions between law and equity. Proceeding thus untrammeled, the court was to deduct "all offsets, counterclaims, and deductions of any and every kind and character which should be allowed to the United States under any valid provision or provisions in said treaties and laws contained, or to which the United States may be otherwise entitled." And therefore, if conflict existed between treaty provisions, or between any of them and subsequent acts of congress, such provisions might necessarily give way and be held invalid; but the language used did not involve a confusion of the respective powers of the departments of the government, nor furnish a basis for an external attack upon the validity of executive or legislative action.

Again, the determination of what, if anything, was justly due, was to be arrived at upon a full consideration of "whether or not the said Indians have heretofore adjusted and settled their said claim with the United States." That claim was the claim referred to the court, the claim which was reported upon by the secretary, the claim which arose and grew out of treaty stipulations, the claim which was preferred in the protest of 1851, and not a claim for the loss of two thirds of 7,000,000 acres of land, and of exclusive rights in the outlet. There had been such a claim as the latter, but it had been definitely relinquished and released by the treaty.

The terms of the treaty of 1828, by which the 7,000,000 acres were guarantied to the Cherokees, while the Western Cherokees were alone being dealt with, expressed that the purpose was to provide a home for the whole Cherokee people, including those east as well as those west. By article 2 of the treaty of 1835 the conveyance of land by the treaties of 1828 and 1833 is declared to have been to the Cherokee nation of Indians, and 800,000 acres additional was agreed to be conveyed in consideration of the sum of $500,000, that there might be no question as to there being a sufficient quantity of land for the accommodation of the

whole nation on their removal west. That treaty was wholly inconsistent with the attitude subsequently assumed. The patent of December 31, 1838, ran to the Cherokee nation. There are many documents in the record indicative of the view of the Indian office that the Western Cherokees were only a contingently separate community from the Eastern body, and were subject to increase by the emigration of those east; and that they did not have, as an independent community, any ownership of the land, or rights therein, except what belonged to them in common with the whole Cherokee people. At the same time the Western Cherokees did set up the opposite contention, and prosecuted it with the greatest vigor and ability before the political departments of the government, especially during the years 1842 to 1846. Indeed, prior to 1842, they seem to have acquiesced in the treaty of 1835, and welcomed not only the treaty party, but the great body of the Eastern Cherokees, to participation with them under existing laws. The papers presented in their behalf show, as stated by counsel, the most careful preparation and noticeable ability. In a memorial bearing date June 16, 1843, their alleged grievances were set forth in extenso, and it was insisted that by the forcible removal of the Eastern Cherokee Indians, and their *471 settlement among them, the Western Cherokees had been, in effect, dispossessed of two thirds of their land. But in June, 1846, the Western Cherokees offered to submit their claims to a board of commissioners, to be appointed by the president and senate of the United States, which commission it was stipulated should be invested with full power to settle the matters in controversy according to the treaty stipulations. The commission was appointed, and its decision was against the claim of the Western Cherokees to the exclusive ownership of and rights in the land in question. On the 3d of August, 1846, the delegates representing the Western Cherokees declared that they did not acquiesce in the decision of the commissioners on this point, and should reassert "their exclusive right to the country," "should the treaty now proposed fail from any cause;" but the treaty did not fail, and, on the contrary, was duly executed by the parties on the 6th day of the same month; and this was followed by the accounting under the treaty, the act of congress of September, 1850, and the payments made and receipted for thereunder. True, there was a protest that the receipts then given ought not to exclude these Indians from obtaining a further amount, but that protest was chiefly based upon the deduction of the cost of subsistence from the treaty fund, and asserted no claim on account of the land, nor the invalidity of the treaty. Moreover, they remained silent, so far as appears from this record, from 1846 until 1875; and when they commenced the agitation of renewed demands the grounds assigned conceded the binding force of the treaty, but questioned the payment under it as a final settlement of what was due.

Upon the facts in this record we can discover no ground for the revival of controversy by the Western Cherokees as to their ownership of or rights in the lands west of the Mississippi, and hold that any such claim in respect thereof as is put forward in the petition cannot be successfully maintained from any point of view. If any matter ever can be put at rest, that has been, and the treaty of 1846 has presented for nearly 50 years an insuperable bar to such a contention.

The treaty declared "that the land now occupied by the Cherokee nation shall be secured to the whole Cherokee people for their common use and benefit;" and that, whereas, it had been decided by the board of commissioners appointed to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828 the Western Cherokees "had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi;" and that the Western Cherokees had a claim upon the United States, growing out of the equitable operation of the same treaty, as having a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as having retained a common interest "in the general funds of the nation,"—the ascertainment of "the value of that interest" was provided for, and the government agreed to distribute it among the Western Cherokees.

In consideration of the premises, the Western Cherokees released and quitclaimed to the United States all right, title, interest, or claim they might have to a common property in the Cherokee lands east of the Mississippi river, and to exclusive ownership to the lands west of the Mississippi, including the outlet west, "consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included."

In order to arrive at the amount to be distributed per capita to the Western Cherokees, or Old Settlers, it was agreed that from the $5,600,000 the investments and expenditures properly chargeable thereupon, and enumerated in the fifteenth article of the treaty of 1835, excluding all extravagant and improper expenditures, should be deducted, and that one third of the residuum should constitute the value of their interest, and, consequently, the amount for distribution. An accounting was had accordingly, and the

amount ascertained, appropriated, and paid over.

*474 *But it is argued that the object of the suit before us was to permit a relitigation of the correctness of that amount, and a determination as to whether anything more should have been paid at that time. And we are confronted by the objection, strongly urged on behalf of the United States, that by the terms of the jurisdictional act, if it be found that "the said Indians have heretofore adjusted and settled their said claim with the United States," such adjustment and settlement must be treated as conclusive.

We agree, as was said in the Case of Choctaw Nation, 119 U. S. 1, 29, 7 Sup. Ct. Rep. 75, that where, in professed pursuance of treaties, statutes have conferred valuable benefits upon the Indians, "which the latter have accepted, they partake of the nature of agreements; the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition, unless that implication is rebutted by other and sufficient circumstances." And it is also true that when a party, without force or intimidation, and with a full knowledge of all the facts in the case, accepts, on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he will not be permitted to avoid his act on the ground of duress. U. S. v. Child, 12 Wall. 232, 244.

But we think, under all the circumstances disclosed here, that congress, being convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and desirous, as being the stronger party to the controversy, that that superior justice, which looks only to the substance of the right, should be done in the premises, voluntarily waived any reliance upon lapse of time or laches, and, after attempts on its own part to arrive at a satisfactory result, determined to obtain a judicial interpretation of the treaties and laws bearing upon the subject, and to be bound by judicial decision in respect of the conclusions flowing therefrom, and arrived at upon equitable principles; and that the jurisdictional act passed in effectuation of such intention left it open to the courts to *readjust the amount notwithstanding the claim might have been theretofore settled. In other words, if the adjustment and settlement were found to have been made upon an erroneous interpretation, which led to an obvious mistake, then congress designed that the mistake should be corrected. We therefore proceed to examine the account in question in accordance with what we believe to have been the intention of congress in the passage of this act.

As we have said, the investments and expenditures which were properly chargeable upon the $5,600,000 were to be deducted, and they were the investments and expenditures particularly enumerated in the fifteenth article of the treaty of 1835. That article provided for the deduction of the amounts "actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee nation, and for an additional quantity of land, and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of this treaty." The national fund of $500,000 embraced the items last mentioned, and no dispute arises here as to that sum or the sums of $500,000 for the additional quantity of land, $1,540,572.27 for improvements, $159,572.12 for ferries, and $264,894.09 for spoliations. Petitioners claim, however, that no deduction should have been made for subsistence, and that the sum allowed for removal should be limited to 2,200 Indians at $20 per head; and they further insist upon an allowance of $30,000 for property destroyed, while they abandon their claim for $9,179.16¼ as the value of the Arkansas agency land and improvements, and concede that the sum of $4,179.26 therefor, as found by the court below, may be accepted as correct. The court of claims disallowed the item of $30,000, and charged for the removal of 16,957 Cherokees at $20 each, and an item for the expenses of the Cherokee committee of $22,212.76.

We concur in the rejection of the claim for $30,000, which finds its basis in a resolution of a council of the Western Cherokees of November 16, 1846, asking the government to *appropriate that sum to pay off* damages and losses alleged to have been sustained by individual Indians in being compelled to leave their homes and go to the states for safety. No such claimants appear or are represented here, and the claim has no relation to per capita distribution. There is no color for its revival in this proceeding.

It was agreed by article 4 of the treaty of 1846 that, so far as the Western Cherokees were concerned, in estimating the expenses of removal and subsistence of an Eastern Cherokee to be charged to the aggregate fund, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835 as commutation money should be adopted. That commutation was placed in the eighth article at $20 per capita for removal and $33.33 for subsistence. The persons composing the treaty party voluntarily emigrated to the Indian Territory prior to 1838 to the number of 2,200, and they took with them 295 slaves of African descent. The court of claims properly considered that the expenses to be deducted could only apply to Cherokees, and therefore, that the slaves could not be included in making the

deduction as between the Western Cherokees and the United States; but to the 2,200 the court added the 14,757 Eastern Cherokees, who were removed in 1838, and, rejecting any deduction for subsistence, charged the commutation price of $20 for 16,957 persons. We are satisfied from a careful examination of the evidence that the number was determined with all the accuracy possible and should not be disturbed; and, in view of the decision of the senate by the adoption September 5, 1850, of the first resolution, reported August 8, 1850, it is obvious that the expense of subsistence should not have been and should not be deducted.

The fourth article of the treaty of 1846 fixed a commutation for subsistence as well as for removal, but the eleventh article provided that whereas the Cherokee delegates contended that the amount expended for one year's subsistence was not properly chargeable to the treaty fund, it was thereby agreed that that question should be submitted to the senate for its decision, which *476 should decide whether the expense should be borne by the United States or the Cherokee funds; and the senate, thus made the umpire, (it having been found that the $1,047,067 appropriated by the act of June 12, 1838, did not fully cover the expense of subsistence,) resolved that the Indians were entitled to $189,422.76 for subsistence, "being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the treasury." This decision was accepted, and the money appropriated to make good the award. The act of 1838 grew out of the inducements offered in promotion of the removal of the entire body, and made the appropriation in discharge of an assumed obligation to subsist the Indians, if they would remove, notwithstanding the involuntary character of that removal. Taking the acts of 1838 and 1850, with the decision of the senate, there can be no question that the United States concluded to bear, and did bear, the entire expense, so far as subsistence was concerned. The court of claims, therefore, correctly deducted the sum of $339,140 for the removal of the whole number of Cherokees at $20 per head, and declined to deduct any charge for subsistence. It was really over this item that the sharpest controversy ensued, for by the original accounting the sum of $961,383.66 had been deducted for the removal and subsistence of 18,026 Cherokees, at $53.33⅓ per head, which was erroneous as to the number, and on account of the inclusion of the commutation of $33.33⅓ for subsistence.

In the account stated by the accounting officers of the treasury, December 3, 1849, the sum of $101,348.31 was deducted from the fund for debts and claims upon the Cherokee nation, made up of these items: For national debts, $18,062.06; for claims of United States citizens, $61,073.49; and for the Cherokee committee, $22,212.76. This sum of $101,348.31 was also deducted in the account stated in the report of the senate committee of August 8, 1850, in the report of the secretary of the interior of February 23, 1883, and in the findings of the court of claims under the reference in February, 1884.

*The court of claims in this suit rejected the items of $18,062.06 and $61,073.49, because, in the opinion of the court, there was no evidence to connect these items with the fund for distribution, while it held the item of $22,212.76, for the expenses of the Cherokee committee, as properly chargeable under the twelfth article of the treaty of 1835, which provided for a committee to carry the treaty into effect. We are not persuaded that this conclusion was correct. Under the tenth article of the treaty of 1835 the United States agreed to pay the just debts and claims against the Cherokee nation held by citizens of the same, and also the just claims of citizens of the United States for services rendered to the nation, and it was stated that "the sum of sixty thousand dollars is appropriated for this purpose." This should be regarded as $60,000 of the total amount, and, in our judgment, the debts and claims upon the Cherokee nation mentioned in article 15, and to be deducted under article 4 of the treaty of 1846, should be confined, so far as the Western Cherokees are concerned, to $60,000, and that amount is justly chargeable against the fund; but we are not satisfied that the expenses of the committee authorized by the twelfth article of the treaty of 1835, which was a committee to recommend persons for the privilege of pre-emption rights and to select missionaries, as well, indeed, as to transact all business which might arise in carrying into effect the provisions of the treaty, ought to be charged in addition.

In view of these considerations, we find and state the account as follows:

The treaty fund		$5,600,000 00
Less—		
For 800 000 acres of land	$ 500,000 00	
For general fund	500,000 00	
For improvements	1,540,572 27	
For ferries	159,572 12	
For spoliations	264,894 09	
For debts, etc	60,000 00	
For removal of 16,957 Cherokees at $20 each	339,140 00	
	$3,364,178 48	3,364,178 48
Giving as the residuum to be divided		$2,235,821 52
One third due to the Western Cherokees		$745,273 84
Less payment September 22, 1851		532,896 90
Leaving a balance of		$212,376 94

And the recovery should also include the sum of $4,179.26 for the Arkansas agency.

By the second resolution adopted by the senate, as umpire, September 5, 1850, it was decided that interest should be allowed, at

the rate of 5 per centum per annum, upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

Under section 1091 of the Revised Statutes no interest can "be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims unless upon a contract expressly stipulating for the payment of interest;" and in Tillson v. U. S., 100 U. S. 43, it was held that a recovery of interest was not authorized under a private act referring to the court of claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself. That determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. 9 St. p. 556.

In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of $4,179.26, which stands upon different ground.

The question remains as to the character in which petitioners come into court, and to whom the amount awarded should be distributed.

*470 The "Old Settlers," or Western Cherokees, are not a *governmental body politic, nor have they a corporate existence, nor any capacity to act collectively. The money belongs to them as individual members of an Indian community, recognized as such by the treaty of 1846, and treated as distinct and separate from the Cherokee nation, so far as necessary to enable the government to accord them their treaty rights. They are described in the fourth article of the treaty as "all those Cherokees west of the Mississippi, who emigrated prior to the treaty of 1835;" and they may be held to include those now living who so emigrated, together with the descendants of those who have died, the succession to be determined by the Cherokee law. The petition does not set forth their names, nor the extent of the rights and interests claimed, respectively, but purports to be brought by three persons, "for themselves and as commissioners" of the Western Cherokees; and they alleged that the claimants "are the remaining part of those Cherokee Indians who formed and composed the Western Cherokee nation; and that they have maintained their separate organization so far as to adjust and settle their claims against the United States." But the evidence is quite inadequate to justify the court in treating the immediate petitioners as appointed by all the beneficiaries as their agents to receive and disburse the amount awarded.

The lands west of the Mississippi were held as communal property, not vested in the Cherokees as individuals, as tenants in common or joint tenants; but by the treaties of 1835 and 1846 the communal character of the property was terminated as to both Eastern and Western Cherokees, and the fund, taking the place of the realty, was invested in the various ways we have mentioned, leaving the remainder to be distributed per capita. The Western Cherokees were paid, under the treaty of 1846, simply as citizens of the Cherokee nation, entitled to receive the money, as having emigrated prior to 1835, or the descendants of such.

The court of claims at first decided that the decree should be in the form usually used where a suit is prosecuted by individuals for themselves and others; that is to say, that the general liability should be established, and then provision made for the *480 individual Old Settlers, or Western Cherokees, to come in and establish their right to share in the fund.

It was said in Smith v. Swormstedt, 16 How. 288, 302, 303, that "the rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and all the others;" but that "in all cases where exceptions to the general rule are allowed, and a few are permitted to sue or defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." And, notwithstanding the suggestion that these so-called "commissioners" do not bring themselves as strictly within the rule upon this subject as they should, yet we think that they do so far represent the interests or rights involved that the case may be allowed to proceed to judgment.

The court of claims, after delivering its opinion, suspended the entry of the decree which it had indicated its intention to render, and, after argument had upon the question, modified that opinion, and held that the fifth article of the treaty of 1846 applied as to the distribution, and entered a decree accordingly. The court was quite right in holding that the amount found due should not be decreed to be received and disbursed by the three petitioners as a commission, and that it was not necessary that the decree should require the beneficiaries to come into that tribunal, and prove up against the fund. The fifth article of the treaty

provided that the per capita allowance to be given to the Western Cherokees should be held in trust by the United States, and "paid out to each individual belonging to that party, or head of family, or his legal representatives," and "be paid directly to the persons entitled to it, or to his heirs or legal representatives;" and that the persons entitled to it should be ascertained by a committee of five, appointed by the president of the United States, from the Western Cherokees, and an agent of the United States. The court was of opinion that the rule thus prescribed should be followed as to this balance of the amount intended for per capita distribution, and it was in acordance with this view that the decree was finally entered.

We approve of this disposition of the matter as just and appropriate under the circumstances, and a competent exercise of judicial power. The court decides and pronounces the decree to be carried into effect as between the persons and parties who have brought the case before it for decision, and none the less so because it leaves the mere matter of distribution to be conducted in the manner and through the agencies pointed out in the treaty.

The result is that we concur substantially in the conclusions reached by the court of claims, whose laborious and painstaking examination of the case has been of great assistance in the investigation we have bestowed upon it; and in respect of the difference in the amount found we direct the decree to be modified so as to provide for the recovery of the defendants of the sum of $212,376.94, instead of the sum of $224,972.68, in full of the per capita fund provided by the fourth article of the treaty between the United States and the Western Cherokees, dated August 6, 1846, together with interest thereon at the rate of 5 per centum per annum from the 12th day of June, 1838, up to and until the modification of the decree, in addition to the sum of $4,179.26; and, as so modified, to be affirmed.

Mr. Justice JACKSON did not sit in this case or take part in its decision.

(148 U. S. 615)

CASEMENT et al. v. BROWN et al.

(April 10, 1893.)

No. 173.

NEGLIGENCE — INDEPENDENT CONTRACTORS — OBSTRUCTION OF RIVER.

1. Defendants contracted to furnish all materials for the construction of the piers for a railroad bridge across a certain river, the materials to be subject to the inspection and approval of the engineer of the railroad company, and to construct the piers according to certain plans and specifications under the continuing inspection and subject to the approval of the engineer. *Held*, that defendants were independent contractors, and as such liable for injuries to third persons, resulting from their negligence in the performance of the work.

2. Before the piers were completed they were submerged by high water, so as to be a dangerous obstruction to navigation, and defendants placed buoys to indicate their position. The buoys were washed away and replaced once. One of them was again washed away, and, after a reasonable time for its replacement had elapsed, and defendants had failed to replace it, a barge in tow of plaintiff's steamer struck the submerged pier, whose position it should have indicated, and was destroyed. *Held*, that defendants were guilty of negligence.

3. It did not appear that the water was so high as to make navigation dangerous, and the steamboat at the time of the accident was under perfect control, and had a sufficiency of competent lookouts, and the course she pursued was the customary and proper one. On the other hand, her pilots had passed the locality frequently before, and had opportunity to become familiar with the positions of the piers. There was no break in the water to indicate that the submerged pier was near the surface, and another boat had shortly before taken the same course in safety. *Held*, that the pilots were not guilty of contributory negligence, since the absence of the accustomed buoy might warrant the inference that the pier—whose exact position they were not bound to know—was submerged to such an extent as to be no longer dangerous.

In error to the circuit court of the United States for the southern district of Ohio.

Action by Samuel S. Brown and Harry Brown, partners as W. H. Brown's Sons, against J. S. Casement & Co., for negligence. There was judgment for plaintiffs, and defendants bring error. Affirmed.

Statement by Mr. Justice BREWER:

This was an action to recover the value of three barges of coal, lost, as claimed, through the negligence of the defendants. The case was commenced in the court of common pleas of Scioto county, Ohio, and removed to the circuit court of the United States for the southern district of Ohio. There it was tried by the court without a jury. Findings of fact were made, and from those findings the conclusion was reached that the defendants were guilty of negligence, whereupon judgment was entered in favor of the plaintiffs for the amount of the loss.

These facts appeared in the findings: Early in the year of 1882 two railroad corporations, one an Ohio and the other a West Virginia corporation, obtained proper authority from those states and from the United States government for the construction of a railroad bridge across the Ohio river, opposite the village of Point Pleasant, in West Virginia. The plan of the bridge and the number and size of the stone piers were submitted to the proper officers of the United States government, and approved, and the bridge and piers were duly constructed as authorized by such officers.

"There were six stone piers provided and built for the support of said bridge, one of which stood on top of the bluff bank of the river on the West Virginia side, another on top of the bluff bank on the Ohio side, and the other four between said banks of the river. Said four piers between

the banks are known as 'A,' 'B,' 'C,' and 'D.' Said pier 'A,' being on the West Virginia side of the river, was located and built at the outer edge of low-water mark, pier 'B' 250 feet west therefrom, pier 'C' 250 feet west of pier 'B,' and pier 'D' at the edge of the water at low-water mark on the Ohio side, at the distance of 500 feet from said pier 'C;' the west side of pier 'A' and the east side of pier 'D' reaching to the edge of the water at low-water mark. The long span between piers 'C' and 'D' was duly established as the channel span, after notice duly given and consultation with those engaged in the navigation of the Ohio river, as required by law."

On January 27, 1882, these corporations entered into a written contract with the defendants for furnishing the material and building these piers. This contract in terms provided that defendants were "to furnish all material of every kind, name, and description necessary for the construction of the same, said material to be subject to the approval of said engineer, and to be of such quality as may best insure the durability of said structure; to be at the expense of and subject to all expenses incident to and connected with said work of construction, the said work to be done and completed according to the plan and specifications hereto annexed, marked 'A,' and subject to the inspection and approval of the said engineer of said companies in charge of said work, and which said plans and specifications are hereby expressly made a part of this contract." It further provided that "the work throughout will be executed in the most thorough, substantial, and workmanlike manner, under the direction and supervision of the engineer of the company, who will give such directions from time to time during the construction of the work as may appear to him necessary and proper to make the work complete in all respects, as contemplated in the foregoing specifications. Said directions of the engineer will in all respects be complied with. The engineer will also have full power to reject or condemn all work or materials which, in his opinion, do not conform to the spirit of the foregoing specifications, and shall decide every question that may arise between the parties relative to the execution of the work, and his decision in the nature of an award shall be final and conclusive on both parties to this contract."

Under this contract the defendants had, at the time of the injury, completed the two piers on the banks, and partly constructed the four piers between the banks. For two weeks before the injury the river had been rising rapidly, and the water was very high. Business on the river had been partially suspended on account thereof. On the Ohio side the bank was under water, which extended inland a quarter of a mile or more. The stage of the water in the river was then 55 feet above low-water mark. Three of the piers were from 37 to 47 feet below the surface of the water, while pier D, on the Ohio side, which had been completed to 48 feet above low-water mark, was covered to the depth of only about 7 feet.

"(5) There is a very slight curve in the river at Point Pleasant, the Ohio shore being on the convex side, and at high stages of water it is customary and proper for coal fleets to 'run the points,' running near the shore on the Ohio side at a distance of a quarter of a mile and more above the bridge in descending the river, and bearing out to the left of channel pier D, and between channel piers D and C, and running in near the shore on the West Virginia side about two miles below said village of Point Pleasant, and the channel of the river was between said channel piers C and D, and the usual and proper course was to run between said piers C and D, running the points as before stated.

"(6) The night before the accident, the plaintiffs' three steamboats,—the Resolute, the Alarm, and the Dexter,—with coal barges in tow, tied to shore during the night some distance above the bridge.

"The Resolute, with its tow, was in advance of the other two, passing the bridge on the morning of the accident between eight and nine o'clock. The Alarm, with its tow, reached the bridge about ten o clock in the morning. Its tow consisted of six coal barges, three abreast, each barge being twenty-six feet wide, and drawing between seven and eight feet of water. The front middle barge ran upon and struck said channel pier D, which caused the injury complained of.

"The steamer Dexter, with its tow, passed shortly after between said channel piers C and D, where the Resolute, with its tow, had previously passed, and while one of the Alarm's barges that struck said pier D was still lying on said pier in plain view.

"(7) The morning of the accident was clear and calm, and the Alarm, with its tow, was steaming and handling well. The pilot in charge was well acquainted with the Ohio river at that point and from Pittsburgh to all points below, and while the work of constructing said pier was going on had passed there twice a week, and saw and knew where said piers were located, and to what extent the work had progressed, and where the channel span had been established, and its length, and also knew that prior to the location of said bridge the usual channel for coal fleets in passing down the river was further to the left, between piers B and C, and near to said pier B.

"(8) As the Alarm approached the bridge no halt was made, nor was any one sent forward in a skiff or otherwise to take observations or make inquiry. The pier standing on the Ohio bank, twenty-four feet out of water, was in plain view, and was seen by said pilot and others in the pilot house, and the same

was the case as to the pier on the east bank of the river.

"The village of Point Pleasant and its buildings, well known to pilots and other rivermen, were also in plain view.

"There were also on the Ohio side, between the top of the bank, both above and below the bridge, growing trees, the tops of which were some distance out of water, that were in plain view, and were noticed by said pilot, but for the distance of about a quarter of a mile immediately above and below said bridge the line of trees did not extend. At the time of the accident there were present in the pilot house, aiding and assisting the pilot in charge, the other pilot of the Alarm and three other pilots, who were on the lookout, making observations and consulting as to the passage of the bridge, none of whom saw any buoys or break to indicate where the pier was. Another man acted as lookout, was on the extreme front of the tow, and he saw no buoys or break to indicate the location of said pier D.

"(9) During the building of said four piers between the banks of the river proper buoys had been kept upon the same, to which, during the night, proper lights had been attached as signals to warn passing boats and other water craft of danger; but for some days prior to the accident, on account of the height of the water and the large quantity of floating drift, the buoys had been carried off and floated down the river, but had been secured and replaced till the night preceding the accident, or the night previous to that, when the buoy on pier D had again been washed off, and had not been replaced at the time of the accident; and the fact of its absence was known to the defendants early in the morning of the accident, and they made no effort to restore it till after the accident, and that they might have done so; neither did they send any one up the river, or adopt any other plan, as they might have done, to notify approaching boats of the absence of said buoy, or adopt any other plan.

"(10) The said railroad companies provided, employed, and paid for the services of a chief and an assistant engineer to superintend said work, one of whom was at all times on the ground, and gave directions as to the mode and manner of constructing said stone piers, and decided as to the quantity of stone, the height and size and shape of the piers, and performed all the duties specified in said written contract. Said railroad companies, through said engineers as their agents, duly authorized, took charge of, directed, and controlled as to providing buoys and lights to be kept upon said piers, the character of the same, and the mode and manner of fastening them to said piers and keeping them in place. Said engineers of said railroad company, however, on behalf of said railroad company, employed the defendants to furnish the materials and perform the work in preparing said buoys and lights, and in putting them up and in keeping them in place when and as directed by said engineers. The defendants were paid for said materials and work, an account of which was kept by defendants and was carried into their monthly bills with the stonework, and was settled and paid for with the other work.

"Prior to said accident said engineers had given to the defendants such directions as to the character of such buoys to be used, and as to the mode and manner of putting them and keeping them up, and it was the duty of defendants to see that they were kept up and replaced when washed away, under said instructions previously given, and without waiting for future instructions, and which they had undertaken to do."

Upon these facts the court found as conclusions of law:

"(1) That the defendants, by the terms of said written agreement made with said railroad companies, are independent contractors, and are liable to the plaintiffs for the injury complained of.

"(2) That the agreement made by defendants with said railroad companies to furnish the material and do the work in preparing, putting up, and keeping up said buoys and lights on said piers created the relation of independent contractors, and made the defendants liable to the plaintiffs for the injury complained of.

"(3) That it was the duty of defendants to have kept a buoy upon said pier D, and, if washed off by drift or otherwise, to have replaced it, or if this could not have been done, on the morning of the accident, before the injury, they could and should have sent some one up the river a sufficient distance above the bridge, or adopted some other plan, to notify approaching boats of the loss of such buoy and of the location of the piers, and their failure to do so constitutes negligence on their part; and under such circumstances those in charge of plaintiffs' coal boats were not chargeable with negligence in failing to make accurate calculations as to the location of said pier D from the other objects in view, and seen by them, or that they might have seen.

"(4) That the plaintiffs and their agents in charge of the tow were at the time in the exercise of reasonable and proper care in the management and navigation of the tow, and were not guilty of contributory negligence; that at the time of the accident the plaintiffs' boat Alarm, with its coal tow, was in the usual and proper place of navigation at that stage of water."

Judgment having been entered in accordance with these findings and conclusions, defendants sued out a writ of error from this court.

W. A. Hutchins and J. W. Bannon, for plaintiffs in error. T. M. Hinkle, for defendants in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

622 The defendants contend: First, that they were not independent contractors, but employes of the railroad companies, and that, therefore, the railroad companies, and not themselves, were responsible for any negligence; second, that they were not guilty of any negligence; and, third, that, if they were, the plaintiffs were also guilty of contributory negligence, and therefore debarred from any recovery.

With reference to the first contention, obviously the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies. The size, form, and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size and at the places fixed. They selected their own servants and employes. Their contract was to produce a specified result. They were to furnish all the material and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work. The contract was not to do such work as the engineers should direct, but to furnish suitable material, and construct certain specified and described piers, subject to the daily approval of the companies' engineers. This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatsoever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with this contract; "only this, and nothing more." They were to see that the thing produced and the result obtained were such as the *623 contract provided for. Carman v. Railroad Co., 4 Ohio St. 399, 414; Corbin v. American Mills, 27 Conn. 274; Wood, Mast. & Serv. p. 610, § 314.

It is unnecessary to inquire whether, because of the supervision retained by the companies through their engineers, or because the work which was done was work done on a public highway, the companies might also be responsible for any negligence in the progress of the work. 2 Dill. Mun. Corp. (4th Ed.) § 1030; Cleveland v. King, 132 U. S. 295, 10 Sup. Ct. Rep. 90; Chicago v. Robbins, 2 Black, 418; Robbins v. Chicago, 4 Wall. 657; Water Co. v. Ware, 16 Wall. 566. It is enough for this case that these defendants contracted to do the work, and to produce a finished structure according to certain plans and specifications, and, having made such contract, and engaged in such work in accordance therewith, they are responsible for all injuries resulting from their own negligence. While, doubtless, the original written contract would cast upon the defendants as contractors the duty of taking all reasonable precaution, by buoys or otherwise, to warn those traveling on this public highway of any danger arising from their work, yet, in addition, it appears that there was a special contract, by which they agreed to furnish the material and perform the work of preparing and keeping in place buoys and lights to warn against all danger. Surely, having made a contract to do the entire work, and, in addition, a special agreement to keep proper buoys and lights in place to warn persons of danger, it does not lie in their mouths to say that their negligence and omission of this contractual duty cast no responsibility upon themselves, but was only the negligence and omission of duty of the railroad companies, for which the latter, and the latter alone, were responsible.

Secondly, equally clear is it that they were guilty of negligence in failing to replace the buoy over this submerged pier. According to the findings, they knew that that which had been there had been carried away, and had ample time to put another in its place. They knew of the submerged pier, and of the danger to boats therefrom. They knew what was necessary to guard against that danger, for they had previously been taking the proper precautions. Having omitted to replace *624 the buoy, although they knew of the necessity therefor, and had ample time to do so, or otherwise to warn of the danger, they were guilty of negligence, and responsible for all injuries which resulted therefrom.

But the stress of this case arises on the third of their contentions, and that is that the plaintiffs were guilty of contributory negligence. It is said that the river was so high that it was dangerous to attempt to run a steamboat with barges down the current; that the piers on the shores on either side were visible, and in fact seen by the pilots, and thus they knew the line on which were placed the then submerged piers in the river; that they were familiar with the river at this place, knew that a bridge was being constructed, and during its construction had passed there twice a week, and saw and knew where the piers were located, and to what extent the work had progressed; that the day was clear, and the steamer under control, steaming and handling well; and that, although approaching where they knew were these partially constructed piers, and seeing that they were submerged, no halt

was made, nor any one sent forward to take observations or make inquiry. In view of these facts it is strenuously urged that the pilots and officers of the steamboat were guilty of negligence which contributed directly to the injury, and that, therefore, the plaintiffs, being responsible for the negligence of their agents and employes, cannot recover. It must be conceded that these facts, thus grouped together, point in the direction of negligence on the part of the pilots and officers. They knew that there was danger there, and, therefore, were bound to take suitable precautions to guard against it. They knew that pier D was near the Ohio shore, and that its construction had progressed further than that of the other piers, and still they did not direct the course of the boat away from that shore, and into the unobstructed channel.

On the other hand, it must be observed that the mere fact of high water does not establish negligence on the part of the plaintiffs. Indeed, as water is a necessity for and means of steamboat navigation, it would seem that the more water the less danger. If it be said that the increased volume of *625 water increases the current, and therefore the difficulty of controlling the motions of the vessel, it is enough to say that the findings show that there was no difficulty or danger in this case on that account. The injury resulted from a submerged obstruction, and the more water there is, apparently the less danger from such sources. It is true the findings state that business on the river was partially suspended on account of the high water. That may have been because prudent men were unwilling to risk the dangers arising therefrom, or because everything on the river driven by steam power was needed to prevent the high water from carrying away personal property along the shore, and to collect that which was being borne away. Whatever may have been the reasons, the fact that business was only partially suspended is satisfactory evidence that it was not in and of itself negligence for these plaintiffs to attempt to run their boats down the river. If it be said that the pilots ought to have taken the boats further out into the channel, it is sufficient answer that it is found as a fact that it was both customary and proper for coal fleets, such as these, to keep somewhat near the Ohio shore at this place, "running the points," as the expression is; and the fact that, in this case, they miscalculated the exact location of the submerged pier, does not subject them to the condemnation of negligence. It seems from this finding that they were pursuing the proper as well as the customary course, and a mere error of judgment is not, under such circumstances, negligence. While it is true the findings state that the pilots knew where the piers were located, and to what extent the work had progressed, having been in the habit of passing there twice a week during the construction, yet it is not to be assumed therefrom that the court meant to find that these pilots knew the exact height to which pier D had been carried, the exact stage of the water at the time, and, therefore, the exact depth of the water above the pier, and also its exact location in the river. All that can reasonably be inferred from the language is that they possessed such knowledge of the location and construction of the piers as they would acquire from passing up and down the river twice a week in their boats. And in reviewing a judgment it is not proper to place any narrow, strained, or strict construction on the language with which the court describes its findings of fact, in order to sustain the contention that they do not support the conclusions of law and the judgment. On the contrary, if any reasonable and fair construction thereof will sustain the judgment, such construction should be recognized and adopted by the appellate court as the true construction. If it be said that, knowing, as they did, that somewhere in the line between the two shore piers was this submerged pier D, they should have ascertained for a certainty its exact position before proceeding on their course, it may be replied that the fact that this was an artificial obstruction, placed there by parties still engaged in the construction of a bridge across the river, and therefore having a present duty of caring for the structures, and seeing that no one was injured thereby, is a fact of significance. If it was a natural obstruction, one in respect to which no party had any duty of preservation or warning, it might be that the obligation resting upon the pilots would be of a different and more stringent character. But they knew that here a great work was being constructed by these defendants; that it was their duty to give all needful warning to persons and boats going up and down the river; and that, if there were no buoys in place, or other warning given, they might fairly conclude that all of these piers were so far submerged as to threaten no danger to passing boats.

Further, as appears from the findings, they saw no break in the water, nothing which would indicate that the top of the submerged pier was near the surface. And, still further, one of the boats in the fleet had but shortly before passed there in safety. They evidently relied on two facts: First, that the appearance of the water in the course they were taking indicated that the pier, if in that course, was so far submerged as to threaten no danger; and, secondly, that, if there were any danger to be apprehended from such an obstruction, the parties in charge of the work would have indicated by buoys or otherwise the place of the danger. Shall they be condemned because they relied upon the defendants' faithful discharge of the duty of giving suitable warn

ing, and, in the absence of such warning, believed there was no danger, and, seeing nothing in the appearance of the water to suggest danger, pursued that which was the customary and proper course for boats to pursue in passing from above to below the line of the bridge? It appears from the findings that the lookout was not confined to one person, but that several were gathered in the pilot house, on the lookout for all indications of danger and all customary guards and warnings.

We are of opinion that the conclusion of the circuit court was right, and that it would be placing too severe a condemnation on the conduct of the pilots in charge of the boats to say that their error of judgment, their dependence on the appearance of the stream, and their reliance upon the duty of the defendants to place suitable buoys or other warnings, was such contributory negligence as would relieve the defendants from liability for the results of their almost confessed, and certainly undoubted, negligence.

The judgment is affirmed.

(143 U. S. 649)

ISAACS v. JONAS, Collector.

(April 10, 1893.)

No. 142.

CUSTOMS DUTIES—CLASSIFICATION—SMOKERS' ARTICLES—CIGARETTE PAPER.

Plaintiff imported packages of paper, specially prepared as cigarette wrappers, cut to the proper size, and separated into divisions of about 250 pieces, being the proper number for a cigarette book. By a separate importation he brought in pasteboard covers of corresponding size, to be used with the paper in making cigarette books by brushing one edge of each subdivision of paper with adhesive material, and cementing the same into the covers. His intention was to unite the two importations into cigarette books, and that was the only form in which such paper had been sold at retail. A part of the paper, however, was sold directly to manufacturers of cigarettes. *Held*, that the importations were dutiable at 70 per cent. ad valorem, as "smokers' articles," within Schedule N of the tariff act of 1883, (22 St. p. 513, c. 121,) and not at 15 per cent., as manufactures of paper not specially enumerated, under Schedule M, (22 St. p. 510.)

In error to the circuit court of the United States for the eastern district of Louisiana. Affirmed.

Statement by Mr. Justice GRAY:

This was an action brought December 17, 1885, by Isaacs against the collector of the port of New Orleans, to recover back an alleged excess of duties paid, under protest, upon 25 cases of cigarette paper and upon 23 cases of pasteboard covers of cigarette paper, both imported by the plaintiff in June, 1885; the paper at the port of New Orleans, and the covers at the port of New York, and thence transferred in bond to New Orleans; and the two entered by the plaintiff simultaneously at New Orleans for withdrawal for consumption.

The collector, and the secretary of the treasury on appeal, held both importations to be subject to the duty of 70 per cent. ad valorem, imposed by Schedule N of the tariff act of March 3, 1883, (chapter 121,) on "pipes, pipe bowls, and all smokers' articles whatever, not specially enumerated or provided for in this act." 22 St. p. 513.

The plaintiff contended that both importations were within Schedule M of the same act, imposing a duty of 15 per cent. ad valorem on "paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act." 22 St. p. 510.

At the trial before a jury it was agreed by the parties, without contention, "that the paper, when imported, was cut into small pieces of the size proper for making cigarettes, and was put up in packages wrapped in paper, the packages being about six or eight inches square, and that these packages were again inclosed in large cases or boxes for sea transportation; that the contents of each of the smaller packages referred to were made up of said small pieces of paper, cut to the size proper, and of the proper character of paper, for making cigarettes; that said cigarette paper, as imported, was in no manner attached together in any form of binding, but was separated into divisions of about 250 pieces of paper by the interposition of a piece of paper of a different color, cut of the same size, so that it subdivided the paper into the divisions of the proper size and number of leaves for the contents of the book of leaves of cigarette paper, of the ordinary size of such books as sold in the markets."

The plaintiff introduced evidence "tending to show that the paper of which the small cut papers were made was made of a peculiar material, and by a process fitting it to be used as wrappers for cigarettes; and that the paper was manufactured in large sheets, and afterwards cut into the form of small pieces of paper as imported, before importation, by machines contrived for that purpose; that the paper was so cut to adapt it to use as wrappers for cigarettes; that cigarettes, as manufactured, consist of a small quantity of disintegrated tobacco leaves, wrapped about and held in place by the paper, and that in consumption both the tobacco and the paper are set on fire, and both consumed or smoked by the smoker; that it was the intention of the plaintiff, at the time of importation, and his motive in making said importation in said form, to manufacture the said material into what are known as 'cigarette books;' that the process of such manufacture is to separate the paper, as imported, where the colored leaves or subdivisions are located in the paper as imported, and with a brush cover one edge of the paper with flour paste, glue, or some adhesive cement adapted to cement leaves together at one edge, and then cement the

paper into the covers as they are imported; that as to and concerning this particular importation a large portion thereof was so put up and cemented into books by the plaintiff after the same came into his possession by withdrawal and payment of duties; that this was done at the expense of about $400 for hire of workmen to do the work; that a portion of the paper as imported was sold directly to manufacturers of cigarettes, to be used in their factories in making cigarettes for sale as a manufacture and article of commerce; that as to this particular kind or manufacture of paper the plaintiff was the sole importer thereof into the United States, by special arrangement with the foreign manufacturers thereof; that as an article of retail sale, or jobbing and sale to the retail dealers, the paper has always been sold in this country in the form of books consisting of a certain number of leaves of the paper, cemented together and to the cover; and that in use thereof by the smoker the leaves are separately torn from the book used in the manufacture of cigarettes by the smoker, and when the leaves are all expended the cover is thrown away as useless; that the function of the cover is simply to protect the leaves from becoming scattered or injured by being handled or carried in the pockets of the smokers, and had no other function or use." The plaintiff thereupon rested his case.

The defendant called as a witness a person connected with the office of the appraisers at the customhouse in New Orleans, who testified that for many years he had been a cigarette smoker, rolling and making his own cigarettes by combining the tobacco and paper himself, and who produced packages of cigarette paper of another kind and greater stiffness than the goods imported, bought at cigar shops in New Orleans, without covers, and held in place as a package by a flexible band; and was permitted by the court, against the plaintiff's objection and exception, to testify that those packages could be used by smokers in the condition in which they were produced, and also that "it was possible to use the paper in controversy in this case in the form in which it *651 was imported, without pasting*together the edge, or pasting or gluing the paper to connect the cover to make a cigarette book."

The bill of exceptions set forth many instructions requested by either party and given by the court with modifications, as well as other instructions given to the jury, the substance of all which sufficiently appears by the following instructions given, to each of which the plaintiff excepted:

"If you find that the smoker himself, by simply placing the package of small leaves of cigarette paper within the cover, and placing the rubber band which adheres to the cover around the cover and the package of small leaves of cigarette paper, can use the book of cigarette paper for all the purposes to which a book of cigarette paper is put by smokers, then the jury should find for the defendant."

"To find that the things imported are smokers' articles, the jury must find that they are ordinarily and distinctively used by smokers in or in connection with smoking, and that they are ready to be so used."

"If the merely laying them together enables the smoker to use them, and he did use them without any process except that of laying them together, they would be smokers' articles; but if, on the other hand, there was a process of manufacture or combination beyond laying together, then they would be materials for smokers' articles, and not smokers' articles."

"If the jury find that the things separately imported are imported separately as matter of business, and not as an evasive device, then they are the materials for the articles, but not the articles themselves; but if the jury find the things, though imported separately, were designed, without any expenditure beyond being put together, to be put and sold together, and were imported separately, merely to escape a higher rate of duty, and not from motives of business, then the separate things are to be classed as parts of a whole, and not simply as materials."

The jury returned a verdict for the defendant, upon which judgment was rendered, and on May 16, 1889, the plaintiff sued out this writ of error.

W. Wickham Smith, Charles Curie, and D. Ives Mackie, for plaintiff in error. Asst. Atty. Gen. Parker, for defendant in error.

*652 *Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

Had there been any question in this case necessary for the consideration and decision of a jury, the plaintiff would have no just ground of exception to the admission of the testimony of an habitual cigarette smoker, accustomed to roll his own cigarettes, that other cigarette paper, sold in similar packages, but without covers, could be used by smokers in that condition, and that the pieces of paper now in question could be so used without being pasted together or into a cover; or to the instructions under which the case was submitted to the jury.

But the several exceptions taken become immaterial, because upon the plaintiff's own case the jury might well have been instructed, as matter of law, that the defendant was entitled to a verdict.

The facts which were either admitted by both parties, or which the evidence introduced in behalf of the plaintiff tended to prove, were, in substance, as follows: The importation of cigarette paper consisted of packages of separate pieces of a paper made of a peculiar material and by a special process, suitable to be used as

wrappers for cigarettes, cut into the proper size, and separated into divisions of about 250 pieces by the interposition of pieces of paper of the same size and of different color. The other importation consisted of pasteboard covers of corresponding size, to be used with the paper in making cigarette books by brushing one edge of each subdivision of the paper with paste or other adhesive substance, and then cementing the paper into the covers, from which the leaves are torn by the smoker as desired, and then the cover (which is useful only to protect the papers) is thrown away.* The *653 plaintiff, by arrangement with the foreign manufacturers of this paper, was the sole importer thereof into the United States; his intention and motive in importing it were to make it up into cigarette books; and that was the only form in which such paper had been sold at retail. A large part of this importation was so made up into books by the plaintiff at an expense of about $400 for the hire of workmen; but a part of it, as imported, was sold directly to manufacturers of cigarettes.

The question is whether, upon these facts, the cigarette paper and the pasteboard covers for it were "manufacturers of paper," within Schedule M, or were "smokers' articles," within Schedule N, of the tariff act of 1883.

Each of the two clauses containing the words, "not specially enumerated or provided for in this act," and the clause concerning smokers' articles being the more specific and definite, this clause must, of course, prevail over the other in the case of a subject falling within both descriptions.

It is manifestly not requisite, in order to bring an article under this clause, that it should, of and by itself, be capable of being used for smoking; for the clause includes not only "pipes," which are ready to be filled and smoked, but "pipe bowls," which cannot be smoked without putting stems to them, "and all smokers' articles whatever."

In the case at bar, the cigarette papers, as well as the covers to hold them, were made, adapted, and intended to be used by smokers in rolling and smoking cigarettes. The plaintiff himself imported both the papers and the covers, and entered and paid the duties upon the two simultaneously; and his intention at the time of importing them, as well as his motive in importing them in the form that he did, was to combine them into cigarette books for the use of smokers. The leaves of paper were fit for nothing else but to be made into cigarettes, and smoked with the tobacco wrapped in them; and they were used in the same way, whether never put into a cover at all, or first pasted into a cover and afterwards torn out one by one. The covers were fit for nothing except to hold and protect the *654 papers until made by the smoker into cigarettes. The mere pasting together of the papers and the covers was in no proper sense a process of manufacture, and did not change the use or the character of the articles.

To decide that these cigarette papers and their covers, or either of the two, are not "smokers' articles," would contravene the plain language, as well as the manifest intent and purpose, of the tariff act.

The cases of Robertson v. Gerdan, 132 U. S. 454, 10 Sup. Ct. Rep. 119, and U. S. v. Schoverling, 146 U. S. 76, 13 Sup. Ct. Rep. 24, cited for the plaintiff, went no further than to hold other provisions of the tariff act, describing a complete instrument, to be inapplicable to the importer of a part thereof only. In Robertson v. Gerdan, the point decided was that ivory keys, sold to manufacturers of pianos and organs, to be scraped and glued to the wood, were not themselves musical instruments. In U. S. v. Schoverling the point decided was that gunstocks, although intended to be put with barrels to form complete guns, yet no question of the importation of gun barrels being involved, were not guns; and there was no intimation that if the stocks and barrels had both been imported by the same person, and entered at the same time, with the intention of himself putting them together as guns, they would not have been dutiable as such, or that gunstocks should not be considered as gunners' or sportsmen's articles.

Judgment affirmed.

(148 U. S. 654)

UNITED STATES v. ISAACS.

(April 10, 1893.)

No. 391.

CUSTOMS DUTIES—CLASSIFICATION—SMOKERS' ARTICLES—CIGARETTE PAPER.

Importations of paper specially prepared for cigarette wrappers, cut to the proper size, and in a condition in which it could be used by smokers to make their own cigarettes, although it is not so sold to smokers in that form, but is first made into cigarette books, are dutiable at 70 per cent. ad valorem, as "smokers' articles," under Schedule N of the tariff act of 1883, (22 St. p. 513, c. 121,) and not as manufactures of paper, under Schedule M of said act.

In error to the circuit court of the United States for the eastern district of Louisiana. Reversed.

Statement by Mr. Justice GRAY:

*655 *This was an action brought June 15, 1886, by the United States against Isaacs to recover additional duties upon 16 cases of cigarette paper, which he had imported and entered for consumption at the port of New Orleans in June, 1885, and had paid a duty of 15 per cent. ad valorem upon, as "manufactures of paper," under Schedule M, and which the collector, in liquidating the entry, held to be dutiable at 70 per cent. ad valorem as "smokers' articles," under Schedule N of the tariff act of 1883.

At the trial before a jury the only contro-

versy was under which description the merchandise was dutiable, upon the following facts agreed by the parties:

"The goods in question consisted of paper of a quality suitable for wrapping cigarettes filled with tobacco, and was cut into sizes fit for that use, and could have been used for that purpose, or in manufacturing cigarettes; but is not usually and in the ordinary course of trade put on the market for sale to smokers in the condition and form in which it was imported, but such paper is fitted for market and sale to smokers by being separated into lots or parcels of from one hundred to two hundred and fifty leaves of paper, after which one edge of the parcel of leaves is connected together with paste, glue, or some other adhesive cement, and afterwards cemented to a protective cover, making, when the manipulation is complete, what is known in commerce as 'cigarette books,' and from which the leaves are torn, one at a time, for the manufacture of cigarettes by smokers or manufacturers. It was, however, possible for any smoker to have taken the separate leaves of paper in form as imported, and used the same in making cigarettes, without having been first made up in books as above described. In fact, a part of this shipment and importation was sold directly to manufacturers of cigarettes in bulk for use in cigarette factories. And if the classification or rate of duty to be imposed is or can be in any manner affected by the intention of the importer as to future use after importation, the defendant admits that at the time of importation and entry it was his intention to use said paper in the manufacture of cigarette books; and that, in fact, a large portion of said paper was so used by him after importation, and was by him sold in that form in the United States."

The United States requested the court to instruct the jury that upon the facts agreed the paper in question was a smoker's article, and liable to a duty of 70 per cent. ad valorem, and that they should find a verdict for the United States. But the court declined so to instruct the jury, and ruled that upon the facts agreed the goods should be classified as a manufacture of paper, and that the defendant, having paid a duty upon it as such, was entitled to a verdict, which was returned accordingly. The United States alleged exceptions, and on February 11, 1890, sued out this writ of error.

Asst. Atty. Gen. Parker, for plaintiff in error. W. Wickham Smith, Charles Curie, and D. Ives Mackie, for defendant in error.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

It having been admitted by the parties at the trial that the paper in question in this case was made of a quality, and cut into a size, fit for wrapping cigarettes, and could, in the condition and form in which it was imported, be used by smokers to make their own cigarettes,—although it is not, in the usual and ordinary course of trade, put on the market for sale to smokers in that condition and form, but is usually prepared for sale to smokers by being made up into cigarette books, or else sold to manufacturers of cigarettes to be used in their factories,—it must, under the opinion just delivered in Isaacs v. Jonas, 13 Sup. Ct. Rep. 677, be held to come within the clause of the tariff act which imposes a duty of 70 per cent. ad valorem on "smokers' articles." The jury having been instructed otherwise, the judgment must be reversed, and the case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

(148 U. S. 482)

NATIONAL HAT-POUNCING MACH. CO. v. HEDDEN et al.

(April 3, 1893.)

No. 138.

PATENTS FOR INVENTIONS—ANTICIPATION—HAT-POUNCING MACHINES.

Letters patent No. 97,178, granted November 23, 1869, to Rudolph Eickemeyer, for an improvement in hat-pouncing machines, covered in the second claim "the arrangement and combination of a rotating pouncing cylinder, with a vertical supporting horn, whereby the supporting horn may be used to support the tip, side crown, or brim during the operation of pouncing the hat." Letters patent No. 220,889 were granted May 21, 1879, to Edmund B. Taylor, for a similar machine, the fifth claim of the patent being for "the combination of the support for the hat and the self-feeding pouncing cylinder, whereby the hat is drawn over the support in the direction of the motion of the pouncing cylinder." The principal difference in the machines was that the earlier one employed feed rollers to regulate the motion of the hat, while in the latter this was done by hand. *Held*, that the fifth claim of the Taylor patent was anticipated by the second claim of the Eickemeyer patent, for the omission of the feed rollers did not involve any invention. 36 Fed. Rep. 317, affirmed.

Appeal from the circuit court of the United States for the district of New Jersey.

Suit by the National Hat-Pouncing Machine Company against Charles M. Hedden and others to restrain the alleged infringement of two patents. A preliminary injunction was refused by the circuit court, (29 Fed. Rep. 147,) and subsequently a decree was rendered for plaintiff as to one patent and for defendant as to the other, (36 Fed. Rep. 317,) from which plaintiff appeals. Decree affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity to recover damages for the infringement of two letters-patent for improvements in machines for pouncing hats, viz.: patent No. 97,178, is-

sued November 23, 1869, to Rudolph Eickemeyer, and patent No. 220,889, issued October 21, 1879, to Edmund B. Taylor.

In his specification Taylor states:

"The object of my invention is to dispense with feed rolls and hat blocks in machines for pouncing hats, to make the cutting or pouncing cylinder self feeding, to enable the operator to control the speed and direction in which the hats to be pounced pass over the cutting or pouncing surface by the hand with the assistance of a guard and presser pin, and to cause the material to be pounced to move in the same direction as the surface of the self-feeding cutter in contact with it, thereby avoiding the injurious strain to which it is subjected in ordinary hat-pouncing machines with feed rolls or their equivalents.

"With my machine, not only can hats be pounced without any stretching or straining of the material to be pounced, but hats of different styles can be pounced, or different parts of the same hats can be pounced more or less, as may be desired, without any change in the adjustment of the machine. * * *

*483 "My machine consists of a table or supporting frame, X, which carries the bearings, F, for the shaft, upon which is fixed the driving pulley, E, and the self-feeding pouncing cylinder, A, which can be revolved at any desirable speed. This self-feeding cylinder is covered with the pouncing or cutting material.

"A block, B, supports the hat or material to be pounced, and presses it against the self-feeding pouncing cylinder, A. This block is adjustable upon its middle point by means of a bolt tapped into it, which passes through the bracket, D, and is fastened by a nut, M. It is supported by the bracket, D, which turns on a pivot, and is operated by a treadle and lever, P, and connecting rod, O. * * *

"A guard, C, is placed directly over the supporting block to protect the hands of the operator from contact with the self-feeding pouncing cylinder, and is adjustable upon the bracket, D, by the means of the nut, R, which works in a stirrup in the guard. * * *

"The mode of operating my machine is as follows: The hat to be pounced is placed over the supporting block, and pressed against the self-feeding pouncing cylinder by means of the treadle operating the swinging bracket. The self-feeding pouncing cylinder, revolving at great speed, draws the hat through the space between the supporting block and the self-feeding pouncing cylinder. The hand of the operator, assisted, when necessary, by the presser pin, L, retards the hat in its passage, and controls its direction, by which means the pouncing surface can be caused to move over the material to be pounced at any rate of speed or in any direction that may be desired.

The only claim alleged to be infringed was the fifth, which reads as follows:

"(5) The combination of the support for the hat and the self-feeding pouncing cylinder, whereby the hat is drawn over the support, B, in the direction of the motion of the pouncing cylinder."

The following represent Figs. 1 and 2 of the drawings:

*484

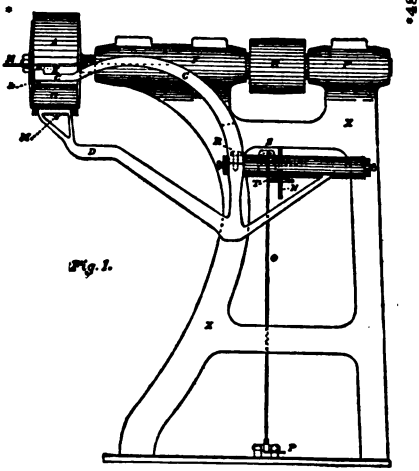

Fig. 1.

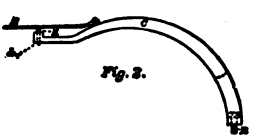

Fig. 2.

Upon a hearing upon pleadings and proofs in the circuit court the court found in favor of the plaintiff upon the second claim of the Eickemeyer patent, but also found the fifth claim of the Taylor patent to be invalid for want of novelty, and dismissed the bill as to this patent. 36 Fed. Rep. 317. Defendants did not appeal from the decree against them as to the Eickemeyer patent, but plaintiff appealed from so much of the decree as related to the patent to Taylor.

Eugene Treadwell and W. W. Swan, for appellant. A. Q. Keasbey and Edward Q. Keasbey, for appellees.

*485 *Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The fifth claim of the Taylor patent was held to be invalid by the court below upon the ground that it was anticipated by the second claim of the Eickemeyer patent.

The operation of cutting or grinding off the rough surface of the wool or fur of which the hat is made by the use of pumice is termed "pouncing." This was formerly done by pumice or sandpaper held in the

hand, and applied to the frame of the hat, laid upon a flat surface, and to the crown, fitted over a hat block of corresponding shape. In time mechanical devices began to be employed for the same purpose. Originally this mechanism consisted simply of a block over which the hat body was stretched, and to which a rotary motion was imparted, while the pouncing material was held in the hand, and applied to the surface of the hat. The patent to Wheeler & Manley of August 14, 1866, contained an improvement upon this, and consisted in pouncing the hat body by means of an emery cylinder or other pouncing surface moving at a high speed in contact with or against a hat body revolving at a comparatively low speed. This machine, however, consisted of two separate devices, one for pouncing the crown of the hat, and the other for pouncing the brim. The patent to Nougaret of September 18, 1866, also provided for two separate devices, —one to pounce the crown and the other the brim. Like the Wheeler & Manley crown machine, the Nougaret device for pouncing the crown contained a revolving hat block for carrying the hat, but the subordinate devices for bringing the different parts of the hat block in contact with the pouncing roller differed somewhat in the two machines. The patent to Labiaux of March 26, 1867, was simply for an improvement in the crown machine of Nougaret, and consisted in the manner of hanging and operating the shafts upon which the pouncing roller and block were secured, and in the manner of securing and holding the sandpaper to the pouncing roller, and in some other minor particulars.

The patent to Eickemeyer of November 23, 1869, was a decided advance upon previous devices in the fact that the crown of the hat was so supported that both the crown and the brim were presented by the same instrument to the pouncing cylinder. National Hat-Pouncing Mach. Co. v. Thom, 25 Fed. Rep. 496. In his specification he stated his method of accomplishing this as follows: "My invention further consists in an arrangement of the pouncing cylinder, and a rest or supporting horn for the hat body, which can be introduced within the crown to support it against the cutting action of the pouncing cylinder during the operation of pouncing, the arrangement being such as to dispense with the use of a hat block in pouncing the tips and side crowns of the hats."

The second and third claims of this patent —the only ones material to be considered— read as follows:

"(2) The arrangement and combination of a rotating pouncing cylinder with a vertical supporting horn, substantially as described, whereby the supporting horn may be used to support the tip, side crown, or brim during the operation of pouncing the hat.

"(3) In combination with a rotating pouncing cylinder and a rest or supporting horn, a swiveling feeding mechanism, substantially as described, whereby the hat may be drawn between the pouncing cylinder in different curves, or directly forward, as required."

The Taylor patent was applied for May 21, 1879. The fifth claim of the specification, as originally drawn, read as follows:

"(5) The combination of the pouncing cylinder and the support for the hat, whereby the hat is drawn over the moving pouncing cylinder in the direction of the motion of the cylinder, substantially as described."

As thus drawn, this claim was rejected by the examiner upon reference to the Eickemeyer patent of March, 1874, which does not appear in the record, but which, it may be presumed, was substantially the same as the patent of 1869 in this particular. The specification was thereupon amended by inserting before the words "pouncing cylinder," wherever they occurred, the word "self-feeding," and the fifth claim was amended to read as follows:

"(5) The combination of the support for the hat and the self-feeding pouncing cylinder, whereby the hat is drawn over the moving pouncing cylinder in the direction of the motion of the cylinder, substantially as described."

In his communication to the patent office the patentee suggested in support of this amended claim that it differed from the claim of the Eickemeyer patent of 1874 in the fact that the cylinder was a self-feeding one, and its operation was to cause the material to be pounced to move in the same direction as the pouncing material. In reply, the examiner expressed a doubt as to what was meant by the clause in the fifth claim, "whereby the hat is drawn over the moving pouncing cylinder in the direction of the motion of the cylinder," and suggested that it should read, "whereby the hat is drawn over the support, B, in the direction of the motion of the pouncing cylinder." In reply, the fifth claim was withdrawn, and two other claims proposed, as follows:

"(5) The combination of the support for the hat and the self-feeding pouncing cylinder, substantially as described.

"(6) The self-feeding pouncing cylinder, which feeds the material to be pounced to the moving pouncing surface in the direction of its own motion."

Attention was also called to the fact that this was the only machine that was self-feeding. "It does not," said the patentee, "depend upon feed rolls for pouncing the hat, but the pouncing cylinder is the only force that moves or presents the hat to the pouncing surface. The claim is for the combination of the self-feeding pouncing cylinder with the support for the hat, as described, in which the only motive power is the rapidly revolving pouncing cylinder. This is believed to differ from all previous machines which contain a feeding apparatus which con-

trols the hat as it is applied to the pouncing cylinder. As can be seen, in Taylor's patent, but one cylinder or roll is used, and this solely for the purpose of pouncing the hats, and not in any way for feeding the hat, except by its direct motion." These claims were rejected upon the ground "that the pouncing roller of all hat-pouncing machines has a tendency to move the material acted upon in the direction of its motion, but feed rolls have been added to facilitate the feeding of the article to be operated upon to the pouncing cylinder, and it is not deemed invention or improvement in the art to omit the feed rollers." The claim was again amended and allowed in the following form: "(5) The combination of the support for the hat and the self-feeding pouncing cylinder, whereby the hat is drawn over the support, B, in the direction of the motion of the pouncing cylinder."

It does not clearly appear why the claim was allowed in this form, since it seems to be open to the same objections that had been previously made to it, when presented in slightly different language.

These proceedings in the patent office are set forth in detail for the purpose of showing the exact particulars which were then, and are now, claimed to distinguish the Taylor patent from the Eickemeyer patent of 1869. These are: (1) The omission of the feed roll of the Eickemeyer patent; (2) the self-feeding characteristic of the pouncing cylinder. An examination of the two devices shows that they are practically the same, except that in the Taylor patent the feeding roll of the Eickemeyer machine is omitted, and a guard and presser pin substituted. The fifth claim of the Eickemeyer patent of 1869, and the second claim of the Taylor patent, are also for the same elements, namely, a pouncing cylinder, called "rotating" by Eickemeyer and "self-feeding" by Taylor, and a support for the hat block, termed a "vertical supporting horn" by Eickemeyer, though the operation of these elements is differently described in the two claims. In the Eickemeyer claim it is said that "the supporting horn may be used to support the tip, side crown, or brim during the operation of pouncing the hat," and in the Taylor claim that "the hat is drawn over the support, B, in the direction of the motion of the pouncing cylinder." It is insisted, however, that the feed roll, though omitted in the second claim of the Eickemeyer patent, is contained in the third, and, being an essential element of his device, should be read into the second claim as if it had been actually incorporated in it. If it were true that the feed roll were necessary to the operation of the combination of the second claim, this result would undoubtedly follow; in other words, if a person has invented a combination of three elements, all of which are necessary to the operation of his device, he cannot, by making a claim for two of them, forestall another, who has so combined these two elements that they perform the same function that the three elements of the former patent performed.

On examination of Eickemeyer's device, however, it is difficult to see wherein the feed roll is so far essential to the operation of the machine that it would not perform practically the same function as the Taylor patent if the feed roll were omitted. There would still be left a support for the hat by and upon which it could be held up to the pouncing cylinder. The feeding of the hat, instead of being accomplished or assisted by the feed roll, would be done entirely by hand, as contemplated in the Taylor patent. Indeed, all the significance of the word "self-feeding" in this connection appears to be that, when the hat is pressed against the pouncing cylinder, it has a tendency to feed in the direction in which the cylinder revolves, and it is difficult to see why in either machine the hat may not be fed in the opposite direction.

In the Eickemeyer machine it was fed in the opposite direction by the aid of the feeding roll, and the same thing, it would seem, may be done, by the application of a little more force, in the Taylor patent.

The case then really resolves itself into the question whether the omission of the feed roll involves invention, and, in view of the fact that the hat support and pouncing cylinder of the Eickemeyer patent will accomplish practically the same functions as the Taylor device, though not so perfectly, we hold it does not; in other words, it required no invention to omit the feed roll of the Eickemeyer patent, and to make the subsidiary changes necessary to produce a working device.

The truth is, the essence of the Taylor invention was the guard, C, and the presser pin, L, and any argument which tends to prove that the feed roll was an essential part of the Eickemeyer device is equally cogent to show that the guard and presser pin are essential to the Taylor patent, since they were designed to take the place of the feed roll, and assist the operator in bringing every part of the hat in contact with the pouncing cylinder. He himself speaks of the presser pin as "a peculiar and novel feature" of his machine, its operation being as follows: "The hat to be pounced can be caused to be revolved about it as a center by means of the pressure exerted upon it, so that every part of the hat, except that immediately under the presser pin, would, in its rotation, come in contact with the pouncing cylinder, and by lessening the pressure the hat would be drawn under the presser pin in any desired direction, and that part of it which had formed the center of rotation would then be pounced." As either the guard or presser pin or both are made an element in all the claims of his patent

but the fifth, it is quite evident that this was his real invention, and that his fifth and last claim was suggested by a desire to make his patent as sweeping as possible.

It is true that the Taylor machine seems to be capable of doing more work, and at less expense for labor and pouncing material, than the prior devices, which it appears to have largely supplanted; but this consideration, while persuasive, is by no means decisive, and is only available to turn the scale in cases of grave doubt respecting the validity of the invention.

The decree of the court below, holding the fifth claim of this patent to have been anticipated by the second claim of the Eickemeyer patent, is therefore affirmed.

(148 U. S. 581)

LONERGAN et al. v. BUFORD et al.

(April 10, 1893.)

No. 203.

SALE—PAYMENT UNDER DURESS—PAROL EVIDENCE TO EXPLAIN WRITTEN CONTRACT.

1. In a suit on a written contract to sell all defendant's cattle on certain ranches, except 2,000 head of steers already sold to another purchaser, written and parol evidence of the contract with such other purchaser may be introduced to show that it called for steers two years old and upward, and therefore that the contract in dispute called for all steers on such ranches under that age. 22 Pac. Rep. 164, affirmed.

2. The purchaser under the disputed contract could recover for all steers under two years old delivered by the seller to the other purchaser to complete the number of 2,000 sold under the prior contract of sale.

3. Plaintiff contracted to buy certain cattle, and paid $175,500, leaving a balance of $27,000 due. He then discovered that certain yearlings and other property covered by the contract, of the value of $14,110, had been delivered to other parties. Plaintiff could not get possession without completing the stipulated payment, and unless he took possession the property would be at great risk of loss for want of care during the winter just then beginning. *Held*, that his payment of the balance under protest was extorted by duress, and that he could maintain a suit to recover the value of the property wrongfully delivered to others. 22 Pac. Rep. 164, affirmed.

In error to the supreme court of the territory of Utah.

At law. Action in the district court of Salt Lake county, Utah, by Marcus B. Buford, John W. Taylor, and George Crocker, copartners under the firm name of the Promontory Stock Ranch Company, against Simon J. Lonergan and William Burke, to recover for breach of a contract of sale. Verdict and judgment were given for plaintiffs, and the judgment was affirmed by the supreme court of the territory of Utah. 22 Pac. Rep. 164. Defendants bring error. Affirmed.

*553 *Statement by Mr. Justice BREWER:

On December 10, 1886, the defendants in error commenced suit in the district court of the county of Salt Lake, Utah T., to recover from the defendants, now plaintiffs in error, the sum of $14,110, for breach of a contract of sale. Defendants appeared and answered. A trial was had before a jury, and on November 14, 1888, a verdict was returned in favor of the plaintiffs for $6,631.63, upon which verdict judgment was duly entered. An appeal was taken to the supreme court of the territory, by which court the judgment was affirmed, and from that court the case has been brought here on error. The allegation in the complaint was that on July 17, 1886, the parties entered into a contract, of which the parts material to the questions presented are as follows:

"This agreement, made this seventeenth day of July, A. D. 1886, by and between Simon Lonergan and William Burke, of the city of Salt Lake, territory of Utah, parties of the first part, and the Promontory Stock Ranch Company, a partnership composed of M. B. Buford, J. W. Taylor, and George Crocker, all of the state of California, parties of the second part, witnesseth:

"Whereas, said first parties are the owners of large herds of cattle now ranging on their ranches in the counties of Oneida, in Idaho, and Box Elder, in Utah, and have contracted and agreed, as hereinafter set forth, to sell the same to said second parties, the exact number of said cattle being unknown; and whereas, said first parties have heretofore sold two thousand head of steers from said herds, one thousand head of which have been separated therefrom and delivered, and one thousand head thereof still remain to be delivered; and whereas, said second parties have agreed to purchase the said herds excepting said undelivered one thousand head of steers, on the terms and conditions hereinafter set forth:

"Now, therefore, the said parties do by these presents, in consideration of ten thousand dollars to them in hand paid, the receipt whereof is hereby acknowledged, the same to be credited on the first payment as hereinafter set forth, contract and agree to and with the said parties of the second part that they will sell, transfer, convey and deliver to said second parties—

"(1) All of the possessory right which said first parties have heretofore held, enjoyed and possessed of, in, and to any and all ranches or ranges in said county of Oneida, in Idaho, and in said county of Box Elder, Utah, with all water rights, fences, and improvements thereon or thereto belonging; and further agree that they, or either of them, will not hereafter herd, keep, or drive any cattle thereon, or in any way interfere with the exclusive right, possession, or occupation thereof by said second parties.

"(2) That they will sell, transfer, and deliver to said second parties all of their said herds of cattle (excepting said reserved and undelivered one thousand head of steers) now on said ranges in said counties

Oneida and Box Elder; said reserved one thousand head of steers to be by first parties separated from said herds, and driven off of said ranches, within ninety days from July 15, 1886.

* * * * * *

"The said second parties agree and hereby contract to and with said first parties to purchase the said properties from said first parties, and to pay therefor, as full consideration for the whole thereof, the sum of thirty dollars per head of cattle, delivered, in sight draft on San Francisco, California, to be promptly paid on presentation.

"And it is mutually agreed that as a basis of estimating the number of cattle sold, and the amount to be paid by said second parties, said first parties have already this year branded fifteen hundred calves, and shall continue to brand the calves from said herds until they shall have branded in all the number twenty-two hundred and fifty head, or until December 1, A. D. 1886, but shall brand no calves after that date, and shall make delivery of all said properties to said second parties so soon as said *584 Lonergan and Burke shall have branded *said twenty-two hundred and *fifty calves, or, in any event, said delivery shall be made not later than December 1, A. D. 1886.

"And it is agreed that said herds shall be estimated to contain three head of cattle for every calf so branded, or three times the number of calves branded this season, and prior to December 1, 1886, but in no event to exceed 2,250 calves, including the fifteen hundred head now branded.

"The said second parties agree to pay the said first parties, as full consideration for all of said properties, including said calves, a sum equal to thirty dollars per head of all cattle, the number being ascertained by the number of the calves branded as aforesaid, the first payment on fifteen hundred calves already branded representing 4,500 head of cattle, equal to $135,000, less the cash payment of $10,000 made at the date hereof, on August 1, 1886, on all calves branded over and above said fifteen hundred head; the third and last payment at the same rate, so soon as said first parties shall have finished their branding and shall have made delivery of the entire property hereby contracted to be sold."

It further stated that the 2,000 steers mentioned as reserved and excepted were intended and understood by all the parties to be steers of two years old and upward, and not otherwise. Full performance by the plaintiffs was alleged, and a failure on the part of defendants to deliver, among other things, 422 head of yearling steers. The answer denied that the 2,000 steers mentioned as reserved in the contract were understood and intended to be of two years old and upward; but, on the contrary, it was intended and understood by all the parties that yearling steers, as well as others, were included. The answer also denied the other allegations in the complaint, except as to the making of the contract, and as to that alleged full performance by the defendants. On the trial the plaintiffs introduced this contract:

"Chicago, Illinois, June 29th, 1886.

"We have this day sold to William E. Hawkes, of the city of Bennington, state of Vermont, one thousand (1,000) head of steers, four hundred (400) two years old, four hundred and *fifty (450) three years old, *585 and one hundred and fifty (150) four years old, branded ⊙ on the left side, and M on the left side. Said cattle are on our ranch in Box Elder county, Utah, and Oneida county, Idaho, and are part of a large herd. The sale is for the sum of twenty-five thousand dollars ($25,000) in cash, to be paid on delivery of the cattle, and delivery to be made on the 15th day of July, 1886.

"And whereas, the said Hawkes has purchased the said cattle with the intention of transferring them to a corporation to be formed by him:

"Now, in consideration of the premises, and one dollar to us in hand paid by the said Hawkes, we further agree to sell to such company as soon as the same is incorporated, and its securities are negotiated, and within not more than ninety days from the date hereof, and the said company shall then purchase from us, one thousand (1,000) additional head of steers, four hundred (400) two years old, four hundred and fifty (450) three years old, and one hundred and fifty (150) four years old, branded in the like manner as above specified, and being a part of the cattle now on our ranch as above described, for the sum of thirty-five thousand dollars, ($35,000,) delivery of the last-named one thousand (1,000) head to be made at Soda Springs, Idaho, and payment thereof to be made on delivery.

[Signed] "Lonergan & Burke.
"Wm. E. Hawkes."

They also offered the testimony of certain witnesses to the effect that Lonergan, one of the defendants, stated to one of the plaintiffs, in conversations prior to the execution of the contract sued on, that the steers which had been sold to Hawkes, and were to be excepted out of the sale to plaintiffs, were two years old and upward. All this testimony was objected to on the ground that it tended to contradict or vary the terms of the written agreement between the parties to the suit, and was incompetent, irrelevant, and immaterial. These objections were overruled, the testimony admitted, and exceptions taken.

*586 On December 10, 1886, the very day on which this suit was commenced, Taylor, one of the plaintiffs, made the final payment to the defendants, at the same time serving them with this protest:

"To S. J. Lonergan and Wm. Burke, Esqs.:

"Gentlemen: You will please take notice

that in payment to you, this date, of $27,000, as the balance of the purchase price of certain ranges and herds of cattle, in pursuance of a contract made by us with you on July 17th, 1886, we do not pay the whole thereof voluntarily. From information possessed by us, we are induced to believe that the entire number of cattle and horses by the contract aforesaid contemplated to be delivered to us on the 1st day of December, A. D. 1886, cannot be, and is not, by you so delivered,—i. e. that four hundred and twenty-two yearlings, forty cows, heifers, and steers, and two buggy horses, all of the value of $14,110, are not delivered. Now, therefore, inasmuch as you decline to make any delivery, under your contract, except upon the payment by us of the entire purchase price, and because we have already paid you a larger proportion thereof, to wit, $175,500, we do hereby pay $14,110 of said $27,000 under protest, and with the distinct avowal that the same is not due you.

"Promontory Stock Ranch Co.

"By John W. Taylor.

"Salt Lake City, December 10th, 1886."

It was claimed by the defendants that, notwithstanding this protest, the payment was voluntary on the part of the plaintiffs, and that, therefore, no money could be recovered back.

John A. Marshall, for plaintiffs in error.
Samuel A. Merritt, for defendants in error.

*688 *Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

There was no error in admitting in evidence the contract of sale to Hawkes of the 2,000 steers,—that being, according to the testimony, unquestionably the sale referred to in the exception and reservation named in the contract in suit,—nor the statements made by Lonergan, the defendant, in reference to the ages of the steers which defendants had sold prior to such last contract, and which they were to except therefrom. This was not testimony varying or contradicting the terms of the written agreement between the parties; it only interpreted and made certain those terms; it simply identified the property which was to pass thereunder to plaintiffs. The exception was not one by quantity, and simply of 2,000 steers,—an exception which might or might not give to the defendants the right to select such steers as they saw fit,—but it was an exception by description, to wit, of steers that had been sold, and it was necessary to prove what had been sold in order to determine what could be and were included within the contract. Until the exception was made certain, that which was conveyed could not be certain. Take a familiar illustration: A deed conveys a tract of land by metes and bounds, but in terms excepts therefrom a portion thereof theretofore conveyed by the grantor. The former deed is referred to and described, but the boundaries of the tract conveyed thereby are not specified. Now, in order that what is conveyed by the deed in question may be known, the land excepted therefrom must be known, and for that the deed referred to, containing the excepted land, must be produced. The production of such prior deed is no contradiction, and involves no variance, of the terms of the latter, but is necessary to make certain that which is in fact conveyed thereby. Or another illustration: Suppose a written contract is made for the sale of a herd of cattle at $30 a head, excepting therefrom all yearling steers. Would not parol testimony of the number of yearling steers in the herd be necessary in order to show the number of cattle sold, and the aggregate sum to be paid? Evidence that the herd contained 1,000 head would not end the question, and parol testimony of the number of yearling steers would not be evidence contradicting the contract. On the the contrary, it would be in support thereof, to make certain that which by the terms of the instrument was not certain.

Again, it is objected that the plaintiffs were not injured by the failure of the defendants to deliver the 422 yearling steers; the idea seeming to be that steers two years old and upward were delivered, instead of such yearlings. Of this, however, there was no evidence, and the court expressly charged the jury that "the plaintiffs are entitled to recover from the defendants, for such steers of the age called for in the contract so failed to be delivered, the value thereof, as the testimony and the admission in the answer shall justify you to determine, provided that you do not find that the defendants, in lieu of the steers under the age set forth in the contract so taken away, not delivered, left other steers of the age called for by the terms of the contract; and, if so, then the plaintiffs are not entitled to recover for any steers so left in the place of those taken away, provided the value of the steers so left (if you find that to be the case) was equal to the value of the steers said to have been taken away by the defendants, Lonergan and Burke." The defendants paid for the cattle at an estimate of three head of cattle for calves branded within a specified time. They were entitled to all the cattle belonging to defendants, ranging in the places named, excepting those specially reserved; and, if there were not enough of steers in those herds of the kind described to satisfy the contract which they had made with Hawkes, they could not make good the deficiency by taking steers of a different description, all of which they had sold to plaintiffs before any attempt at delivery to Hawkes. There was no error in the ruling in this respect.

Finally, it is objected that the last payment was voluntary, and therefore cannot

be recovered, either in whole or in part, although it was, in terms, made under protest. *550 It appears from the testimony that the defendants refused to deliver any of the property without full payment. This was at the commencement of the winter. The plaintiffs had already paid $175,500, and without payment of the balance they could not get possession of the property, and it might be exposed to great loss unless properly cared for during the winter season. Under those circumstances, we think the payment was one under duress. It was apparently the only way in which possession could be obtained, except at the end of a lawsuit, and in the mean time the property was in danger of loss or destruction. The case comes within the range of the case of Radich v. Hutchins, 95 U. S. 210, 213, in which the rule is thus stated: "To constitute the coercion or duress which will be regarded as sufficient to make the payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' Mayor, etc., v. Lefferman, 4 Gill, 425; Brumagim v. Tillinghast, 18 Cal. 265; Mays v. Cincinnati, 1 Ohio St. 268."

In Stenton v. Jerome, 54 N. Y. 480, the defendants, who were stockbrokers, held two United States bonds belonging to the plaintiff, which they threatened to sell unless she paid a balance claimed by them on account. On page 485 the court says: "Great stress, however, is laid upon the payment by the plaintiff of the balance shown by the account, as rendered, to be due from her. This payment was in one sense voluntary, as she was not compelled by physical duress to pay it, but the defendants held her two bonds, which they threatened at once to sell unless she would pay this balance. She had great need for the bonds, and could not well wait for the slow process of the law to restore them to her; and she *551 paid this balance, not assenting to the account, and not assenting that it was justly due, for the sole purpose of releasing her bonds. Under such circumstances it is well settled that the law does not regard a payment as voluntary."

In Harmony v. Bingham, 12 N. Y. 117, it is said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion." See, also, Baldwin v. Steamship Co., 74 N. Y. 125; McPherson v. Cox, 86 N. Y. 472; Spaids v. Barrett, 57 Ill. 289; Hackley v. Headley, 45 Mich. 569.

These are all the questions in this case. We see no error in the proceedings below, and the judgment is affirmed.

(148 U. S. 537)

LASCELLES v. STATE OF GEORGIA.

(April 3, 1893.)

No. 1,262.

EXTRADITION—INTERSTATE RENDITION—TRIAL FOR DIFFERENT OFFENSE.

As between the states of the Union, fugitives from justice have no right of asylum, in the international sense; and a fugitive who has been returned by interstate rendition may be tried for other offenses than that for which his return was demanded, without violating any right secured by the constitution or laws of the United States. 16 S. E. Rep. 945, affirmed.

In error to the supreme court of the state of Georgia.

Indictment of Sidney Lascelles in the superior court of Floyd county, Ga., for forgery. Defendant was convicted, and the judgment was affirmed by the supreme court of the state, (16 S. E. Rep. 945,) whereupon he sued out a writ of error from this court. Affirmed.

W. W. Vandiver, for plaintiff in error. J. M. Terrell and D. B. Hamilton, for the State.

Mr. Justice JACKSON delivered the opinion of the court.

This case is brought here by writ of error to the supreme court of the state of Georgia. The single federal question presented by the record, and relied on to confer upon this court the jurisdiction to review the judgment of the supreme court of Georgia, complained of by the plaintiff in error, is whether a fugitive from justice, who has been surrendered by one state of the Union to another state thereof upon requisition charging him with the commission of a specific crime, has, under the constitution and laws of the United States, a right, privilege, or immunity to be exempt from indictment and trial in the state to which he is returned for any other or different offense than that designated and described in the requisition proceedings under which he was demanded by and restored to such state, without first having an opportunity to return to the state from which he was extradited.

The facts of the case on which this question is raised are briefly these: In July, 1891, two indictments were regularly found by the grand jury of the county of Floyd, state of Georgia, against the plaintiff in error, under the name of Walter S. Bere-

ford, which respectively charged him with the offense "of being a common cheat and swindler," and with the crime of "larceny after trust delegated," both being criminal acts by the laws of Georgia, and alleged to *538 have been committted in the county of Floyd. At the time these indictments were found, the plaintiff in error was residing in the state of New York. In September, 1891, the governor of the state of Georgia made a requisition on the governor of the state of New York for the arrest and surrender of the plaintiff in error to designated officials of the former state, naming him, as he was named in the indictment, Walter S. Beresford. In the requisition, as well as in the warrant for his arrest, the offenses for which his rendition was demanded were stated and designated as charged in the indictment. After being arrested in pursuance of the warrant, he was duly delivered to the agent of the state of Georgia, was brought to the county of Floyd, in said state, and there delivered to the sheriff of the county, by whom he was detained in the county jail. While so held, and before trial upon either of the indictments on which the requisition proceedings were based, the grand jury of the county, on October 6, 1891, found a new indictment against him for the crime of forgery, naming him therein as Sidney Lascelles, which was his true and proper name. Thereafter he was put upon his trial in the superior court of the county of Floyd upon this last indictment. Before arraignment he moved the court to quash said indictment "on the ground that he was being tried for a separate and different offense from that for which he was extradited from the state of New York to the state of Georgia, without first being allowed a reasonable opportunity to return to the state of New York." This motion was overruled, and he was put upon trial. Thereupon he filed a special plea setting forth the foregoing facts, and averring that he could not be lawfully tried for a separate and different crime from that for which he was extradited. This plea was overruled, and, having been put upon his trial under the indictment, he was found guilty of the offense charged. His motion for a new trial being overruled and refused, he filed a bill of exceptions, and carried the case to the supreme court of Georgia, the court of highest and last resort in that state, before which he again asserted his exemption from trial upon the indictment upon the grounds stated in his motion to quash, and in his special *539 plea; but the supreme court of Georgia sustained the action of the lower court therein, and in all respects affirmed the *540 judgment of the superior court.

The plaintiff in error prosecutes the present writ of error to review and reverse this decision of the supreme court of Georgia, claiming that, in its rendition, a right, privilege, or immunity secured to him under the constitution and laws of the United States, specially set up and insisted on, was denied. The particular right claimed to have been denied is the alleged exemption from indictment and trial except for the specific offenses on which he had been surrendered.

The question presented for our consideration and determination is whether the constitution and laws of the United States impose any such limitation or restriction upon the power and authority of a state to indict and try persons charged with offenses against its laws, who are brought within its jurisdiction under interstate rendition proceedings. While cases involving questions of international extradition and interstate rendition of fugitives from justice have frequently been before this court for decision, this court has not passed upon the precise point here presented. The second clause of section 2, article 4, of the constitution of the United States, declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." To carry this provision into effect, congress passed the act of February 12, 1793, the first and second sections of which have been reenacted and embodied in sections 5278 and 5279 of the Revised Statutes of the United States, prescribing the methods of procedure on the part of the state demanding the surrender of the fugitive, and providing that "it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," and providing further, that the agent "so appointed, who shall receive the fugitive into his custody shall be empowered to transport him to the state or territory from which he has fled."

Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one state to demand and the obligation of the other state upon which the demand is made to surrender, a fugitive from justice. Now, the proposition advanced on behalf of the plaintiff in error in support of the federal right claimed to have been denied him is that, inasmuch as interstate rendition can only be effected when the person demanded as a fugitive from justice is duly charged with some particular offense or offenses, his surrender upon such demand carries with it the implied condition that he is to be tried alone for the designated crime, and that, in respect to all offenses other than those specified in the demand for his surrender, he has the same right of exemption as a fugitive from justice

extradited from a foreign nation. This proposition assumes, as is broadly claimed, that the states of the Union are independent governments, having the full prerogatives and powers of nations, except what have been conferred upon the general government, and not only have the right to grant, but do in fact afford, to all persons within their boundaries, an asylum as broad and secure as that which independent nations extend over their citizens and inhabitants. Having reached, upon this assumption, or by this process of reasoning, the conclusion that the same rule should be recognized and applied in interstate rendition as in foreign extradition of fugitives from justice, the decision of this court in U. S. v. Rauscher, 119 U. S. 407 et seq., 7 Sup. Ct. Rep. 234, is invoked as a controlling authority on the question under consideration. If the premises on which this argument is based were sound, the conclusion might be correct. But the fallacy of the argument lies in the assumption that the states of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties on that subject; and in the further assumption that a fugitive from justice acquires in the state to which he may flee some state or personal right of protection, improperly called a "right of asylum," which secures to him exemption from trial and punishment for a crime committed in another state, unless such crime is made the special object or ground of his rendition. This latter position is only a restatement in another form of the question presented for our determination. The sole object of the provision of the constitution, and the act of congress to carry it into effect, is to secure the surrender of persons accused of crime, who have fled from the justice of the state whose laws they are charged with violating. Neither the constitution nor the act of congress providing for the rendition of fugitives upon proper requisition being made confers, either expressly or by implication, any right or privilege upon such fugitives, under and by virtue of which they can assert, in the state to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done. Kentucky v. Dennison, 24 How. 66, 101, 102; Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. Rep. 1148.

The case of U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, has no application to the question under consideration, because it proceeded upon the ground of a right given impliedly by the terms of a treaty between the United States and Great Britain, as well as expressly by the acts of congress in the case of a fugitive surrendered to the United States by a foreign nation. That treaty, which specified the offenses that were extraditable, and the statutes of the United States passed to carry it and other like treaties into effect, constituted the supreme law of the land, and were construed to exempt the extradited fugitive from trial for any other offense than that mentioned in the demand for his surrender. There is nothing in the constitution or statutes of the United States in reference to interstate rendition of fugitives from justice which can be regarded as establishing any compact between the states of the Union, such as the Ashburton treaty contains, limiting their operation to particular or designated offenses. On the contrary, the provisions of the organic and statutory law embrace crimes and offenses of every character and description, punishable by the laws of the state where the forbidden acts are committed. It is questionable whether the states could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offenses for which fugitives would or should be surrendered. But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process. Ker v. Illinois, 119 U. S. 436, 444, 7 Sup. Ct. Rep. 225; Mahon v. Justice, 127 U. S. 700, 707, 708, 712, 8 Sup. Ct. Rep. 1204; Cook v. Hart, 146 U. S. 183, 190, 192, 13 Sup. Ct. Rep. 40.

In the case of Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. Rep. 1204, a fugitive from the justice of Kentucky was kidnapped in West Virginia, and forcibly carried back to Kentucky, where he was held for trial on a criminal charge. The governor of West Virginia demanded his restoration to the jurisdiction of that state, which being refused, his release was sought by habeas corpus; and it was there contended that, under the constitution and laws of the United States, the fugitive had a right of asylum in the state to which he fled, which the courts of the United States should recognize and enforce, except when removed in accordance with regular proceedings authorized by law. Instead of acceding to this proposition, this court said: "But the plain answer to this contention is that the laws of the United States do not recognize any such right of asylum as is here claimed, on the part of the fugitive from justice in any state to which he has fled; nor have they, as already stated, made any provision for

the return of parties who, by violence, and without lawful authority, have been abducted from a state." And the court further said: "As to the removal from the state of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the constitution, which declares that 'a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime,' and the laws passed by congress to carry the same into effect, it is not perceived how that fact can affect his detention upon a warrant for the commission of a crime within the state to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer." Pages 707, 708, 127 U. S., and page 1208, 8 Sup. Ct. Rep. After reviewing a number of cases on this question, the court proceeded: "Other cases might be cited from the same courts, holding similar views. There is, indeed, an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another state, and conveyance within the jurisdiction of the court holding him, is no objection to the detention and trial for the offense charged. They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another state. It would indeed be a strange conclusion if a party charged with *545 a criminal offense could be excused from answering to the government whose laws he had violated because other parties had done violence to him, and also committed an offense against the laws of another state." Page 712, 127 U. S., and page 1211, 8 Sup. Ct. Rep. The same principle was applied in the case of Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225.

If a fugitive may be kidnapped or unlawfully abducted from the state or country of refuge, and be thereafter tried in the state to which he is forcibly carried, without violating any right or immunity secured to him by the constitution and laws of the United States, it is difficult to understand upon what sound principle can be rested the denial of a state's authority or jurisdiction to try him for another or different offense than that for which he was surrendered. If the fugitive be regarded as not lawfully within the limits of the state in respect to any other crime than the one on which his surrender was effected, still that fact does not defeat the jurisdiction of its courts to try him for other offenses, any more than if he had been brought within such jurisdiction forcibly, and without any legal process whatever.

We are not called upon, in the present case, to consider what, if any, authority the surrendering state has over the subject of the fugitive's rendition, beyond ascertaining that he is charged with crime in the state from which he has fled, nor whether the states have any jurisdiction to legislate upon the subject, and we express no opinion on these questions. To apply the rule of international or foreign extradition, as announced in U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, to interstate rendition, involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded; there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there *546 is the binding force and obligation, not of *contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned.

There are decisions in the state courts, and in some of the lower federal courts, which have applied the rule laid down in U. S. v. Rauscher, supra, to interstate rendition of fugitives under the constitution and laws of the United States; but in our opinion they do not rest upon sound principle, and are not supported by the weight of judicial authority.

The cases holding the other and sounder view, that a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was rendered up, but may, after being restored to the demanding state, be lawfully tried and punished for any and all crimes committed within its territorial jurisdiction, either before or after extradition, are the following: In re Noyes, 17 Alb. Law J. 407; Ham v. State, 4 Tex. App. 645; State v. Stewart, 60 Wis. 587, 19 N. W. Rep. 429; People v. Cross, 135 N. Y. 536, 32 N. E. Rep. 246; Com. v. Wright, (Mass.) 33 N. E. Rep. 82; and In re Miles, 52 Vt. 609.

These authorities are followed by the supreme court of Georgia in the clear opinion pronounced by Lumpkin, J., in the present case.

The highest courts of the two states immediately or more directly interested in the case under consideration hold the same rule

on this subject. The plaintiff in error does not bear in his person the alleged sovereignty of the state of New York, from which he was remanded, (Dows' Case, 18 Pa. St. 37;) but, if he did, that state properly recognizes the jurisdiction of the state of Georgia to try and punish him for any and all crimes committed within its territory. But, aside from this, it would be a useless and idle procedure to require the state having custody of the alleged criminal to return him to the state by which he was rendered up in order to go through the formality of again demanding his extradition for the new or additional offenses on which it desired to prosecute him. The constitution and laws of the United States impose no such condition or requirement upon the state. Our conclusion is that, upon a fugitive's surrender to the state demanding his return in pursuance of national law, he may be tried in the state to which he is returned for any other offense than that specified in the requisition for his rendition, and that, in so trying him against his objection, no right, privilege, or immunity secured to him by the constitution and laws of the United States is thereby denied.

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It follows, therefore, that the judgment in the present case should be affirmed.

(148 U. S. 603)

SWAN LAND & CATTLE CO., Limited, v. FRANK et al.

(April 10, 1893.)

No. 150.

EQUITY—CREDITOR'S BILL — INDISPENSABLE PARTIES—CORPORATIONS—STOCKHOLDERS.

1. A person having a claim for unliquidated damages arising out of fraud in a sale against a corporation which has sold its assets, distributed its corporate funds among its stockholders, and suspended business, but which has not been legally dissolved, cannot maintain a suit in equity in a federal court against a portion of the stockholders to subject to his claim the assets so received by them without making the corporation itself a party; and the fact that it has no officers or agents upon whom personal service can be made is immaterial when, by the statutes of the state of its incorporation, (Nebraska,) a method is provided whereby it can be brought into court. Mr. Justice Brown dissenting on the ground that there is no method of making the corporation a party so as to bind it by personal judgment.

2. Nor, in such case, could the plaintiff maintain his suit against the stockholders without first reducing to judgment his claim against the corporation. Mr. Justice Brown dissenting on the ground above stated.

Appeal from the circuit court of the United States for the northern district of Illinois.

In equity. Bill by the Swan Land & Cattle Company, Limited, against Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, and others. In the circuit court a demurrer to the bill was sustained, and the cause dismissed. 39 Fed. Rep. 456. Modified and affirmed.

W. H. Swift and Thos. D. Jones, for appellant. J. M. Woolworth and Levy Mayer, for appellees.

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*Mr. Justice JACKSON delivered the opinion of the court.

The appeal in this case presents for our consideration and determination the question whether the circuit courts of the United States can properly entertain jurisdiction of a suit in equity which unites and seeks to enforce both legal and equitable demands, when the right to the equitable relief sought rests and depends upon the legal claim being first ascertained and established, and where the person against whom such legal demand is asserted is not made a party defendant; or, stated in another form more directly applicable to the present case, can a party having a claim for unliquidated damages against a corporation, which has not been dissolved, but has merely distributed its corporate funds among its stockholders, and ceased or suspended business, maintain a suit on the equity side of the United States circuit court against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment, and without making the corporation a defendant and bringing it before the court? This question, which hardly needs or requires more than its bare statement to indicate the answer that must be made thereto, arises as follows:

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The appellant, the Swan Land & Cattle Company, Limited, a corporation organized under the companies' acts of Great Britain, and being a citizen of that kingdom, filed its bill in equity in the court below against the appellees, all of whom are citizens of Illinois, except two, who are citizens of Wyoming, containing substantially the following material averments: That in November, 1882, three Wyoming corporations, known, respectively, as the Swan & Frank Live-Stock Company, the National Cattle Company, and the Swan, Frank & Anthony Cattle Company, being the owners of large herds of cattle and other property in Wyoming, and engaged there in the business of raising and selling what are known as "range cattle," entered into an agreement in writing with one James Wilson, of Edinburgh, Scotland, acting in his own behalf and for others to be thereafter associated with him in a limited liability company to be formed under the companies' acts of Great Britain, by the terms of which said company, when organized, was to purchase of the Wyoming corporations, for the sum of $2,553,825, "all and singular the lands and tenements, water rights, improvements upon lands, houses, barns, stables, corrals, and other improvements and grazing privileges; also all live stock, consisting of neat cattle, horses, and mules, belonging to the said three Wyoming corporations, or any or either of them; also

all live stock, brands, tools, implements, wagons, harness, ranch, camp, and round-up outfits, and branding irons" belonging to said Wyoming corporations, all of such property being particularly enumerated and described in certain inventories annexed to said agreement. In regard to all the property sold, except the live stock, the agreement provided that the representations in those inventories should be verified by a competent inspector or inspectors to be named by the British company, prior to the transfer of the title to such property, and that deficiencies, if any, in such representations should be made good or supplied by the Wyoming companies. The agreement then provided "as to all live stock mentioned and described in said inventories, *that said first parties [the Wyoming corporations] shall and do hereby agree and guaranty to and with said second party [the British corporation] that the herd books of said first parties, showing the acquisitions, increase, disposition of, and number of cattle now on hand of said first parties, respectively, have been truly and correctly kept;" a copy of which herd books was required to be furnished to the party of the second part.

The bill then averred that, after the making and delivery of this agreement, the vendor companies proceeded to make the necessary arrangements for the turning over of their property to the purchaser in accordance with the terms of the agreement; and that, in pursuance of the agreement, the said Wilson returned to Scotland, and organized a limited liability company, completing its organization March 30, 1883. In effecting this organization Wilson was aided in inducing parties to take stock in the new company by a certain report in relation to the properties that were the subject of the negotiation, made by one Lawson in December, 1882, who had previously visited and inspected said properties, and who, it was averred, was acting in the interests of the vendor corporations, and was in their employ, having received from them the large sum of $12,000 for said report, and also by Alexander H. Swan, the president of each of the vendor corporations, who at that time was in Scotland, and represented that the number of cattle the vendors would turn over under the agreement was 89,167, as was shown by alleged copies of the herd books, which he produced, and also by certain alleged inventories of the stock on the ranches, and that any death losses in the herds would be more than made good by the number of calves on the ranches that escaped branding at the usual branding season; and who also made certain estimates as to the prospective increase in the herds, which representations and estimates were implicitly relied upon by the parties forming the new corporation. By a supplemental agreement, also in writing, between the contracting parties, it was provided, among other things, that Swan should become the general manager of the new company at a salary of $10,000 a year, and he and the vendor companies should subscribe for 10,000 shares of stock in the new company; and the vendors then agreed that if the number of calves branded in 1883 belonging to the herds sold should be fewer than 17,868, then they should be jointly and severally bound to pay to the new company $31.68 for each deficiency in that number.

The bill then averred that the vendors represented that it would be impossible to count the cattle upon the ranches, and that the new company would be obliged to take possession of them wherever they might be ranging, without any count being made; and that, relying upon all these representations made by the vendors, and in their behalf, as above set forth, the new company received delivery of the property so purchased by it, and paid the purchase price it had agreed to pay, in the manner agreed upon, and did and performed all the things it was required to do and perform by the terms of the aforesaid agreements.

The bill then averred that the representations made by the vendors, and in their behalf, as respects the number of cattle on the ranches, and which were relied upon by the parties forming the new company, were grossly untrue, and known at the time by the vendor companies to be so, and that the number of cattle actually turned over to the new company under the agreement was at least 30,000 less than was represented by the vendors, whereby it had suffered loss and damage in the sum of at least $800,000.

The bill then proceeded as follows: "Your orator further showeth that said vendors had no other business except the management of the herds sold to your orator, and no other assets, or substantially none, except the properties sold by them to your orator; and your orator showeth that, after the sale of their said properties to your orator, and the receipt by them of the purchase price, as aforesaid, said three vendors paid whatever liabilities they had outstanding except their liability to your orator hereinset forth, and distributed the money and stock obtained from your orator as the proceeds of said sale and all their other assets amongst their respective *shareholders, and the same were received by said shareholders; and since that time said three corporations have not, nor has either of them, made any use whatever of their franchises, but they have abandoned the same; and neither of said corporations has any officer or agent upon whom process can be served; and they have not, nor has either of them, any assets of any kind out of which any judgment at common law against them, or either of them, could be satisfied. Your orator further showeth that the assets of said corporation were in the hands of said corporations in trust fund, held by said corporations in trus

to satisfy the claim of your orator herein set forth, before the shareholders of said corporations were entitled to receive any portion of the same; and said shareholders, in receiving said assets, did take and now hold the same as trustees in place of said corporations, and subject to the lien of your orator's aforesaid claim, and should account for the same to your orator, and apply the same, so far as necessary, in satisfaction of your orator's claim, herein set forth."

The bill prayed that the several defendants be required to answer certain interrogatories thereto attached, but not under oath, and that whatever property each and every one of them may have received from the vendor corporations, or any of them, in the distribution of the assets aforesaid, be decreed to have been taken and to be held by them in trust for the payment of the claim of the plaintiff, and "be applied, so far as shall be necessary, in satisfaction of the damages which shall be found due to your orator from the vendors aforesaid upon final hearing hereof," and for other and further relief, etc.

The three vendor corporations were not made parties defendant to the suit. The two Wyoming defendants were not served with process, and did not appear in the case. The Illinois defendants who were served with process entered a special appearance, and demurred to the bill upon three grounds: (1) That the bill did not state a case within the equity jurisdiction of the court, or one entitling the complainant to any discovery or equitable relief as prayed; (2) that the several vendor corporations, and each of them, were necessary parties to the suit; and (3) that the averments of the bill are too general in their nature to charge the defendants, or either of them, as a trustee of any portion of the assets of any one of the vendor corporations.

The demurrer was sustained by the circuit court, and the bill dismissed, (39 Fed. Rep. 456,) and an appeal from that decree brings the case here.

The grounds upon which the court below based its decision and decree were: (1) That the complainant had no standing in a court of equity without first reducing its claim for damages to a judgment; and (2) that, even if that position be untenable, still the vendor corporations were necessary and indispensable parties to the suit.

The bill does not seek to hold the defendants below personally liable for the alleged fraud committed by the vendor corporations in which they were stockholders. There is no averment, or even intimation, in the bill that the defendants in any way participated in the fraudulent misrepresentations of the vendor companies on which it is charged the complainant relied and acted to its injury. They are therefore not personally responsible for any damage resulting to the complainant by reason of the alleged fraud.

The theory of the bill is that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a trust fund for the payment of all debts and demands against the companies, and may therefore be followed in the hands of and recovered from such stockholders to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings against all necessary parties, to the payment, so far as may be needed, of outstanding indebtedness against the corporations which distributed the same; but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto. It has no judgment against the corporations by which it was defrauded, nor are such corporations made parties defendant to the suit, or brought before the court. The stockholder defendants, who have been served with process and entered their appearance, do not undertake to represent, and cannot in any way represent, the corporations against whom the claim for damages is asserted. Bronson v. Railroad Co., 2 Wall. 283, 301, 302.

Now, it is too clear to admit of discussion that the various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising therefrom. Unless made parties to the proceedings in which these matters are to be passed upon and adjudicated, neither they nor their other stockholders would be concluded by the decree. The defendants cannot be required to litigate those questions which primarily and directly involve issues with third parties not before the court. As any decree rendered against them would not bind either the corporations or their coshareholders, it would manifestly violate all rules of equity pleading and practice to pursue and hold the defendants on an unliquidated demand for damages against companies not before the court. The complainant's right to follow the corporate funds in the hands of the defendants depends upon its having a valid claim for damages against the vendor corporations. That demand is not only legal in character, but can be settled and determined and the amount thereof ascertained by some appropriate proceeding to which the corporations against which it is made are parties and have an opportunity to be heard. Stockholders cannot be required to represent their corporations in litigation involving such questions and issues. The corporations themselves are indispensable parties to a bill which affects corporate rights or liabilities. Thus in Deerfield v. Nims, 110 Mass. 115, it was held that the corporation was a necessary party in a bill by a creditor

of the corporation against its officers or stockholders, who had divided its assets among themselves. So in Gaylords v. Kelshaw, 1 Wall. 81, 82, it was held by this court that in a bill to set aside a conveyance as made without consideration and in fraud
*611 of creditors, the alleged fraudulent grantor is *a necessary defendant, because it was his debts that were sought to be collected, and his fraudulent conduct that required investigation.

The general rule that suits in equity cannot be entertained and decrees be rendered, when necessary or indispensable parties, whether corporations or individuals, are not brought before the court, is not affected by section 1 of the act of February 28, 1839, re-enacted in section 737 of the Revised Statutes of the United States, as this court has repeatedly held. Shields v. Barrow, 17 How. 130, 141; Coiron v. Millaudon, 19 How. 113, 115; Ogilvie v. Insurance Co., 22 How. 380; Barney v. Baltimore City, 6 Wall. 280; Davenport v. Dows, 18 Wall. 626. The same rule is applied in respect to averments as to citizenship of necessary parties to confer jurisdiction or the right of removal. Thayer v. Association, 112 U. S. 717, 719, 5 Sup. Ct. Rep. 355; Railway Co. v. Wilson, 114 U. S. 61, 62, 5 Sup. Ct. Rep. 738.

To take the present case out of the operation of the general rule it is argued on behalf of appellants that the bill discloses such a practical abandonment of their franchises as to amount to a dissolution of the vendor corporations. We cannot so construe the bill. The dissolution of corporations is or may be effected by expirations of their charters, by failure of any essential part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises with the consent of the state, by legislative enactment within constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means. No such dissolution is alleged in the bill. The averments that said corporations paid all other liabilities, and thereafter distributed their remaining assets among their respective stockholders, and have since made no use of their franchises, and have no agent or officer upon whom process can be served, and no assets out of which any judgment against them could be satisfied, fall far short of a dissolution such as would prevent a suit against the corporations or their
*612 trustees, as provided by the laws of Wyoming, to establish the validity and amount of the appellant's claim *for damages. Sections 506, 515. The cases cited to the point that when the corporation is dissolved the necessity for making it a party is dispensed with, need not, therefore, be reviewed. They are not applicable to the present case. It does not help the matter that complainant could not get the vendor corporations before the circuit court for the northern district of Illinois. That fact in no way affects the question of their being necessary parties, without whose presence no decree could be rendered against the appellees. We do not deem it necessary to refer to the Wyoming statutes further than to say we think they provide the means by which the vendor corporations could there have been sued.

We are also clearly of opinion that the court below was correct in sustaining the demurrer to the bill upon the other ground assigned,—that the complainant had not previously reduced its demand against the vendor corporations to judgment. That claim was purely legal, involving a trial at law before a jury. Until reduced to judgment at law, it could not be made the basis of relief in equity. This is well settled by the decisions of this court in Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. Rep. 397; Tube-Works Co. v. Ballou, 146 U. S. 517–523, 13 Sup. Ct. Rep. 165; and Scott v. Neely, 140 U. S. 106, 115, 11 Sup. Ct. Rep. 712. In this latter case the subject is fully reviewed, and the question settled so far as the federal courts are concerned.

Our conclusion is that there is no error in the decree of the circuit court sustaining the demurrer to the bill, but we are of opinion that the bill, instead of being dismissed generally, should have been dismissed without prejudice. In Durant v. Essex Co., 7 Wall. 107, 113, it is said that the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, is for the court to express in its decree that the dismissal is without prejudice, and that the omission of that qualification in a proper case will be corrected by this court on appeal, in support of which numerous authorities are cited. In Kendig v. Dean, 97 U. S. 423, 426, the same practice was adopted. The decree must therefore be modified at appellant's costs, and the cause remanded, with directions to dismiss the bill without prejudice, and it is so ordered.

Mr. Justice GRAY was not present at the argument, and took no part in the decision of this case.

*613 *Mr. Justice BROWN, dissenting.

I concur in the opinion of the court that the question involved in this case needs little more than its bare statement to indicate the answer that should be made to it, but I do not concur in the answer made by the court. Admitting to the fullest extent the proposition that the mere discontinuance of business by a corporation, the sale of its assets, the failure to re-elect officers, and the nonuser of its franchise, do not, ipso facto, work a dissolution of the corporation, it seems to me that this is aside from the

merits of the case. I agree, too, that before resorting to the stockholders a judgment should, if possible, be obtained against the principal debtors, which in this case are the three Wyoming corporations. But the law does not compel that which is impossible, and, if the facts alleged in the bill show that no judgment can be obtained against the corporations, and that it is useless to pursue them, the bare existence of such corporations, ought not to defeat the recovery of a just claim. I do not understand it to be denied that, if the corporations had been formally dissolved by the decree of a competent court, the plaintiff might have maintained this bill, and the fact that it had no judgment against the corporations would be no defense.

Now, the allegations of the bill in this case are such as to show, not only that the Wyoming corporations are practically dissolved, and exist only in name, but that it would be impossible to obtain a judgment against them in the jurisdiction where they were organized. The Revised Statutes of Wyoming (section 2431) provide that "A summons against a corporation may be served upon the president, mayor, chairman, or president of the board of directors or trustees, or other chief officer, or, if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or other place of business of said corporation, with the person having charge thereof." In that connection the allegation of the bill is "that, after the sale of their *615 said properties to your orator, and the receipt by them of the purchase price as aforesaid, said three vendors paid whatever liabilities they had outstanding, except their liability to your orator herein set forth, and distributed the money and stock obtained from your orator as the proceeds of said sale, and all their other assets, amongst their respective shareholders, and the same were received by said shareholders, and since that time said three corporations have not, nor has either of them, made any use whatever of their franchises, but they have abandoned the same; and neither of said corporations has any officer or agent upon whom process can be served; and they have not, nor has either of them, any assets of any kind out of which any judgment at common law against them or either of them could be satisfied." Now if there be no officer or agent of a corporation upon whom process can be served it follows that there can be no office or other place of business of such corporation, within the meaning of section 2431, since the only object of an office or place of business is for the accommodation of an officer or agent. The act does not authorize service upon a trustee, but only upon the president of the board of trustees, who would, of course, be an officer of the corporation. The allegations of the bill in these particulars may be shown to be untrue, but upon demurrer they must be taken as true.

It is true that by section 2435 "service by publication may be had * * * in actions against a corporation incorporated under the laws of this territory which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made, * * * and which has no place of doing business in this territory."

But while such service by publication might be effective so far as to charge any property of the corporation within the territory, it would not create a general liability against the corporation which would be available elsewhere. This court has repeatedly held that a personal judgment is without any validity if it be rendered against a party served only by publication of a summons, but upon whom no personal service of process within the state was made, and who did not appear. Pennoyer v. Neff, 95 U. S. 714; Harkness v. Hyde, 98 U. S. 476; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. Rep. 354.

*The cases relied upon to sustain this decree do not touch this question, and the authorities which require corporations to be made parties to a bill against the stockholders have no application to cases in which it is only useless, but impossible, to make them parties. I do not think the defendants in this case, who are charged with receiving the proceeds of a gross fraud, should be permitted to take refuge in the shadow of these defunct corporations. *616

(148 U. S. 529)

CHICOT COUNTY, ARK., v. SHERWOOD et al.

(April 3, 1893.)

No. 170.

FEDERAL COURTS—JURISDICTION—SUITS AGAINST COUNTIES—STATE STATUTES—MUNICIPAL AID TO RAILROADS.

1. The act of Arkansas of February 27, 1879, repealed all laws allowing suits against counties, and provided that any person having a claim against a county must present the same to the county court for allowance or rejection, with the right of appeal to either party from its action thereon. *Held*, that under this statute the allowance or rejection of a claim either has the force and effect of a judgment for or against the county from which an appeal will lie, or it is merely a preliminary proceeding, which may be carried to an appellate court, where an actual trial is had; and in either view the result is that counties are in substance and effect suable by the local law, and therefore subject to suit in a federal court by original process.

2. In a suit on county bonds issued in aid of a railroad the answer alleged that no legal election authorizing the issue was had, by reason of divers irregularities, which would appear by reference to certified copies of papers sent from several precincts to the clerk of the county court, marked as "exhibits," and made a part of the answer. It was further alleged, as showing the invalidity of the bonds, that the county court was not the proper tribunal to

determine whether a legal election had been held; that the false recitals in the bonds to the contrary did not estop the county; that the terms of the order submitting the question to a vote of the people had not been complied with, and therefore the county was not legally bound to pay, and that the railroad had obtained the bonds illegally and fraudulently. *Held*, that these were allegations of legal conclusions, and that the answer presented no issuable questions of fact going to the merits of the suit, and was bad on demurrer. Dixon Co. v. Field, 4 Sup. Ct. Rep. 315, 111 U. S. 83, distinguished.

In error to the circuit court of the United States for the eastern district of Arkansas.

Action by J. K. O. Sherwood and F. W. Dunton against Chicot county, Ark., to recover on certain bonds issued by defendant in aid of a railroad. A demurrer to the answer was sustained, and judgment was given for plaintiffs. Defendant brings error. Affirmed.

D. H. Reynolds, for plaintiff in error.

Mr. Justice JACKSON delivered the opinion of the court.

This was an action by the defendants in error, citizens of the state of New York, against Chicot county, Ark., upon 17 bonds and 80 interest warrants or coupons thereto attached, forming a portion of an issue of bonds made and executed by that county in 1872 for the amount of a stock subscription made by it to the Mississippi, Ouachita & Red River Railroad Company. The bonds and coupons sued on were in the following form:

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"United States of America, State of Arkansas.

"No. 3. $500.

"It is hereby certified that the county of Chicot is indebted unto and will pay the Mississippi, Ouachita and Red River Railroad Company or bearer, on the first day of January, 1887, five hundred dollars, lawful money of the United States of America, with interest at the rate of six per centum per annum, payable semiannually, on the first day of January and July of each year, at the Union Trust Company, in the city of New York, on the presentation and surrender of the proper coupon hereto annexed. This bond is one of a series of two hundred, numbered from one to two hundred, inclusively, of like date, tenor, and amount, issued under an act of the general assembly of the state of Arkansas, entitled 'An act to authorize counties to subscribe stock in railroads,' approved July 23, 1868, and in obedience to the vote of the people of said county at an election held in accordance with the provisions of said act, authorizing the subscription of one thousand dollars to the capital stock of said railroad company.

"In witness whereof, the said county has caused to be affixed hereto its seal, and has caused the same to be attested by the signature of its county and probate judge, countersigned by the signature of its county clerk, who also signs the coupons hereto annexed, at their office, in said county, this 11th day of May, 1872. Jas. W. Mason,

"County and Probate Judge.

"M. W. Graves, County Clerk.

"Receivable in payment of all county taxes.

"State of Arkansas: The treasurer of the county of Chicot will pay fifteen dollars to bearer at the office of the Union Trust Company, in the city of New York, on the first day of January, 1887, being amount of interest on bond No. 3.

"M. W. Graves, County Clerk."

*Judgment was rendered in favor of the plaintiffs for the amount of the bonds and coupons sued on, and the county prosecutes this writ of error therefrom, assigning as grounds of reversal—First, that the circuit court had no jurisdiction to entertain the suit; and, secondly, that said court erred in sustaining the plaintiffs' demurrer to the plea or answer of the county, and in rendering judgment against it, upon its delining to make further answer in bar or defence of the action.

After being summoned in the usual manner, the defendant moved to dismiss the suit on the grounds that since the passage of an act of the legislature of Arkansas, on February 27, 1879, repealing all laws authorizing counties in the state to sue and be sued, the county could not be sued or proceeded against in any court, state or federal, by complaint and summons, or otherwise than in the manner provided by said act; that the county had not been brought into the circuit court in any manner authorized by law, so as to acquire jurisdiction over the same; that the plaintiffs had not presented their demand to the county court of Chicot county, duly verified according to the requirements of the statute, for allowance or rejection; and that without such verification and demand no case against or controversy with the county could arise of which any state or federal court could take cognizance or jurisdiction. The second section of the act of February 27, 1879, on which this motion was based, provided "that hereafter all persons having demands against any county shall present the same, duly verified according to law, to the county court of such county for allowance or rejection. From the order of the county court therein, appeals may be prosecuted as now provided by law. If in any appeal the judgment of the county court is reversed, the judgment of reversal shall be certified by the court rendering the same to the county court, and the county court shall thereupon enter the judgment of the superior court as its own."

The circuit court overruled this motion to dismiss the suit, and this action of the court constitutes the first error relied on for re

versal of its judgment. It is claimed for plaintiff in error that, inasmuch as the courts of general jurisdiction in Arkansas have no original jurisdiction to hear and determine cases like the present since the passage of said act of February 27, 1879, the courts of the United States can exercise no such jurisdiction. In the case of Nevada Co. v. Hicks, 50 Ark. 416, 420, 8 S. W. Rep. 180, it was said by the supreme court of Arkansas that, "whilst it is true, by the act of February 27, 1879, counties cannot be sued in the ordinary way of bringing suits, still judgments may be and are rendered against them. Every allowance of a claim by the county is a judgment; and unquestionably, when an appeal is prosecuted from the action of the county court in allowing or rejecting a claim, the decision of the appellate court is a judgment; and when the judgment of the county court is reversed the judgment of reversal, when certified to the county court, is required to be entered as the judgment of the county court."

If, under this construction of the act, the allowance or rejection by the county court of any demand against the county, duly verified according to law, has the force and effect of a judgment for or against the county, from which an appeal will lie, it would seem that the making or presenting a demand against the county to the county court is, to all intents and purposes, such a legal proceeding as would permit the application of the rule which plaintiff in error invokes to defeat the jurisdiction of the federal court; for in the case of Gaines v. Fuentes, 92 U. S. 10, 20, cited and relied on to support its position, it is said: "If by the law obtaining in the state, customary or statutory, they [suits] can be maintained in a state court, whatever designation that court may have, we think they may be maintained by original process in a federal court where the parties are on one side citizens of Louisiana, and on the other citizens of other states."

If, however, the presentation of a demand against the county, duly verified according to law, to the county court thereof, "for allowance or rejection," is not the beginning of a suit, or does not involve a trial inter partes, it is then only a preliminary proceeding to a suit or controversy which, by the appeal of either side, is or may be carried to an appellate court, before which there is an actual trial between the parties interested. The right to maintain this revisory trial in the state court, even under the principle contended for, will be sufficient to maintain a like suit by original process in a federal court where the requisite diverse citizenship exists. In Delaware County Com'rs v. Diebold Safe & Lock Co., 133 U. S. 473, 486, 487, 10 Sup. Ct. Rep. 399, Mr. Justice Gray, speaking for this court, and commenting upon a somewhat similar statutory provision, said: "It was also objected that the petition for removal was filed too late, after the case had been tried and determined by the board of county commissioners. But, under the statutes of Indiana then in force, although the proceedings of county commissioners in passing upon claims against a county are in some respects assimilated to proceedings before a court, and their decision, if not appealed from, cannot be collaterally drawn in question, yet those proceedings are in the nature, not of a trial inter partes, but of an allowance or disallowance, by officers representing the county, of a claim against it. At the hearing before the commissioners there is no representative of the county, except the commissioners themselves. They may allow the claim, either upon evidence introduced by the plaintiff, or without other proof than their own knowledge of the truth of the claim; and an appeal from this decision is tried and determined by the circuit court of the county as an original cause, and upon the complaint filed before the commissioners. * * * It follows, according to the decisions of this court in analogous cases, that the trial in the circuit court of the county was 'the trial' of the case, at any time before which it might be removed into the circuit court of the United States under clause 3 of section 639 of the Revised Statutes."

If, therefore, the presentation of a demand to the county court under the Arkansas statute is not the commencement of a suit against the county, then, under the rule stated in Delaware County Com'rs v. Diebold Safe & Lock Co., just quoted, the court to which such demand may be carried after allowance or rejection receives and determines it as an original cause. In either case the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other view of the subject would prevent citizens of other states from resorting to the federal courts for the enforcement of their claims against counties of the state, and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this. In Hyde v. Stone, 20 How. 170, 175, it is said: "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority

or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67; Bank v. Jolly, 18 How. 503." This principle has been steadily adhered to by this court.

In the case under consideration the state statute relied on to defeat the jurisdiction of the United States circuit court was passed after the bonds sued on were issued and put in circulation, and if its requirement of presenting the bonds to the county court of Chicot county "for allowance or rejection" was binding upon citizens of other states holding such bonds, as a condition of bringing suit, it would present a very grave question whether it was not such a substantial and material change in the remedy in force when the contract was made as to impair its obligation. But it is not necessary to consider and determine that question, as the objection is merely to the jurisdiction of the circuit court, and, for the reasons already stated, is not well taken.

The second assignment of error is to the action of the circuit court in sustaining the demurrer to the answer of the county. The answer, after setting out the constitutional and statutory provisions of the state under *535 which the county was authorized to issue the bonds in question, and the proceedings of the county court in reference to the submission of the question of subscribing $100,000 to the capital stock of the railroad company, and the election had thereunder by the people of the county, together with the result of the vote, which, according to the returns, as ascertained and found by the county court, showed a majority of 320 votes in favor of the county's making the subscription, proceeds to set forth a mass of irrelevant matter, such as the occurrence of a riot at a former election; the occupation of the county seat by a force of state troops to protect life and property when the order for the election under which the subscription voted was made, and continued so occupied till after the election; and alleges "that a condition of affairs existed in the county that precluded a free and fair election, and the veriest sham of an election was held at some of the various precincts on February 17, 1872, (the day of the election,) as shown by papers filed with the county clerk, and which upon their face show that there was not a legal election at any precinct in the county of Chicot on said February 17, 1872; and that no poll books were furnished to the several precincts as required by law;" together with various other recited irregularities, alleged to be shown by papers filed, but by whom filed is not averred; nor is it stated how or in what way, as matter of fact, such irregularities affected the vote actually cast and counted, on which the subscription was carried. After a recital of these matters, which, it is said, appear "by reference to certified copies of the papers sent into the clerk's office from some of the various precincts in the county," numerous papers are marked as "exhibits," and made part of the answer, and from which is drawn the conclusion set up in the answer, as follows: "And so the county says that there was in fact no election held in said county on February 17, 1872, to determine whether or not the county would subscribe to the capital of said railroad company and issue bonds to pay the same."

It is further averred in the answer that the county court was not the proper tribunal to determine whether an election had been held in pursuance of the statute regulating the matter; that the false recitals on the face of the bonds to the contrary did not estop the county; that the terms and conditions of the order submitting the question of subscription to a vote of the people were not complied with so that the county was not legally bound to pay the bonds, or any part thereof; and that the railroad company had delivered the stock to the county court before the election was held, and, after said election, had obtained the bonds illegally and fraudulently, etc. The answer also sets out proceedings had in the county court after the bonds were issued, and reports made to it in relation thereto, which are made exhibits to the answer, and which, it is claimed, show that the bonds were not issued in conformity to law.

To this answer there was interposed a demurrer, which was sustained, and, the county electing to stand on its answer, and say nothing further in bar of the plaintiffs' right to recover, judgment was thereupon rendered in favor of the plaintiffs for the amount of the bonds and coupons sued on, with interest and costs of suit.

It is urged by the plaintiff in error that this action of the lower court was erroneous for the reason that the answer set forth sufficient facts to invalidate the bonds within the rule laid down in Dixon Co. v. Field, 111 U. S. 83, 92, 93, 4 Sup. Ct. Rep. 315. We do not take this view of the answer. It abounds in recitals, in statements of what papers made exhibits thereto show, and in conclusions of law, which are not admitted by the demurrer; the rule being well settled that only matters of fact well pleaded are admitted by a demurrer, while conclusions of law are not. U. S. v. Ames, 99 U. S. 45; Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S. 569, 578, 11 Sup. Ct. Rep. 656.

The answer was of such a character as to present no issuable questions of fact going to the merits of the suit, and was properly demurred to, and there was no error in sustaining the demurrer.

Our conclusion is that the judgment should be affirmed.

(148 U. S. 547)

GRANT v. WALTER.

(April 10, 1893.)

No. 187.

PATENTS FOR INVENTIONS—NOVELTY—DISCLAIMER—SILK SKEINS.

1. Letters patent No. 267,192, issued November 7, 1882, to James Grant, claimed "(1) a skein of silk or other thread wound upon a reel diagonally from side to side, and laced back and forth across its width to preserve its form;" and "(2) the combination of the lacing with a wide skein of silk, or other thread, in which the strands are diagonally crossed." Similar skeins were well known in the art, differing from Grant's only in that the thread was gummed, and the lacing was tight, so that they were not available for dyeing, while Grant's skeins were highly useful for dyeing. *Held*, that the specifications and claims fail to limit the patent to that purpose, and it is void for want of novelty. 38 Fed. Rep. 594, affirmed.

2. A disclaimer of so much of the claims as "might make them apply to a skein which, by reason of a coating of gum or of tight lacing, is not in condition for dyeing," will not aid the validity of the patent; for that leaves only the discovery of a new use for an old device, which does not involve patentability. 38 Fed. Rep. 594, affirmed.

Appeal from the circuit court of the United States for the southern district of New York.

Suit by James M. Grant against Richard Walter for the infringement of a patent. The circuit court dismissed the bill, (38 Fed. Rep. 594,) and plaintiff appeals. Affirmed.

W. E. Simonds, for appellant. Henry Grasse, for appellee.

Mr. Justice JACKSON delivered the opinion of the court.

This is a suit in equity, in the usual form, for the alleged infringement of letters patent No. 267,192, issued to the appellant, James M. Grant, on the 7th of November, 1882, for "certain new and useful improvements in the art of reeling and winding silk and other thread." The bill averred that the defendant had infringed the patent by making, using, vending, and putting in practice, without complainant's license, improvements described and claimed in the patent. The prayer was for an injunction, and for an account of profits, and damages. The answer set up, among other defenses not necessary to be noticed, a denial that Grant was the original inventor of the improvements described in the patent; that there was a want of novelty in the invention, and a prior use of the improvements claimed as patentable by various designated parties. Replication was duly filed, proof taken, and the court below, upon the hearing of the cause, found in favor of the defendant, and accordingly dismissed the bill. 38 Fed. Rep. 594. From this decree the present appeal is prosecuted, and the appellant assigns for error the lower court's "denial of patentability to the skein, which Grant claims, while awarding it to the process, which he does not claim." The court, however, did not decide that it was a valid process patent, but suggested that, if the improvement was a valid invention, it was in the process, and not in the product.

The material parts of the specification, and the claims based thereon, are as follows:

"My invention relates to a novel manner of winding silk or other thread upon the reels in a reeling machine preparatory to its being dyed.

"The object of my invention is to provide an improved skein of silk, whereby a greater quantity can be reeled upon the same machine in a given time, and to provide at the same time for making these skeins in a proper form to receive the dye in the best manner, and be ready, after the dyeing, to be placed upon the swift for unwinding upon bobbins in the customary manner.

"In the present method of manufacturing silk, the thread, previous to dyeing, is wound into skeins upon a reeling machine, in which some twenty or more small skeins, containing generally one thousand yards, or less, are wound upon a set of parallel bars set around an axis forming a long reel. Each skein is tied up by itself, and the reel is taken down, or collapses, to release the separate skeins. These small skeins are then dyed, and then placed separately upon swifts to again unwind them. Larger skeins than above named have been found inconvenient, if not impracticable, on account of becoming tangled in the dyeing, and difficult to unwind. By means of my improvement I am enabled to wind skeins of twenty-four thousand yards, or more, in each separate skein, upon the reels, thus saving a great amount of labor in taking down the reels to remove the skeins, and the larger skeins, wound in my improved manner, can be placed at once upon the swifts and unwound without difficulty.

"My improvement consists in winding the silk or other thread upon the reel in the form of a wide band, in which the thread crosses from side to side as it is wound, somewhat in the manner now employed, but so arranged as not to form single skeins by passing one layer over the other. I prefer to have the thread cross in five sixths of one revolution of the reel, although other proportions will answer. When the required quantity has been wound, I lace the skein or band, before it is removed from the reel, in one or more places, generally on opposite sides of the reel, so as to divide it into a number of parts, and hold it in its flat or band-like condition. This lacing constitutes the chief point of my invention, and is what preserves the skein in its shape, and prevents its becoming entangled in the process of dyeing. After lacing, the skein is removed from the reel, and passes into the hands of the dyer.

After winding in the manner above described, the skein is so laid—one thread crossing the other—that its texture is more open, even, than the small skeins wound in the ordinary manner, and, although much larger, the dye easily penetrates to every part, and insures a uniform color. The several threads cannot become matted together, as with the ordinary skein wound in the customary manner.

"By means of my invention a great saving is made in the expense of manufacture, the waste of silk is greatly reduced, and less skill is required in the winding after the dyeing, thereby dispensing with the high-priced, skilled operatives now employed upon this work.

"What I claim as my invention is:

"(1) A skein of silk, or other thread, wound upon a reel diagonally from side to side, in the manner described, and laced back and forth across its width to preserve its form, substantially as set forth.

"(2) The combination of the lacing, B, with a wide skein of silk, or other thread, in which the strands are diagonally crossed, substantially as described."

At the hearing of the case a disclaimer was filed in the patent office by the appellant "to so much of said claim as does or might make such claim apply to a skein which, by reason of being coated with gum, or by reason of the manner of its lacing, or for any other reason, is not in condition for dyeing for ordinary manufacturing purposes." By stipulation of the parties, it was provided "that this disclaimer may be made a part of the record in this suit, nunc pro tunc, as of the date of hearing thereof, as if the same had been filed on that date, to indicate the willingness of the complainant to limit his patent by said disclaimer, and as an aid in the construction of his patent, but without prejudice to the rights of this defendant on the question of delay in filing said disclaimer."

The circuit court held that the claims of the patent covered a product, and not a process, and that the patent was void for want of patentable novelty, for the reason that the form of skein described in the specification, and covered by the claims, was well known, and in use, long prior to Grant's invention, which consisted in the method of dyeing and winding silk by the use of such well-known form of skein, and not in the skein itself, and, if valid to any extent, it was only upon the process. The court further held that the disclaimer could neither operate to give validity to the patent for the skein, nor change it into one for the process, and accordingly dismissed the bill.

As found by the circuit court, the evidence fully and clearly established the fact that skeins of silk diagonally reeled, and laced across the width, so as to separate the skein into two or more sections, were in use, and well known to the silk trade, long prior to Grant's improvement. The form of such skeins was substantially the same as that adopted by Grant. These anticipating skeins were in their construction similar to the construction of the skeins of the patent. They were produced in the same manner by the horizontal, to and fro motion of a guide bar for carrying the thread in front of the reel as the latter revolved, thus causing the diagonal or cross reeling in the formation of the skein. They were laced into two or three sections across their width. The object and purpose of this diagonal reeling and lacing was to preserve the form of the skein, and to prevent entanglement and snarling in the handling and future winding of the silk. These old skeins were made of raw silk,—that is, silk coated with, or carrying, the silkworm's gum,—and were smaller in size, and more tightly laced across their width, than the Grant skeins in question. The diagonal reeling was somewhat wider in the skein of the patent than in the old skeins. The raw silk having a more delicate thread, and much more liable in handling to become entangled, and therefore less easily wound than when the silk had been brought to a condition of thread, necessitated this cross reeling and lacing to preserve the form of the skein, and to facilitate the transportation and future handling of the silk in its further development in the process of manufacturing. Nor could the raw silk be dyed, because the filaments would separate, the gum which holds them together would be dissolved out, so that they would become snarled or entangled, without this cross reeling and lacing in the process of ungumming, and could not be subsequently wound without great difficulty and loss. It had to be first "boiled off," as it is called, or the gum removed, by being immersed for some period in soap and water or other liquid.

The process of manufacturing silk thread is thus described by a witness for the complainant:

"The silk, in the shape in which it is formed by the silkworm, exists in the shape of cocoons. These cocoons, in the countries in which silk is grown, are soaked in a suitable bath, and the filaments of silk that compose the cocoons are unwound from the cocoons, and formed in skeins on reels or swifts. In this shape it forms the raw silk of commerce, and is imported into America in large quantities,—mostly from Europe and Asia. The skeins of raw silk are treated by the manufacturer of silk thread (I do not mean by this term 'thread' sewing silks and braids, only, but rather that known as 'tram' and 'organzine,' that is used in making textile fabrics) usually as follows: The raw silk is ungummed. It is dried to a sufficient degree, and is then, in skein form, put on swifts, from which it is wound onto spools or bobbins. The silk, according to

the use to which it is to be put, is further doubled, in which operation it goes from spool to spool; is twisted, in which operation it goes from spool to spool; and when of sufficient size, as to number of threads, and of condition, as to twisting, it is reeled from the spool or bobbin into skein form. In this skein form it is dyed, and, with the old form of skeins, is then parted, to separate the several small skeins that compose the larger skein, such as I now produce, and is then put on 'risers,' so called, and wound onto bobbins, in which shape the silk is used, usually, in the manufacture of textile fabrics. I will state that the 'risers,' as used in this old process of manufacture that I am describing, consisted of two small drums or pulleys, usually of about five or six inches in diameter, and that the skein was wound from these 'risers.'

"In this art the term 'winding' means the changing of the silk from the skein form to its form on a bobbin or spool, and by 'reeling' is meant the putting of the silk into the skein form."

The contention of the appellant is that the skein of the patent should be considered in connection with the specification and knowledge of the art possessed by the persons to whom the specification is addressed, and, if the prior art requires limitations in order to leave validity in the patent, then it is right and proper for the court to read such limitations into the claims by construction; and on the basis of this proposition it is urged that Grant's skein differed from the earlier skeins shown by the testimony in at least two particulars: First, that the earlier skeins were gummed, and Grant's skeins are ungummed, which prevented the former from being dyed,* while the latter can be; and, secondly, that the earlier skeins were laced tightly, for the purposes of transportation and handling, while Grant's skeins are laced loosely, so that they are in a condition for dyeing. The Grant skein is shown to be an improvement over the earlier skeins, for the purposes of dyeing, but neither the specification nor the claims of the patent limit it to that purpose. The disclaimer undertakes so to do, or rather to limit it to a condition in which the skein may be dyed.

The court below properly held that the disclaimer did not give any increased validity to the patent for the skein, or change it into one for a process. And the simple question presented is whether Grant's skein possesses features of patentable novelty over the earlier skeins shown by the testimony. The cross reeling and lacing in the skein of the patent perform substantially the same function in substantially the same way as in the earlier skeins, but at a later and different stage or condition of the silk thread forming the skein. It is perfectly manifest that, if a patent had existed on the earlier skein, the skein of the patent would be an infringement thereof, as being simply for a double or analogous use. Such analogous use, under the authorities, is not patentable. Brown v. Piper, 91 U. S. 37; Pennsylvania R. Co. v. Locomotive, etc., Co., 110 U. S. 491, 4 Sup. Ct. Rep. 220; Miller v. Foree, 116 U. S. 22, 6 Sup. Ct. Rep. 204; Dreyfus v. Searle, 124 U. S. 60, 8 Sup. Ct. Rep. 390. And the same result must follow, although the earlier skein is not patented, if it embodies substantially the same form, and for a like use.

The function and purpose of the prior skein and the patented device were exactly analogous, operated in the same way, and were serviceable in both cases to preserve the skein from entanglement; the patented skein being applicable to a later stage of the thread. This, within the principle announced in Smith v. Nichols, 21 Wall. 112, would constitute simply a mere carrying forward or extended application of the original device with the change only in degree, but doing substantially the same thing, in the same way, by substantially the same means, with some better results, and would not, therefore, be patentable.

* The difference insisted upon in support of the patent—that the looser lacing of the skein across the band to preserve its form, and keep it in condition suitable for dyeing the thread—is clearly a matter of mechanical skill, which does not involve invention. It is said by one of complainant's witnesses that such loose lacing as is insisted upon as a requisite for effective dyeing is neither shown in the drawings, nor in the specification, nor claims, but that it should be read into the patent because "a man that understands his business must know that it must be laced loosely, or that the silk would be spoiled in dyeing," and that if this were not noticed, or not known, it would be taught him by the first experiment. It is perfectly evident that it would readily occur to any one skilled in the art that, as the skeins are increased in size or width of band, the necessity for lacing in order to preserve the form, and keep the skein in a condition for dyeing, would be correspondingly increased, and that the looser the lacing the more perfect would be the dyeing. Such changes in degree, merely, would not constitute an invention. Estey v. Burdett, 109 U. S. 632, 3 Sup. Ct. Rep. 531.

It is settled that distinct and formal claims are necessary to ascertain the scope of the invention. Merrill v. Yeomans, 94 U. S. 568; Western Electric Manuf'g Co. v. Ansonia Brass & Copper Co., 114 U. S. 447, 5 Sup. Ct. Rep. 941.

If, therefore, the elements of "boiling off," or ungumming the silk, or the dyeing thereof, and of improving the winding facility, were patentable, in view of the prior skeins, they should have been covered by the claims of the patent. James v. Campbell, 104 U. S. 356, and authorities cited above.

The disclaimer takes away nothing from

the claims, except what is not in condition for dyeing, and no silk thread is in condition for dyeing by simply being cross reeled and laced. The patent, notwithstanding the disclaimer, is still for an old device of a cross-reeled and laced skein, for whatever purpose it may be designed, and is void for want of patentable novelty. The counsel for the appellant, while claiming the benefit of his disclaimer, and insisting that Grant's skein is distinguishable from the earlier anticipating skeins, for the reason that
*555 the latter were coated with gum, and were not loosely laced, states that *"Grant's specification addresses its direction wholly to the skein maker, never to the dyer. It says: 'My invention relates to a novel manner of winding silk or other thread upon the reels in a reeling machine preparatory to its being dyed. * * * My improvement consists in winding the silk or other thread upon the reel in the form of a wide band. * * * When the required quantity has been wound, I lace the skein or band * * * so as to divide it into a number of parts, and hold it in its flat or band-like condition.' Grant had a clear idea of the real nub of his invention. He says: 'This lacing constitutes the chief point of my invention, and is what preserves the skein in its shape, and prevents its beoming entangled in the process of dyeing.' Grant gives no instructions to the dyer or the winder, for the simple reason that in dyeing his skein, and afterwards winding it upon bobbins, the procedure is identical with the procedure of the old art. All that is novel is found in the skein, and that answers the question, is Grant's improvement a skein or a process? That answer is, Grant's improvement is a new skein." So that the whole invention must be tested by the simple question whether the looser lacing, for the purpose of dyeing, over the more tightly-laced skeins, for the purpose of preserving their form and winding qualities while being "boiled off," or ungummed, constitutes a patentable invention. Considering the purpose for which it is now claimed, it cannot be anything more than a mere application of an old process to a new use, which does not rise to the dignity of invention; the looser lacing for the purposes of dyeing being perfectly apparent to any one skilled in the art of silk manufacture, or in the preparation of thread for that purpose. But while it is thus claimed that the Grant specification addresses itself to the direction, wholly, of the skein maker, and never to the dyer, the disclaimer undertakes to confine such direction solely to the dyer, rather than to the skein maker, as the effect of the disclaimer is intended to exclude skeins "which, by reason of being coated with gum, or by reason of the manner of its lacing, or for any other reason, is not in condition for dyeing for ordinary manufacturing purposes." So that, under the operation
*556 of the disclaimer, *the specification and claims would have to be read as addressed to the dyer, rather than to the skein maker. This would involve a complete change of what was covered by the specification and claims, which must be held controlling.

The most that can be said of this Grant patent is that it is a discovery of a new use for an old device, which does not involve patentability. However useful the nature of the new use to which the skein is sought to be confined by the disclaimer, compared with the former uses to which the old skein was applied at the date of the improvement, it forms only an analogous or double use, or one so cognate and similar to the uses and purposes of the former cross-reeled and laced skein as not to involve anything more than mechanical skill, and does not constitute invention, as is well settled by authorities already referred to.

The advantages claimed for it, and which it no doubt possesses to a considerable degree, cannot be held to change this result; it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent laws to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that, and still less of its patentable novelty. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. Rep. 76, and authorities there cited.

Our conclusion is that there was no error in the decree of the court below, and the same is accordingly affirmed.

(148 U. S. 573)

GERMAN BANK OF MEMPHIS et al. v. UNITED STATES.

(April 10, 1893.)

No. 693.

TRUSTS — ILLEGAL TRANSFER OF REGISTERED BONDS—LIABILITY OF GOVERNMENT—SUBROGATION.

1. The government of the United States is not liable for the wrongful act of the register of the United States treasury in permitting a transfer of registered bonds of the United States belonging to a trust estate upon insufficient evidence of authority in the holder to demand the transfer.

2. Plaintiffs procured a transfer of registered bonds of the United States belonging to a trust estate, effected a sale of the bonds, and paid over the proceeds to the depositor of the bonds, whereby they were lost to the estate. Plaintiffs, having been compelled to make good the loss to the estate, filed a petition in the court of claims, alleging that the register of the treasury had made the transfer without authority, and claiming to be subrogated to the rights of the trust estate against the United States because of such transfer. *Held* that, as their alleged right was based in part on their own wrongful acts, they were in no position to invoke the aid of the doctrine of subrogation.

On appeal from the court of claims. Affirmed.

Statement by Mr. Justice BROWN:

This was a petition by the German Bank of Memphis, as successor of the German

National Bank of Memphis, and the Chemical National Bank of New York, against the United States, to recover the amount of three registered bonds, alleged to have been wrongfully canceled by the register of the treasury under the following circumstances:

In 1869, one Henry P. Woodward died in Shelby county, Tenn., leaving a will, in which he directed that certain insurance money due his estate should be invested in United States interest-bearing bonds, with coupons attached, which coupons were to be given to his wife, Sallie, as they fell due, for her support and the support and education of her child; and that when the child should arrive at the age of 21 years the bonds should be divided between the said child and its mother equally, one Marcus E. Cochran being appointed sole executor of the will.

The will was admitted to probate in November, 1869, and Cochran qualified as executor. Having a balance of insurance remaining after paying the debts, he invested the same in three registered bonds of $5,000 each, in which it was certified that "the United States of America are indebted unto M. E. Cochran, executor or assigns, the sum of five thousand dollars," etc. "This debt is authorized by act of congress, approved March 3, 1865, and is transferable on the books of this office."

Cochran collected the interest on these bonds regularly, and paid the same to the widow of the testator, as provided in the will, until May, 1873, when he died. On September 9th one James A. Anderson, public administrator, was appointed by the probate court administrator de bonis non of Woodward's estate, duly qualified as such, and three days thereafter obtained these bonds from the Union & Planters' Bank of Memphis, in whose custody they had been, and by which the interest had been collected and paid over, giving therefor a receipt as administrator. He subsequently gave another receipt to the attorney of Mrs. Cochran, as administrator of her deceased husband.

In December, 1876, Anderson, who had long been a depositor in the German National Bank, and a man of high standing, took two of these bonds to this bank, and requested it to sell them, saying that he wanted to invest for a better interest; that he could get 10 per cent. for the money, at the same time showing a paper from the treasury department at Washington, which in some way recognized his authority to transfer the bonds, but by whom the paper was written, and the exact terms of it, do not appear, no copy of the same being in evidence. The bank sent the bonds to the Chemical National Bank of New York by express, with a letter directing them to sell the same, and place the proceeds to their credit, adding: "Judge J. A. Anderson filed the proper papers with the department, as per memo. inclosed. We do not wish to be responsible, after paying the funds over here, for any irregularity in papers."

On receiving these bonds, the Chemical National Bank wrote to the register of the treasury, notifying him of the receipt of the bonds from the German National Bank, describing them as "No. 7,701, to order M. E. Cochran, executor, of Memphis, Tenn., $5,000; do. No. 6,081, to order of M. E. Cochran, executor, $5,000,—which said bank request us to sell, but distinctly state they do not want to be held responsible, after paying the funds over, for any irregularity in papers, which I herewith inclose. We desire to comply with the wishes of the German Nat., but do not wish to be responsible for regularity, etc., and therefore refer the case to you. Please inform us what action to take. The certificates are assigned in blank by J. A. Anderson, adm'r of H. P. Woodward, deceased, and appear to have been witnessed by a notary public, having his official seal attached. If you are willing, we will forward them for registration in our own name, as in their present shape they are not a good delivery in this market."

The register replied to this, and stated: "There is on file in this office satisfactory power in favor of your bank to transfer the bonds referred to, and a reassignment by your Mr. Jones as pres't to any party purchasing will be recognized, or, if preferred, new bonds will be issued to your bank under the present assignment." The bank replied to this letter under date of December 28, 1876, and requested the register to issue new bonds in the name of "the Chemical National Bank of N. Y."

In January, 1877, Anderson took the third bond to the German National Bank, by which it was transferred to the Chemical National Bank with similar instructions. The latter bank transferred the bond to the treasury department, which thereupon issued to the Chemical National Bank three new bonds, in which it was certified that "the United States of America are indebted to the Chemical National Bank of New York, or assigns, in the sum of five thousand dollars," etc. The Chemical National Bank of New York having thus obtained title to these bonds, sold the same, and transferred the proceeds, $16,840.60, to the German National Bank of Memphis, where they were passed to the personal credit of said Anderson, drawn out by him from time to time on his personal checks, and lost to the beneficiaries by conversion to his own use.

The original bonds had borne upon their back a blank form of assignment, executed by Anderson, with certain instructions, among which were that the execution of the assignment must be witnessed by a public officer, attested by his official seal, and that "exec-

utors, administrators, and trustees, when the stock stands in the name of the person they represent, must furnish legal evidence of their official character to be filed." The regulations of the treasury department at this time required that, "in case of death or successorship, the representative or successor must furnish official evidence of decease and appointment. An executor or administrator may assign stock standing in the name of a deceased person. Where there is more than one legal representative all must unite in the assignment, unless by a decree of court or provision of will some one is designated to dispose of the stock. If the stock was held by the deceased as a fiduciary, the letters of administration must be accompanied by an order of the court authorizing the transfer."

When taken to the German National Bank of Memphis the blank form of assignment had been filled out, (except the name of the assignee, for which a blank was left,) signed by Anderson, and executed before a notary public.

In 1872, the widow of said Woodward married Thomas H. Covington, who died in 1884. Anderson paid her the interest on the bonds up to 1880, when he failed, and the payments ceased. During that year a bill was filed in the equity court by Covington and wife and Henriella P. Woodward, minor child of testator, against Anderson, who had become insolvent, the German National Bank of Memphis, the Chemical National Bank of New York, and others, defendants, charging Anderson with a breach of trust in the sale of the bonds, and the conversion of the proceeds to his own use, and the two banks with participating therein by receiving and selling the bonds charged with notice of the trust. The final result of this suit after trial in the chancery court of Memphis, and in the supreme court of Tennessee on appeal, was a decree against the two banks in favor of the plaintiffs in the sum of $23,211.82, that being the principal and interest of the bonds so converted. Covington v. Anderson, 16 Lea, 310.

*577 *Subsequently the two banks paid the amount of this judgment to a trustee appointed by the chancery court, and on November 22, 1888, filed a petition in the treasury department for the payment of the money here claimed. The petition was referred to the solicitor of the treasury, who advised that the amount for which the bonds were sold should be paid by the government, but the secretary of the treasury thought the claim presented was not of such a nature as to be properly adjudicated by him. On March 12, 1889, another petition was presented to the treasury department, which decided that the government was not liable, and this suit was begun.

Upon a finding of facts, of which the above statement is the substance, the court of claims dismissed the petition, (26 Ct. Cl. 198,) and the claimants appealed to this court.

Wm. S. Flippin, A. H. Garland, and Heber J. May, for appellants. Asst. Atty. Gen. Maury, for the United States.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The question in this case is whether the government can be held liable for the amount of certain registered bonds which the register of the treasury had canceled without authority of law, plaintiffs themselves having been held liable to the owners of the bonds for having been parties to the transaction.

Briefly stated, the facts are that the bonds were originally issued to "M. E. Cochran, executor or assigns;" that, Cochran having died, one Anderson was appointed administrator de bonis non, obtained possession of the bonds, took them to the German National Bank, and requested the bank to sell them for him, exhibiting a paper from the treasury department at Washington to the effect that, as the successor of Cochran in the administration of the estate, he had power to transfer them. The bank sent them to the Chemical National Bank of New York with a similar request to sell. The Chemical National Bank transmitted them to the register of the treasury, stating that neither the German National Bank nor the Chemical National Bank wished to be responsible for any irregularities in the papers. In reply the register stated that there was on file in that office satisfactory power in favor of the bank to transfer the bonds, and subsequently, at the request of the bank, issued new bonds to the "Chemical National Bank of New York, or assigns." These bonds were sold, the proceeds transmitted to the German National Bank at Memphis, passed to the personal credit of Anderson, and embezzled by him. Suit was thereupon begun against the two banks by the heirs of the estate represented by Cochran and Anderson, upon the theory that, as the bonds ran to "M. E. Cochran, executor or assigns," the banks were apprised of the fact that there was a trust of some kind impressed upon them, which could be ascertained by reference to the will; and that they bore the unmistakable brand of the rights of ownership of others, without the slightest evidence of claim of any character on the part of Anderson.

Having paid the judgment against them, the banks filed this petition, claiming to be subrogated to the rights of the parties who had recovered against them, and to hold the government liable upon the ground that they were induced, by the act and conduct of the register of the treasury, to do

what had been adjudged to be wrong on their part, and on account of which a decree had been taken against them.

Under these circumstances, are the plaintiffs entitled to maintain this suit against the government? Plaintiffs were held liable by the supreme court of Tennessee to the heirs of Woodward for the unlawful conversion of the bonds, the court holding that the banks received the bonds and disposed of them under circumstances showing that a breach of trust was meant by Anderson, and under such circumstances as to put them upon inquiry as to his title to the bonds and the motive prompting him to offer them for sale. The court held further *that the fact that the bonds were payable to M. E. Cochran as executor put them upon inquiry as to whose estate Anderson was administrator of; why there was no assignment upon the bonds; how Anderson came by them; by what authority he proposed to dispose of bonds created by a will when he was not himself the executor; why the bonds had been kept off the market so long; for whose benefit Anderson proposed to invest in securities at a greater rate of interest; and why he should do so when the bonds were a certain security. "These suggestions," said the court, "would have led at once to an inspection of the records, which would have discovered that Anderson had no right whatever to manage or control the bonds, and that his purposes were anything but honest. It was impossible to have read the bonds, however casually, without discovering that there was a trust of some character impressed upon them, which trust could be ascertained by reference to the will."

Plaintiffs now seek to hold the government liable upon the ground that the register of the treasury participated with them in such conversion. In other words, it is an attempt on the part of one wrongdoer, not merely to enforce contribution from another, but to hold him liable for the entire amount of damages occasioned by their joint negligence. It is only upon the theory that the register exceeded his power that the plaintiffs have any possible standing. If his conduct in canceling the original and issuing the new bonds was within the scope of his authority as register of the treasury, there is no possible reason for charging him or his principal with liability. Assuming, however, that he was guilty of negligence in reissuing these bonds upon insufficient evidence of the authority of the holder to demand such reissue, (as to which we express no opinion,) it was an act of negligence for which the government is not liable to these plaintiffs. It is a well-settled rule of law that the government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to congress. This rule was applied in the cases of U. S. v. Kirkpatrick, 9 Wheat. 720, 735; U. S. v. Van Zandt, 11 Wheat. 184; U. S. v. Nicholl, 12 Wheat. 505; and *Dox v. Postmaster General, 1 Pet. 318,—cases of laches in failing to prosecute delinquent officers within a reasonable time; in Gibbons v. U. S., 8 Wall. 269, to a case of alleged duress by a military officer; in Jones v. U. S., 18 Wall. 662, to the negligence of the government in permitting a dishonest postmaster to remain in office; in Hart v. U. S., 95 U. S. 316, to the negligence of an officer of the United States in permitting the removal of distilled spirits from a distillery warehouse before the payment of taxes; in Minturn v. U. S., 106 U. S. 437, 1 Sup. Ct. Rep. 402, to the unlawful act of a customs officer in giving up goods without the payment of duty; in Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. Rep. 10, to certain frauds by officers of the United States in issuing land patents; and in Robertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. Rep. 1286, to the negligence of an officer of the customs in keeping a trunk of a passenger on the pier instead of sending it to the public store, so that it was destroyed by fire.

If this be treated as a case of tort, then it is clear that the government is not liable, not only upon the ground above stated, but because under the act of congress conferring jurisdiction upon the court of claims (24 St. p. 505) there is an express exception of cases sounding in tort.

Plaintiffs, however, take the further ground that if, instead of suing the banks, Covington and his wife and daughter had sued in the court of claims upon the original bonds, the government could not have shown in defense that the bonds had been canceled and reissued to the Chemical National Bank, since such cancellation was without authority. Therefore they insist that, having paid these bonds themselves, they are entitled to be subrogated to the claim of the heirs of the estate, and to recover in their own names upon these bonds. There are difficulties, however, in sustaining this position. In the first place, the plaintiffs themselves had no contract with the government and, if they had, such contract was fully performed by the issuing of the new bonds to them. They are not entitled to be subrogated to the heirs of the estate, since their right of subrogation arises from certain conduct of theirs which was adjudged by the supreme court of Tennessee to be tortious. *It is said that a person who invokes the doctrine of subrogation must come into court with clean hands. Sheld. Subr. § 44; Railroad Co. v. Soutter, 13 Wall. 517; Wilkinson v. Babbitt, 4 Dill. 207; Guckenheimer v. Angevine, 81 N. Y. 394. They are unfortunately put in the position of claiming through the judgment of the supreme court of Tennessee, which held them liable for having participated in the alleged misconduct of the register of the treasury. As we hold that they are not entitled to invoke the doctrine of subroga-

tion, it becomes unnecessary for this court to determine as an independent question whether the register acted within the scope of his authority in canceling and reissuing the bonds. The opinion of the supreme court of Tennessee would not be conclusive upon that point, the government not having been a party to that action.

Under no view that we have been able to take of this case can we hold the government liable, and the judgment of the court of claims is therefore affirmed.

(148 U. S. 663)

MARTIN et al. v. SNYDER.

(April 10, 1893.)

No. 131.

REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES—WRONGFUL REMOVAL—COSTS.

1. Under Act March 3, 1887, (24 St. p. 552, c. 373,) only defendants who are nonresidents of the state where the action is pending can remove a cause to a federal court. Defendants sued in a court of their own state by citizens of another state have no such right of removal.

2. Where a case has been wrongfully removed to a federal court, and a decree there given for complainants, from which an appeal is taken, there should be a reversal, with costs against appellants, and the cause should be remanded to the trial court, with directions to render judgment against them for costs in that court, and remand the cause to the state court whence it was removed. Torrence v. Shedd, 12 Sup. Ct. Rep. 726, 144 U. S. 527, followed.

Appeal from the circuit court of the United States for the northern district of Illinois. Reversed.

D. W. Voorhees, Reese H. Voorhees, L. B. Hilles, and G. W. Kretzinger, for appellants. A. C. Story, for appellee.

THE CHIEF JUSTICE. This was a bill of complaint filed by Samuel F. Engs, George Engs, and Henry Snyder, Jr., of the city, county, and state of New York, against Morris T. Martin and Carrie E. Martin, in the circuit court of Lake county, in the state of Illinois, on the 27th of October, 1887.

November 7, 1887, the defendants preferred a petition for the removal of the cause to the United States circuit court within and for the northern district of Illinois on the ground of diverse citizenship, and the case was transferred accordingly.

The petition stated "that the controversy in said suit is between citizens of different states, and that the petitioners were at the time of the commencement of this suit, and still are, citizens of the state of Illinois, and that all the plaintiffs were then, and still are, citizens of the state of New York."

Under the act of congress of March 3, 1887, (24 St. p. 552, c. 373,) it is the defendant or defendants who are nonresidents of the state in which the action is pending who may remove the same into the circuit court of the United States for the proper district. The defendants here were not entitled to such removal, and the decree, which was in favor of complainants, and from which the defendants prosecuted this appeal, must be reversed for want of jurisdiction, with costs against the appellants, and the case remanded to the circuit court, with directions to render a judgment against them for costs in that court, and to remand the case to the state court. Torrence v. Shedd, 144 U. S. 527, 533, 12 Sup. Ct. Rep. 726.

Judgment reversed and cause remanded accordingly.

(148 U. S. 591)

BOARD OF EDUCATION OF CITY OF ATCHISON, KANSAS, v. DE KAY.

(April 10, 1893.)

No. 176.

SCHOOL BONDS—VALIDITY—ACTIONS—PARTIES.

1. Gen. St. Kan. (1868) p. 154, c. 19, entitled "An act to incorporate cities of the second class," provided that each city should constitute one school district, unless divided by the council; and it vested title to all school property in the city, which was to constitute a single district for purposes of taxation. The school board, which was to be chosen at the annual city election, was authorized to issue bonds for certain purposes with the consent of the council; and a tax was required to be levied sufficient to pay the interest on the bonds and create a sinking fund. Before the city of A. was incorporated under this act it had constituted a county school district, such districts being bodies corporate, under Pub. Laws, Kan. 1858, § 37, c. 8. *Held*, that whether the school board was merely an administrative agent of the municipality, or the city and school district were separate corporations, inasmuch as they were coterminous, bonds issued by the board according to law are valid obligations of the city.

2. It does not affect the validity of such bonds that in reciting the title of the act under which they were issued the term "organize" is substituted for the term "incorporate," used in the title.

3. As there is nothing in the act requiring the consent of the council to be given by ordinance, it may be evidenced by a resolution.

4. It was shown that this consent was given at one of a series of adjourned meetings, the first of which was held pursuant to an adjournment by the clerk because no member of the council was present. It was not shown what the rules were as to adjournment, nor whether the dates on which the council met were not those fixed for regular meetings. Interest was paid on the bonds for a number of years, and no objection made that the consent was not properly given. *Held*, that the objection could not avail in an action to recover the principal of the bonds.

5. The school board that issued the bonds is none the less the proper party to be sued thereon because in the mean time the city, by simple increase of population, has become a city of the first class, in which class the school boards have no separate corporate existence. Knowles v. Board of Ed., 7 Pac. Rep. 561, 33 Kan. 692, followed.

6. Express authority granted the school boards to issue bonds bearing interest carries with it the power to issue interest coupons attached to the bonds.

In error to the circuit court of the United States for the district of Kansas.

Action by Francis M. De Kay against the board of education of the city of Atchison

Kan., on certain school bonds. There was judgment for plaintiff, and defendant brings error. Affirmed.

*Statement by Mr. Justice BREWER:

On January 1, 1869, the board of education of the city of Atchison isued $20,000 of bonds. They were in this form:

"No. ——. School Bond. $1,000.00.

"City of Atchison, State of Kansas.

"Know all men by these presents that the city of Atchison, Kansas, for value received, is indebted to the bearer in the sum of one thousand dollars, which it promises to pay on the 1st day of January, A. D. 1884, at the National Park Bank, in the city of New York, with interest at the rate of ten per cent. per annum, payable semiannually, on the 1st day of January and on the 1st day of July of each year, upon presentation at the said National Park Bank of the interest coupons hereto attached as they mature; the last installment of interest payable with this bond. This bond is issued under and by virtue of an act of the legislature of the state of Kansas entitled 'An act to organize cities of the second class, approved February 28th, 1868,' and is secured by pledge of the school fund and property of said city of Atchison for the payment of the principal and interest thereof, as the same may become due.

"Dated at Atchison, this 1st day of January, 1869.

[Signed] "Jno. A. Martin,
"President of the Board of Education.
"W. F. Downs, Clerk.
"[Countersigned] Frank Smith, Treasurer."

Each bond had interest coupons attached. On June 30, 1885, plaintiff, Francis M. De Kay, claiming to be the owner of certain of these bonds and coupons, commenced suit in the circuit court of the United States for the district of Kansas. The defendant answered, a trial was had, and on June 6, 1889, judgment was entered in favor of the plaintiff for $31,699.40, from which sum $1,325 was thereafter remitted, as excessive interest. To reverse this judgment, defendant sued out a writ of error from this court.

Henry Ellison and David Martin, for plaintiff in error. T. J. White, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

Two questions are presented: First. Were the bonds and coupons valid obligations? Second. If valid, was the board of education of the city of Atchison the proper defendant, and could judgment be rightfully entered against it for the sum of these bonds and coupons?

The bond on its face purports to be the obligation of the city of Atchison, secured by pledge of the school fund and property of the city, and was executed by the president and clerk of the board of education. It is insisted that the board of education had no power to bind the city by such a promise to pay. To a clear understanding of this question an examination must be made of the statutes of Kansas. The city of Atchison was incorporated under an act of the territory of Kansas of February 12, 1858, Priv. Laws 1858, p. 172. By an act passed the same day, providing for the organization, etc., of common schools, (Pub. Laws 1858, pp. 47, 51, c. 8, §§ 15, 37,) each county superintendent of common schools was authorized to divide his county into school districts, and every school district organized in pursuance of the act was declared to be a body corporate, possessing the usual powers of a corporation for public purposes, with the name and style of "School District No. ——, County of ——." Under that act "school district number 1, Atchison county," was organized, with territorial limits the same as those of the city of Atchison. *On February 23, 1867, an act was passed to incorporate cities of the second class, that class being of those cities having more than 1,000 and less than 15,000 inhabitants, to which class the city of Atchison belonged. Laws 1867, p. 107. Section 14 is as follows: "Each city shall constitute at least one school district, and the city shall not be divided into more than one school district without the consent of a majority of the council, but such council may divide the city into as many school districts as it may deem expedient." On February 26, 1867, a supplemental act was passed, (Laws 1867, p. 128,) providing for a board of education in cities of the second class, to have charge of school matters. Particular reference to the provisions of this act is unnecessary, as both these acts were superseded in the Revision of 1868. Gen. St. Kan. p. 154, c. 19. This act was entitled "An act to incorporate cities of the second class." This was a new enactment, though practically only a consolidation and revision of the statutes of 1867 in reference to such cities. It contained section 14, heretofore quoted, of the law of 1867, and placed, as did the supplementary act of 1867, the entire control of school matters in a board of education.

Noting the act a little in detail, section 55 provides that "at each annual city election there shall be a board of education, consisting of two members from each ward, elected," etc. Section 57: That such board shall "exercise the sole control over the schools and school property of the city." By section 67 the board of education was empowered to estimate the amount of funds necessary to be raised by taxation for school purposes, and report the same to the city council, by which body the amount was levied and collected as other taxes. Under section 68 the moneys thus collected were paid into the

hands of the city treasurer, subject to the order of the board of education. Sections 69–71, 76, 77, are as follows:

"Sec. 69. The whole city shall compose a school district for the purposes of taxation.

"Sec. 70. The title of all property held for the use or benefit of public schools shall be vested in the city.

*595 "Sec. 71. No school property of any kind shall be sold or conveyed by the mayor or councilmen, except at a regular meeting of the same, and not then without the concurrence of the board of education."

"Sec. 76. Whenever it shall become necessary, in order to raise sufficient funds for the purpose of a school site or sites, or to erect a suitable building or buildings thereon, it shall be lawful for the board of education of every city, coming under the provisions of this act, with the consent of the council, to borrow money, for which they are hereby authorized and empowered to issue bonds, bearing a rate of interest not exceeding ten per cent. per annum, payable annually or semiannually, at such place as may be mentioned upon the face of said bonds, which bonds shall be payable in not more than twenty years from their date, and the board of education is hereby authorized and empowered to sell such bonds at not less than seventy-five cents on the dollar.

"Sec. 77. The bonds, the issuance of which is provided for in the foregoing section, shall be signed by the president and clerk of the board of education, and countersigned by the treasurer; and said bonds shall specify the rate of interest, and the time when the principal and interest shall be paid, and each bond so issued shall be for a sum not less than fifty dollars."

Section 78 peremptorily required the board of education in its annual estimation, authorized in section 67, to include a sufficient amount to pay the interest on such bonds and create a sinking fund, and such amount the city council was required to levy and collect. Section 81 reads: "The school fund and property of such city is hereby pledged to the payment of the interest and principal of the bonds mentioned in this article, as the same may become due."

What, now, are the specific objections to the validity of these bonds and coupons? First. It is objected that the bond purports to be issued under authority of an act entitled "An act to organize cities," etc., approved February 28, 1868; that no such act is to be found in the statutes of that year; and that, therefore, the bonds were issued without authority of law, and are not valid obligations. This is trifling. There was an *596 act giving authority to the board of education to borrow money and issue bonds, and whose title was exactly as described in this bond, except in place of the word "organize" the word "incorporate" was used. "Falsa demonstratio non nocet." Commissioners v. January, 94 U. S. 202. An error in copying into an instrument a single word in the title of a statute does not vitiate the deliberate acts of the proper officers of a municipality as expressed in the promise to pay which they have issued for money borrowed.

Again, it is insisted that the board of education had no power to bind the city of Atchison as a municipal corporation, but only that other and quasi corporation, known as "School District No. 1, Atchison County." The argument is that there were two corporations: First, a school-district corporation, whose name and corporate existence were prescribed by the laws of 1858; and another, a strictly municipal corporation, known as the "City of Atchison," with the ordinary powers attached to such a municipality; that, though they embraced within their limits the same territory and population, they were in fact distinct corporate entities; and that the board of education, having control of the affairs of the one corporation, had no power to bind the other by its promises to pay. It may well be doubted whether there were two distinct corporations. Section 14 of the acts of 1867 and 1868, incorporating cities of the second class, provided that "each city shall constitute at least one school district." There is no pretense, under the power reserved in that section, that the city of Atchison was ever divided into districts; so by that section Atchison city constituted a school district. The members of the board of education were to be elected at the annual city election, and to the board was given full control of the school affairs of the city. Section 57. In other words, it was the city's schools and the city's school property which were placed under the management of the board of education. Upon the report of the board of education the city council levied and collected the school taxes. Section 67. When they were collected, they were retained by the city treasurer in his custody. Section 68. The title to all school property was vested in the city. Section 70. No bonds could be issued without the consent of the city council. Section 76. And the school fund and property of such city was pledged to the payment of the bonds. Section 81. The whole idea of the statute seems to have been the mingling of the schools and the schools interests with the ordinary municipal functions of the city of Atchison, giving to the board of education, as an administrative body of the city, the management of the schools and the school property. Further, when, in 1872, a new act was passed in respect to the incorporation of cities of the second class, by section 100, Laws 1872, p. 221, it was expressly provided that "the public schools of each city organized in pursuance of this act shall be a body corporate, and shall possess the usual powers of a corporation for public purposes by the name and style of 'The Board of Education

of the City of ——, of the State of Kansas;' and in that name may sue," etc. This legislation seems to imply that up to that time there was in cities of the second class no separate school corporation.

But even if this be a misconstruction of the statute, it is clear that the school district and the city were coterminous; that, by the act of 1868, the board of education was authorized to borrow on the credit of the school property, with the consent of the city council, and to issue bonds in payment therefor. They did proceed, as appears from the recital in the bonds, under authority given by that act, and if there were a misrecital of the name of the obligor, such mere misrecital would not vitiate the obligations. Proceeding strictly under that act, they bound the corporation whose officers they were, and for which they assumed to act; and whether the name of that corporation was technically "The City of Atchison" or "School District No. 1, Atchison County," by the issue of bonds they bound that corporation.

This is not the case, as counsel suggest, of a written declaration of A. that B. is indebted, and that B. promises to pay; nor a case where two corporations are so entirely distinct that the name of one in an instrument carries no possible suggestion that the other was intended; but it is the case where officers of a corporation, having power to borrow and issue promises to pay, have at the best only misrecited the name of the corporation for which they issued and were authorized to act.

Another objection is that there was no legal consent of the city council, as required by section 76. The record shows that on Monday, October 5, 1868, none of the councilmen being present, the city clerk adjourned the council to Monday, October 12th. On Monday, October 12th, the mayor and five of the eight councilmen appeared, the minutes of all previous meetings not theretofore read were read and approved, and the council adjourned until Monday, October 19th. On Monday, October 19th, council met pursuant to adjournment, and another adjournment was had until October 26th, and so from October 26th to October 28th, and thence to November 2d, and to November 9th. At none of these meetings were all of the city council present. At the meeting on November 9th the mayor and five councilmen, being a majority of the council, were present, and a resolution was passed giving the consent of the council to the issue of these bonds. Now, it is insisted that consent could only be given by an ordinance, and not by resolution, and in support thereof the case of Newman v. City of Emporia, 32 Kan. 456, 4 Pac. Rep. 815, is cited; that, even if a resolution were sufficient, there was no legal meeting of the council, because all the members were not present, and it does not appear that all were notified, or that a special meeting had been duly called; that it was not at a regular, but apparently an adjourned, meeting; and that the first adjournment, on October 5th, was without validity, because none of the councilmen were present, and the adjournment was ordered by the clerk alone, and in support of the proposition that notice to or presence of all the members is essential to a valid special meeting the cases of Paola & Fall River R. Co. v. Commissioners of Anderson Co., 16 Kan. 302, and Aikman v. School Dist., 27 Kan. 129, are cited.

In respect to the first of these contentions, the general rule is that, where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance. State v. Jersey City, 27 N. J. Law, 493; Butler v. Passaic, 44 N. J. Law, 171; Merchants' Union Barb Wire Co. v. Chicago, B. & Q. Ry. Co., 70 Iowa, 105, 28 N. W. Rep. 494; Sower v. Philadelphia, 35 Pa. St. 231; Gas Co. v. San Francisco, 6 Cal. 190; Municipality v. Cutting, 4 La. Ann. 335; City of Green Bay v. Brauns, 50 Wis. 204, 6 N. W. Rep. 503; 1 Dill. Mun. Corp. (4th Ed.) § 307, and notes. Nor is there anything in the case in 32 Kan., 4 Pac. Rep., in conflict with this. That simply holds that when a charter requires that certain things be done by ordinance they cannot be done by resolution. In this act incorporating cities of the second class there is nothing which either in terms or by implication requires that the consent of the city council should be given only by ordinance. A resolution was, therefore, sufficient.

Neither is the other contention of any force. The record of the city council was produced, showing a series of meetings extending from October 5th to November 9th, at some of which meetings general business was transacted. The act of 1868 (section 13) provides that regular meetings of the city council shall be held at such times as the council may provide by ordinance. No evidence was offered showing what were the dates of regular meetings, as provided by ordinance. We are left to infer that these meetings were not regular meetings from the language at the commencement of the records thereof, "that council met pursuant to adjournment." The first adjournment was made by the city clerk alone, no member of the city council being present. We are not advised by the testimony as to what rules, if any, had been prescribed by the city council in respect to such matter. It is not an uncommon thing for legislative bodies, such as a city council, to provide by rule that, in the absence of all members, the clerk or secretary shall have power to adjourn. That probably such a rule as that was in existence is evidenced by the fact that at succeeding meetings—which, giving full weight to the language used at the

commencement of the record, were simply adjourned meetings—the council, all but one of whom were present at one of the meetings, approved the records. All these entries of meeting appear to have been kept upon the regular record of the city council, and it is obvious that either because *600 an adjournment by the clerk in the absence of the council was *authorized by rule, or because the days of the subsequent meetings were in fact the regular days therefor, such meetings were accepted and recognized by the council as legal. Certain is it that when bonds have been issued in reliance upon a consent thus evidenced, and when four years thereafter interest has been duly paid upon such bonds, the courts will not, after the lapse of 20 years, in a suit on the bonds, pronounce them invalid on such technical and trivial grounds. The cases cited from 16 and 27 Kan. do not militate against these views. In the case in 16 Kan., which was an action by the county against the railway company to cancel a subscription for stock, and for the return and cancellation of bonds of the county on deposit with the state treasurer, the matter was submitted on demurrer to the petition, and that petition averred that the subscription was ordered at a special session of the board, at which only two or three of the commissioners were present; that no call for such session was made, nor anything done to authorize a call; that B. M. Lingo, the absent commissioner, was in the county, at his residence, but had no knowledge or notice of such intended special session; "that knowledge and notice of such intended special session was intentionally and fraudulently concealed and kept from said B. M. Lingo by said railway company and its agents; and said session was not a regular session of said board, nor was it an adjourned session from any regular session thereof, nor from any duly called special session of said board." The court held that the subscription ordered under those circumstances was not binding upon the county. In that case the contract was executory, and the bonds had not been delivered, but were still within the control of the county. The special session, with only a fraction of the board present, was fraudulently intended and fraudulently brought about, and the railway company was the wrongdoer. The illegality of the session was not a matter of inference, but a fact alleged and admitted.

The case in 27 Kan. is even stronger. That was a suit on a written contract, signed by two members of a school-district board, the *601 board consisting of three. Such a contract could only be made by the district board as a board. It appeared *affirmatively that there was no meeting of the board; that it was signed by the two members, not after consultation, but by each separately, and at a different time from the other.

More in point is the case of Scott v. Paulen, 15 Kan. 162, 167, in which a session of a board of county commissioners was held to be valid at which only two out of the three members were present; and the record failed to show either an adjournment to that date, or a call for a meeting at that time, but did show that it was not held on the regular days of session; but its validity was not challenged until some time thereafter. In the opinion in that case, written by the same judge who wrote the opinion in the case in 16 Kan., is this language: "Hence it seems to us that when a quorum of the county board, with the clerk, is present, assuming to act as a county board, and at a time and place at which a legal session is possible, and to such board in actual session a proper and legal petition is presented for a county-seat election, and an election ordered, and thereafter full and legal notice given of such election, two elections had, generally participated in by the electors, the result canvassed and declared, and no objection made thereto for more than a year, it will be too late to question the validity of the election on the ground that the record of the proceedings of the commissioners shows that the chairman was absent, and fails to show a session pursuant to a legal adjournment from a regular session, or that the session was a special session, and duly called by the chairman on the request of two members." We think, therefore, that the bonds in suit were valid obligations, and that the circuit court did not err in overruling these objections to them.

But it is further insisted that, even if the bonds were valid, the coupons were not, because coupons are not named in the section of the statute authorizing the issue of the bonds. But coupons are simply instruments containing the promise to pay interest, and the express authority was to issue bonds bearing interest. While it is true that the power to borrow money granted to a municipal corporation does not carry with it by implication the power to issue negotiable bonds, (City of Brenham v. German American Bank, 144 U. S. 173, 12 Sup. Ct. Rep. 559,) we are of opinion *that the express power to issue* bonds bearing interest carries with it the power to attach to those bonds interest coupons.

The final objection is that the proper defendant is not sued. The claim here is that, while by the act of 1872 the public schools of cities of the second class were organized into a body corporate, by the name and style of "The Board of Education of the City of ——, of the State of Kansas," and at that time, if not before, the real debtor was this distinct corporate entity, yet at the time of the commencement of this action the city of Atchison had passed, by reason of the growth of its population, from a city of the second to a city of the first class, and that in such cities there was no separate school corporation, but the board of education was

simply an administrative body, having charge of the school affairs of the city. The case of Knowles v. Board of Ed., 33 Kan. 692, 7 Pac. Rep. 561, is a sufficient answer to this contention. Topeka, like Atchison, had been a city of the second class, and became by mere increase in population a city of the first class; and in the opinion of the court in that case, delivered by Chief Justice Horton, it is declared that "the board of education of the city of Topeka is a distinct corporation from the municipal corporation of the city of Topeka." That case came to the supreme court from the superior court of Shawnee county, and in the opinion in the latter court, delivered by Webb, J., an opinion which is found in the report of the case, and referred to with approval by the supreme court, is this discussion of the question: "Topeka remained a city of the second class until January, 1881, when it became a city of the first class. Article 10 of said chapter 122, Laws 1876, relates to 'public schools in cities of the first class.' Its provisions, as to the powers and duties of the board of education, are very similar to those contained in article 11, relating to 'public schools in cities of the second class.' But there is no provision in said article 10, declaring that 'the public schools' or the 'school district' of cities of the first class shall be bodies corporate. Nor has the writer of this opinion been able to find any such provision in any act or statute, although the powers conferred by said article 10 are those usually conferred upon incorporated school districts, and the government of the public schools in incorporated cities has been in the hands of 'boards of education' since 1867. There has been no legislation respecting boards of education of cities of the first class since Topeka became a city of that class, except that which regulates the number of members, and fixes their terms. But it will hardly be contended that the corporate powers lawfully conferred upon the board of education of the city of Topeka when said city was a city of the second class have been lost or destroyed by reason of the transition of the city from a city of such class to a city of the first class. It will, therefore, be considered, for the purposes of this case, that the public schools of the city of Topeka are 'a body corporate under the name and style of the "Board of Education,'" and that, therefore, said chapter 56 of the Laws of 1885 is not void for want of a proper body corporate to which it can apply."

That which was true of Topeka is of course true of Atchison, and the board of education of the city of Atchison is a distinct corporation, and the proper one to be sued for the enforcement of a debt like this. Indeed, if it were not a corporate entity, by what right does it come into court and carry on this litigation?

We think this is all that needs to be said in reference to the questions presented. The defenses interposed are purely technical, and, as we think, without foundation.

The judgment is affirmed.

(148 U. S. 627)

HUMPHREYS et al. v. PERRY et al.

(April 10, 1893.)

No. 167.

CARRIERS — NEGLIGENCE — MERCHANDISE SHIPPED AS BAGGAGE.

The traveling salesman of a firm of jewelers bought a ticket over defendant's road, and demanded a check for his trunk, without saying anything as to its contents. The trunk contained a stock of jewelry, from which sales were to be made to his principals' customers at various places; but, except that it was unusually heavy for its size, there was nothing to indicate its contents, and defendants' baggage agent checked it without any inquiries. The car in which it was placed was thrown from the track, and the trunk and its contents were destroyed by fire. It was shown that it was usual to transport such trunks in this way, but there was no evidence that any railroad company would do so if notified of their character and contents. *Held*, that the railroad's liability, under the circumstances, was only as for personal baggage, and the value of the jewelry could not be recovered from it.

Appeal from the circuit court of the United States for the northern district of Illinois. Reversed.

Wells H. Blodgett, for appellants. Richard S. Tuthill, for appellees.

*Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an intervening petition, filed May 28, 1886, in the circuit court of the United States for the northern district of Illinois, by John H. Perry, Arthur J. Perry, James K. Perry, and Frank A. Perry, copartners under the firm name of Perry Bros., in the suit pending in said court of the Wabash, St. Louis & Pacific Railway Company against the Central Trust Company of New York and others, in which suit Solon Humphreys and Thomas E. Tutt had been appointed receivers of said railway.

The intervening petition was filed against the receivers by leave of the court. It sets forth that the principal office of the firm of the petitioners is at Chicago; that on January 30, 1885, Arthur J. Perry, one of the firm, in carrying on its business, bought and paid for a ticket for his passage from Springfield, Ill., to Petersburg, Ill., over and upon the railroad of the company, running between those two places, and at the same time checked with the company a trunk containing jewelry, watches, and merchandise of the firm, such as was necessary for him to take with him in prosecuting the business of the firm, and such as is usually taken as baggage by traveling salesmen in prosecuting business similar to that of the petitioners, for transportation by the company from Springfield to Petersburg; that for the transportation of the trunk he paid the company a sum of money additional to that which he had already paid for his ticket; that thereupon he entered the coach

of the company, and the trunk was placed by its agents in the baggage car of the company en route for Petersburg; that shortly before reaching that place, by the negligence and carelessness of the company in constructing and repairing its roadbed and track, and in running that train, the cars containing said Arthur J. Perry and said trunk were derailed, and the baggage car containing the trunk was overturned and rolled down an embankment, and at the foot thereof, by the negligence and carelessness of the company in using in the car an unsafe, improper, and dangerous kind of stove, and in having said stove unsecured, or improperly secured, the baggage car caught on fire, and was totally consumed, together with said trunk, and the watches, jewelry, and merchandise of the petitioners in the trunk were almost totally destroyed; that the value of the trunk and its contents was $9,818.46; that the petitioners recovered from the debris of the baggage car a part of the merchandise, so that their loss amounts to $9,218.46; that the receivers were appointed May 29, 1884, and had possession of and were operating said road from Springfield to Petersburg at the time of the loss of the trunk; and that they had refused to allow the claim of the petitioners. The prayer of the petition is that the receivers answer the claim for damages.

The answer of the receivers sets forth that at the time in question they were not prepared to carry articles of jewelry and watches as baggage, and did not undertake or advertise themselves to the public as ready or willing to transport the same; that by the rules of the receivers, then in force and well known to the interveners, the agents and servants of the receivers were not allowed to take trunks containing jewelry, watches, and valuable merchandise as baggage; that on January 30, 1885, Arthur J. Perry, one of the interveners, presented to the agent of the receivers, at Springfield, *630 Ill., the trunk in question, and demanded a check therefor, and the *receivers then and there undertook to carry the trunk as containing only the personal baggage of said Perry; that he then and there wrongfully concealed from the said agent the fact that the trunk contained jewelry, watches, or valuable merchandise, and, by such wrongful conduct and fraudulent concealment of the contents of the trunk and their value, secured a check for it from the agent as baggage; that, because it was so checked, it was placed by the agent in a baggage car, and transported as ordinary baggage by the receivers over said line of road; that, before reaching Petersburg on said day, the train containing the baggage car in which the trunk had been placed became derailed, without fault or negligence on the part of the receivers or their agents or servants; and that, without any such fault or negligence, the baggage car caught fire after being so derailed, and a portion of the contents of the trunk, so wrongfully and fraudulently shipped as baggage, was destroyed. The answer denies that the interveners are entitled to any relief.

On June 30, 1886, the court made an order referring the intervening petition to E. B. Sherman "to take proof and report the same to the court." Mr. Sherman was one of the masters in chancery of the court. He took proofs and made a report to the court, accompanied by the proofs, and filed October 23, 1888. In his report he recites the order of reference as directing him to take evidence and report to the court "with his findings in the premises." He did report the evidence, and also findings by him, both of fact and of law. The receivers excepted to the report, because (1) the findings were contrary to the evidence; (2) the findings were contrary to law; (3) the findings were contrary to the law and the evidence; (4) the finding should have been that the intervening petition be dismissed; (5) the interveners were not entitled to the relief prayed for; and (6) the amount found by the master was excessive, and not warranted by the testimony. The master found that the interveners were entitled to recover from the receivers $7,287.87, with costs. There was no exception to the fact that the master had found the facts and the law, or had departed from the order of reference, and neither of the parties nor the court took any objection in that respect.[1]

The case was heard before the circuit court, held by Judge Gresham, (39 Fed. Rep. 417,) on the report of the master and the exceptions thereto, and a decree was made July 29, 1889, overruling the exceptions, confirming the report of the master, and decreeing in favor of the interveners for $7,287.87, and for the payment of that sum to them by the receivers, with costs, and $150 for master's fees. From this decree the receivers have appealed.

On January 30, 1885, Arthur J. Perry, a member of the interveners' firm, was in Springfield, Ill., with a trunk of jewelry, containing a stock of goods from which he was to make sales and deliveries to their customers. He there bought a passage ticket from the agent of the receivers for his transportation to Petersburg, on their road, and presented his trunk to be checked to Petersburg as his personal baggage. The trunk was of a dark color, iron bound, weighed 250 pounds, and as to size was described in the evidence as being "what a sample man would call small." The agent gave him a check for the trunk, and collected from him 25 cents on account of its extra weight, only 150 pounds of personal baggage being carried free for each passenger. Nothing was said to the agent by

[1] The master states that a stipulation was made before him by the parties that he should report his findings in the premises, though no such stipulation is found in the record.

Perry concerning the contents of the trunk, nor did he make any inquiries of Perry in regard to its contents. When the train had reached a point a few miles from Petersburg the car in which the trunk was being conveyed was thrown from the track, and was ignited from the fire in a stove on board, and the trunk and contents, to the value of $7,287.87, were destroyed. There was evidence tending to show that the stove was cracked, and that its door was without a latch or other fastening. As to the cause of the derailment, there was evidence tending to show that the night was cold, and that, as the train was rounding a curve, a rail broke under it. There was also evi- 632 dence tending to show that many of the cross-ties in the track at the place of the accident were so decayed that they did not firmly hold the spikes, and that the disaster was caused by the rails spreading. The master, in his report, attributed it to the latter cause, and found that the condition of the track was so unsafe that the receivers were presumed to have known of its condition. He found as a fact, however, that the condition of the track had been improved by the receivers, and at the time of the accident was better than when they were appointed.

There was evidence tending to show that it was, and had been for a number of years, a practice among the wholesale jewelry merchants of Chicago and other places to send out agents or members of their firms among their country customers with trunks filled with goods, and that such agents had been accustomed to sell and deliver goods from the stocks thus carried about. The evidence tended to show that such stocks of goods were generally carried in trunks similar in character to the one used by Perry, and that as a rule they had been checked as personal baggage. But there was no evidence tending to show that the railroad companies or their agents knew what the trunks contained; and John H. Perry, one of the firm, who testified as to what had been the custom, also testified that he did not know of any railroad in the country that he could go to and say: "Here is a trunk containing $10,000 worth of jewelry. I want a check,"—and get a check for the trunk. No witness testified that, after the appointment of the receivers, and before the occurrence of this loss, he had received a check over the Wabash, St. Louis & Pacific Railway for a trunk containing jewelry; nor was there any evidence tending to show that the receivers knew of any custom under which trunks containing stocks of jewelry were checked as personal baggage.

Arthur J. Perry, in his testimony, gave the following evidence as to the trunk in question: "Question. What kind of a trunk was that? Answer. It was a heavy, iron trunk,—iron bound, dark trunk, small size. Q. Had it any particular designation that you know of? A. It is a trunk that we used in our business, 633 is about all; very small and heavy. Q. The kind of a trunk known as a 'jeweler's trunk,' is it? A. Commonly used and known as a 'jeweler's trunk.'"

He also testified as follows: "Question. Are you acquainted with the wholesale and retail jewelry trade as conducted in Chicago? Answer. Since 1880. Q. Just state how the wholesale jewelers in Chicago conduct their business with the outlying towns with which they have trade. A. The majority of them conduct it the same as we do; that is, they put goods in trunks, and send them with men on the road. Q. They send traveling men or members of the firm with a jeweler's stock in a trunk? A. Yes, sir. Q. And go to different towns, and sell from that trunk? A. Yes; sell, deliver, and bill. Q. And, to your knowledge, that has been the custom since 1880? A. My knowledge goes further back than that. Q. How far beyond? A. Since 1873. Q. Is that their manner in conducting business now? A. Yes, sir. Q. Did I understand you to say you sell by samples? A. It isn't the rule. There are a few that do it,—not one in ten. Q. They send a stock of jewelry, and sell from that stock? A. Yes, sir; they sell from the stock. Q. And what is the usage in regard to the transportation of these jewelry trunks? A. We check them the same as other sample trunks. Q. Check as baggage? A. Yes. They allow us, as commercial baggage—they allow us 200 pounds when we have a thousand-mile ticket. When we have a local ticket they allow us 150 pounds, and we have to pay for all over that. Q. They have been carried as baggage and checked as baggage since when? A. Since 1873. Q. Had you traveled over this road before, and carried your trunk in the same manner? A. I had. Q. Do you know of others transacting the same kind of business? A. Yes, sir. Met them in Springfield many times, and at different points on the road. It is a common occurrence. Q. Was it or not the common and invariable usage, so far as you know? A. Yes, sir; that is the way the business is conducted." On cross-examination he testified as follows: "Q. You say that was a small trunk? A. Yes, sir. Q. What was its color? A. A dark trunk,—a black or gray. Q. Was it a small trunk or an ordinary sized trunk? A. It was 634 a small trunk for the weight of it, and what sample men would call a small trunk."

Another witness, Theodore Kearney, testified as follows: "Question. Are you familiar with the custom or usage throughout the United States of selling goods at wholesale? Answer. Yes, sir. Q. By traveling men? A. Yes, sir. Q. State what that usage has been for that time. A. The usual custom is to carry the stock of goods of various values, according to the class of the house, and sell from that stock to the customers. It is the universal custom. Q. What proportion of the dealing in jewelry is done in that man-

ner? A. I think nine tenths in the jobbing trade. Q. And how is this jewelry carried from place to place? A. Carried as baggage,—trunks checked as baggage; carried in compartments made in the trunk for that particular purpose. Q. What kind of trunks are they carried in? A. What is known as the 'Crouch' and 'Fitzgerald' trunks,—wooden trunks. I think they are made for that express purpose,—almost universally made and used for that purpose. Q. Iron bound? A. Iron strapped, not bound. Properly, iron corners and strips; covered by three or four strips in various ways."

John H. Perry, one of the interveners, testified as follows: "Question. I will ask you if you are familiar with the usages and customs of the wholesale and jobbing jewelers in reference to selling their goods? Answer. To a fair extent I am. Q. How are they sold? A. Our goods have been sold in that way. Q. How? A. Sold by traveling men from trunks on the road; stocks carried by traveling men, and delivered as the sales were made, and bills sent in to the house. Q. How are these trunks transported from place to place? A. Checked as baggage." The same witness also testified that some railroads had refused to receive and check such trunks unless they were given indemnifying bonds. On cross-examination he testified as follows: "Q. Mr. Perry, do you know of any railroad in this country that you could go to with a trunk, and say, 'Here is a trunk containing $10,000 worth of jewelry. I want a check,'—and get a check for it? A. I am not acquainted with any such road. Q. You don't know of any such road? A. No, sir." On his redirect examination, he testified as follows: "Q. You said you didn't know of any road that would receive a trunk if a man would say it contained $10,000 worth of jewelry. Did you ever know of a railroad refusing to check a jewelry trunk? A. No. I did not."

J. W. Patterson, the baggage agent of the receivers at Springfield, testified as follows: "Question. What business were you engaged in during the time you have lived in Springfield? Answer. Station baggage man for the Wabash. Q. Were you engaged in that business on the 30th of January, 1885? A. Yes, sir. Q. Did you check a trunk on that day from Springfield to Petersburg? A. Yes, sir; that is, I checked a piece of baggage. Couldn't say it was a trunk. Q. Do you know the number of that check? A. Yes, sir. Q. What is it? A. It is 10,763. Q. Do you know Mr. Perry? A. No, sir; not that I know of. Don't know him by name. Might know him if I saw the gentleman. Q. Was that the only piece of baggage checked for Petersburg that day? A. Yes, sir. Q. That was for the evening train? A. Yes, sir; evening train,—2:10. Q. Did you know whether or not at the time you checked this trunk or piece of baggage that it contained jewelry? A. No, sir. I did not know what it contained. Q. Was it checked in the ordinary way that baggage is checked? A. Yes, sir." On cross-examination the same witness testified as follows: "Q. When you see a trunk, a heavy trunk, heavily ironbound, with heavy iron corners and iron clasps, iron along the corners, and iron bandages all around it, and two or three strong locks in front, what kind of baggage would you suppose to be in the trunk? A. Well, we couldn't suppose what was in the trunk. Q. You wouldn't suppose that it contained ordinary wearing apparel, would you,—a trunk of that sort? A. Well, I don't know as I would. Q. Are not trunks of that description trunks that are carried by commercial travelers generally? A. Bless you, they carry all kinds, sizes, and sorts. Q. Don't they carry that kind of trunk? A. Yes, sir; lots of that kind of trunks on the road. Q. Those are not the trunks ordinarily used by travelers carrying wearing apparel? A. No; but there is,—once in awhile you find a castaway sample trunk that are picked up, parties carrying them; but it is not very often the case. Q. What do you mean by sample trunks? What is a sample trunk? A. What we call—that is, a trunk that contains different kinds of samples. Q. How do you know when you see them? A. Well, we don't know them without some party opens the trunk. Q. When you see a trunk of that sort you naturally suppose it has samples in it? A. Yes, sir. Q. They are made much stronger than ordinary trunks, are they not,—different build? A. Yes, sir; different built trunk. Q. Well known to all baggage men and railroad men as sample trunks, are they not? A. Yes, sir. Q. You know as a matter of fact, do you not, that jewelry firms have transported their stock of jewelry in trunks of that make? A. Yes, sir. Q. Passing over your lines daily? A. Yes, sir. Q. Checked as ordinary baggage? A. Yes, sir; at that time, but not now. * * * Q. Don't you know, from your experience of 11 years, if a trunk containing jewelry came into your possession, and you handled it, you would be able to tell what was in it? A. No, sir; and nobody else. Q. If a trunk came into your possession of that sort, at least its character is so well known to you, you would make inquiry about it, wouldn't you? A. Of course, once in a while. We do not every time. * * * Q. You know at that time there were a great many jewelry trunks on the road, and had been previous to that time, in carrying stocks of jewelry in trunks? A. Couldn't say a great many, because I never saw but very few of them. Couldn't see what they contained. Q. You know as a general thing that jewelers travel on the road with their stocks, don't you? A. Yes, sir. Q. They transported their goods from town to town in trunks? A. Yes, sir. Q. And sold from

their trunks? A. I couldn't say about that. Don't know anything about that. Checked the baggage." On redirect examination he testified: "Q. As a fact, from your knowledge of trunks, could you tell from looking at that trunk that it contained jewelry? A. I could not."

*637 *The circuit court said, in its opinion, that the nature and contents of the trunk were not expressly disclosed to the agent at Springfield; that he made no inquiries on that subject; that the trunk was 3 by 2½ feet, ironbound, weighed 250 pounds, and was known in the trade and to baggage men as a "jeweler's" or "commercial traveler's" trunk; that the evidence showed that the interveners and other merchants of the same class, then and prior thereto, sold their goods, in the main, directly from trunks transported from place to place over railroads, and that this road had previously and frequently checked and carried such trunks for the interveners and others as personal baggage. The opinion then said: "If the station agent did not know that the trunk contained jewelry, he had reason to believe it did. He received it knowing that Perry was not entitled to have it carried as personal baggage. The agent did not believe the trunk contained wearing apparel only. It is plain from the evidence that he recognized it as a jeweler's trunk, and that he understood it contained a stock of jewelry. He was not, therefore, deceived, and the receivers were not defrauded. Having checked the trunk by their agent as personal baggage, knowing or having reason to believe that it contained jewelry, the receivers became bound to safely transport it to its destination, which they did not do; and they are liable for the damages that resulted from a breach of the contract. They sustained to the trunk and its contents the relation of a carrier, and they are liable for the property destroyed by their negligence, just as if the trunk had contained nothing but wearing apparel, or as if they had undertaken to carry it as freight."

The receivers contend that the circuit court erred in basing its judgment, either wholly or in part, on the assumption that the baggage agent at Springfield had actual knowledge of what the trunk contained, and that he knew, or had reason to believe, that it contained a stock of jewelry.

There is no evidence showing, or tending to show, that the baggage agent had any actual knowledge of the contents of the trunk. Arthur J. Perry did not suggest that he either told the agent what the trunk contained or opened it in the agent's presence. He testified to no fact from which the inference could be drawn that the agent had actual knowledge that the trunk contained a stock of jewelry. Patterson, the agent, testified expressly that at the time he checked the trunk he did not know what it contained. The master states in his report that Perry did not disclose the character of the contents of the trunk, or say anything in regard thereto, but simply presented the trunk, as had been customary with him and other salesmen, to be received and checked as ordinary baggage, as it had been customary for agents to do on this and other roads; and the court said, in its opinion, that the nature and contents of the trunk were not expressly disclosed to the agent, and that he made no inquiries on that subject. It is clear, therefore, that the liability of the receivers cannot be founded on the proposition that the agent had actual knowledge of what the trunk contained.

It is further contended that the circuit court erred in holding that the agent ought to have known what was in the trunk by its external appearance. The circuit court says, in its opinion, that it is plain from the evidence that the agent recognized the trunk as a jeweler's trunk, and understood that it contained a stock of jewelry; and that, their agent having checked the trunk as personal baggage, knowing or having reason to believe that it contained jewelry, the receivers became bound to transport it safely to its destination.

Is there any evidence in the case from which it can fairly be said that the agent had reason to believe that the trunk contained jewelry? It is clear that Perry, in purchasing a ticket for a passenger train, and then tendering his trunk to the agent to be checked, tendered it as containing his personal baggage. The agent was not informed to the contrary by Mr. Perry or by any other person. As the agent did not know what the contents were, the allegation that he recognized the trunk as a jeweler's trunk, and understood that it contained a stock of jewelry, necessarily implies that such recognition and understanding must have arisen from the outward appearance of the trunk. The testimony on that subject is as follows: Arthur J. Perry testified: "Question. What kind of a trunk was that? Answer. It was a heavy iron trunk,—ironbound,*639 dark trunk, small size. Q. Had it any particular designation that you know of? A. It is a trunk that we used in our business, is about all; very small and heavy. Q. The kind of a trunk known as a 'jeweler's trunk,' is it? A. Commonly used and known as a 'jeweler's trunk.'" He also said on cross-examination: "Q. You say that was a small trunk? A. Yes, sir. Q. What was its color? A. A dark trunk,—a black or gray. Q. Was it a small trunk or an ordinary sized trunk? A. It was a small trunk for the weight of it, and what sample men would call a small trunk." That is all the testimony that was given as to the size, shape, or appearance of the trunk.

Kearney, a witness for the interveners, testified as follows as to the kind of trunk generally carried by traveling men in the jewelry trade: "Question. Are you familiar with the custom or usage throughout the United States of selling goods at wholesale? Answer. Yes, sir. Q. By traveling

men? A. Yes, sir. Q. State what that usage has been for that time? A. The usual custom is to carry the stock of goods of various values, according to the class of the house, and sell from that stock to the customers. It is the universal custom. Q. What proportion of the dealing in jewelry is done in that manner? A. I think nine tenths in the jobbing trade. Q. And how is this jewelry carried from place to place? A. Carried as baggage,—trunks checked as baggage; carried in compartments made in the trunk for that particular purpose. Q. What kind of trunks are they carried in? A. What is known as the 'Crouch' and 'Fitzgerald' trunks,—wooden trunks. I think they are made for that express purpose,—almost universally made and used for that purpose. Q. Iron bound? A. Iron strapped, not bound. Properly, iron corners and strips; covered by three or four strips in various ways."

Patterson, the baggage agent at Springfield, testified that he checked a piece of baggage on the day in question from Springfield to Petersburg, and he said on cross-examination that he had no particular recollection about the trunk of Perry, and that he did not recollect Perry.

The evidence, therefore, is that the trunk *640 which Perry delivered to be checked as his personal baggage was a wooden trunk, of dark color, iron bound, heavy for its size, and in size what a sample man would call small; and the question arises on these facts whether the agent was bound to know, or to be presumed to know, that such a trunk contained a stock of jewelry. If he was, it must be presumed, contrary to the positive evidence, that he could tell what was in the trunk by looking at it or handling it, and this notwithstanding the agent testified as follows on cross-examination: "Question. Don't you know, from your experience of 11 years, if a trunk containing jewelry came into your possession, and you handled it, you would be able to tell what was in it? Answer. No, sir; and nobody else."

The hypothetical trunk put to Patterson on cross-examination was described as a trunk with heavy iron corners and iron clasps, iron along the corners, and iron bandages all around it, and two or three strong locks in front. That hypothetical trunk does not appear to be such a trunk as Perry delivered to the agent.

Perry, as a passenger on a passenger train, was bound to act in good faith in dealing with the carrier. He presented the trunk to the baggage agent as containing his personal baggage, and got a check for it as such; and, that being so, he cannot recover for the loss of a stock of jewelry contained in it. No circumstances occurred, according to the evidence, which required the baggage agent to make inquiries as to the contents of the trunk so presented as personal baggage. The presentation of the trunk, under the circumstances, amounted to a representation that its contents were personal baggage. The fact that Perry and other persons, on other occasions, had obtained, on passenger tickets, checks from other railroad companies for trunks containing merchandise by representing them as containing personal baggage, furnishes no good reason for permitting a recovery in the present case. There is no evidence to show that on the occasions when Perry and other travelers received checks on passenger tickets for trunks containing jewelry the carrier knew what were the contents of the trunks. The testimony is that John H. Perry did not know of a railroad company which would receive and check a trunk as a passenger's baggage which was filled with valuable jewelry.

*641 "In the present case the trunk was offered as containing the personal baggage of a passenger. The passenger did not inform the baggage agent as to the actual contents of the trunk. The agent did not know what the trunk contained. There is no evidence that any agent of the receivers had theretofore received and checked a trunk as the personal baggage of a passenger, knowing that it contained a stock of jewelry; and it does not appear that any railroad company would issue a check to a passenger for a trunk, if previously informed that the trunk contained a valuable stock of jewelry.

The 25 cents extra paid by Mr. Perry on account of the weight of the trunk was paid merely for the overweight, and not at all in respect of the contents of the trunk. It was paid for so much overweight of personal baggage.

It has long been the law that the principle which governs the compensation of carriers is that they are to be paid in proportion to the risk they assume. So long ago as the case of Gibbon v. Paynton, 4 Burrows, 2298, in 1769, it was held, in the king's bench, Lord Mansfield delivering the opinion, that a bailee was only obliged to keep goods with as much diligence and caution as he would keep his own, but that a carrier, in respect of the premium he was to receive, ran the risk of them, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery; that his warranty and insurance was in respect of the reward he was to receive; and that the reward ought to be proportionable to the risk. In that case the sum of £100 was hidden in some hay, in an old nail bag, and sent by a coach, and lost. The carrier had not been apprised that there was money in the bag. The same principle was applied in Batson v. Donovan, 4 Barn. & Ald. 21, in 1820, where it was held that a carrier was not liable for bank notes contained in a parcel, when he had not been informed of the contents of the parcel.

This principle is commented on in Story on Bailments, (9th Ed. § 565,) where it is said: "It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened; and if there is any such fraud or unfair concealment it will exempt the carrier from responsibility under the contract, or, more properly speaking, it will make the contract a nullity."

There is a uniform series of cases on this principle in the supreme judicial court of Massachusetts. In Jordan v. Railroad Co., 5 Cush. 69, it was laid down that a common carrier of passengers was not responsible for money included in the baggage of a passenger, beyond the amount which a prudent person would deem proper and necessary for traveling expenses and personal use, or intended for other persons, unless the loss was occasioned by the gross negligence of the carrier or his servants.

In Collins v. Railroad, 10 Cush. 506, it was held that the term "baggage," for which passenger carriers were responsible, did not include articles of merchandise not intended for personal use; and that a carrier was not liable for the loss of merchandise sent by a passenger train by a person who expected to go himself in the same train, but did not, the goods having been lost without any gross negligence in the carrier, or any conversion by him.

In Stimson v. Railroad Co., 98 Mass. 83, it was held that a railroad company was not liable to either owner or agent, on its ordinary contract of transportation of a passenger, for losing a valise delivered into its charge as his personal luggage, but which contained only samples of merchandise, and, with its contents, was owned by a trader whose traveling agent the passenger was, to sell such goods by sample, nor in tort for the loss, without proof of gross negligence.

In Alling v. Railroad Co., 126 Mass. 121, the above cases in 5 Cush., 10 Cush., and 98 Mass. were cited and applied, and it was held that if a passenger delivered to a railroad company a trunk containing samples of merchandise belonging to a third person, whose agent he was, to be transported to a place for which the agent had a ticket, the only contract entered into was for the transportation of the personal baggage of the agent, and the company was not liable in contract to the owner of the trunk for its loss, nor in tort, except for gross negligence; and that evidence that a large part of the company's business consisted in transporting passengers known as "commercial travelers," with trunks like the one lost, containing merchandise; that such trunks were known as "sample trunks," and were of special construction; and that such travelers purchased tickets for the ordinary passenger trains, and received checks for their trunks, and were transported for the price of the tickets,—was immaterial.

In Blumantle v. Railroad, 127 Mass. 322, it was held that evidence that a passenger delivered to the baggage master of a railroad corporation a package of merchandise, and received a check for it on showing his passenger ticket, that the baggage master knew it was merchandise, and that other passengers had similar packages, would not warrant a jury in finding that the corporation agreed to transport the merchandise, or became liable for it as a common carrier, in the absence of evidence of an agreement that the merchandise should be carried as freight, or that the baggage master had authority to receive freight to be carried on a passenger train, or to bind the corporation to carry merchandise as personal baggage. In the opinion of the court, delivered by Chief Justice Gray, the earlier Massachusetts cases, and other cases, English and American, were cited, and it was said: "In the case at bar the plaintiff offered and delivered the bundles as his personal baggage, and requested that they might be checked as such; and the baggage master gave him checks for them accordingly, as he was bound to do for personal baggage of passengers by St. 1874, c. 372, § 136. There was no evidence that either the plaintiff or the baggage master agreed or intended that they should be carried as freight or that the baggage master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage. The case cannot be distinguished in principle from the previous decisions of this court, already cited. Evidence tending to show that the baggage master knew or supposed the bundles to contain merchandise, or that other passengers had similar bundles, would not warrant the jury in finding that the defendant agreed to transport the plaintiff's merchandise, or become liable therefor as a common carrier."

In Hawkins v. Hoffman, 6 Hill, 586, it was held that the usual contract of a carrier of passengers included an undertaking to receive and transport their baggage, though nothing was said about it; that, if it was lost, even without the fault of the carrier, he was responsible; but that the term "baggage" in such case did not embrace samples of merchandise carried by the passengers in a trunk, with a view of enabling him to make bargains for the sale of goods.

In Railway Co. v. Keys, 9 H. L. Cas. 556, a railway passenger, with knowledge that the company, although allowing each passenger to carry free of charge a certain amount of luggage, required all merchandise to be paid for, took with him, as if it was personal luggage, a case of merchandise, and did not pay for it as such; and it was held that no contract whatever touching the same arose between him and the company, and that there-

fore, on the merchandise being lost, he was not entitled to recover the value of it from the company.

In Cahill v. Railway Co., 10 C. B. (N. S.) 154, in the court of common pleas, where a railway company was accustomed to allow each passenger to take with him his ordinary luggage, not exceeding a given weight, without any charge for the carriage of it, a passenger took with him as luggage a box containing only merchandise, but not exceeding in weight the limit prescribed for personal luggage. He gave no information to the company's servants as to the contents of the box, nor did they inquire, although the word "glass" was written on the box in large letters. In an action to recover against the company for the loss of the box it was held that, inasmuch as it contained only merchandise, and not personal luggage, there was no contract on the part of the company to carry it, and the company was not liable for the loss. That decision was affirmed in the exchequer chamber. 13 C. B. (N. S.) 818.

*645 In Railroad Co. v. Carrow, 73 Ill. 348, a passenger on a railroad had brought to the depot a trunk which *contained costly jewelry, gave no notice of its contents, and had it checked as ordinary baggage, and there was nothing about the trunk indicating its contents. It was consumed by fire while being carried, the company not being guilty of gross negligence, and it was held that the company was not liable for the contents of the trunk. It was further held that a carrier of passengers is not bound to inquire as to the contents of a trunk delivered to the carrier as ordinary baggage, such as is usually carried by travelers, even if the same is of considerable weight, but may rely upon the representation, arising by implication, that the trunk contains nothing more than baggage; that it is the duty of a passenger having valuable merchandise in his trunk or valise, and desiring its transportation, to disclose to the carrier the nature and value of the contents; that if the carrier then chooses to treat it as baggage, without extra compensation, the liability of the carrier will attach, but not otherwise; and that where a person, under the pretense of having baggage transported, places in the hands of the agents of the railroad company merchandise, jewelry, and other valuables, without notifying them of the character and value of the same, he practices a fraud upon the company which will prevent his recovery in case of a loss, except it occurs through gross negligence.

In Haines v. Railway Co., 29 Minn. 160, 12 N. W. Rep. 447, it was held that a carrier of passengers for hire was bound only to carry their "personal baggage;" that, if a passenger delivered to the carrier as baggage a trunk or valise containing merchandise, not his personal baggage, of which fact the carrier had no notice, the carrier, in the absence of gross negligence, would not be liable for its loss; and that the carrier was not bound to inquire, in such a case, as to the nature of the property, but had a right to assume that it consisted only of the personal baggage of the passenger.

In Pfister v. Railroad Co., 70 Cal. 169, 11 Pac. Rep. 686, it was held that a railroad ticket entitling the purchaser to transportation in the first-class passenger coaches of the seller between the points indicated thereon gave the purchaser the right to have his luggage, not exceeding the quantity specified in the ticket, transported at the same time free of charge, but that it did not give him the right to transport, either in his own charge or that of the railroad company, any merchandise or property not included in the term "luggage."

In the present case there is no allegation in the intervening petition of any gross negligence in the receivers, nor does the evidence make out any.

Various cases are cited on the part of the interveners; but either we do not concur in the views expressed in them, or they are distinguishable from the present case. Thus, in Kuter v. Railroad Co., 1 Biss. 35, it was said by Judge Drummond, in a charge to a jury, that, if the railroad company knew that immigrants, like the plaintiff, were in the habit of putting valuable articles and money among their household goods, and from such knowledge might have inferred that the box of the plaintiff might contain money, then it became the duty of the company to make inquiry in order to relieve itself from liability. But we do not think that view is sound.

In Minter v. Railroad Co., 41 Mo. 503, the merchandise in question was fully exposed, and it was known to the railroad company's agent what it was.

In Railroad v. Swift, 12 Wall. 262, it was held by this court that where a railroad company received for transportation, in cars which accompanied its passenger trains, property of a passenger, other than his baggage, in relation to which no fraud or concealment was attempted or practiced upon its employes, it must be considered to have assumed, with reference to that property, the liability of a common carrier of merchandise. But that is not the present case.

So, also, the case of Stoneman v. Railway Co., 52 N. Y. 429, was one where a carrier of passengers, in addition to passage money demanded and received from a passenger compensation as freight for the transportation of packages containing merchandise and baggage; and it was held, in the absence of evidence of fraud or concealment on the part of the passenger as to the contents of the packages, that such carrier, in case of loss, was liable for the merchandise as well as the baggage. The same principle was ap-

plied in Sloman v. Railway Co., 67 N. Y. 208.

In Millard v. Railroad Co., 86 N. Y. 441, the same principle was applied in a case where the railroad company's agent was advised by a person who had purchased a passenger ticket, of the fact that a trunk contained merchandise, and the agent demanded and received extra compensation for its transportation.

The same rule was applied in Railroad Co. v. Capps, 2 Civil Cas. Ct. App. § 34. In Jacobs v. Tutt, 33 Fed. Rep. 412, the suit was against the same receivers as in the present case, to recover the value of a trunk and contents, which were stolen, and the trunk was the trunk of a jewelry salesman, containing his stock in trade. The agent who took it knew that fact, and the plaintiff had made no effort at concealment; and it was held that the receivers were liable as for the loss of ordinary baggage on the railroad.

We have examined the other cases cited on behalf of the interveners, namely, Butler v. Railroad Co., 3 E. D. Smith, 571; Hellman v. Holladay, 1 Woolw. 365; Railroad Co. v. Fraloff, 100 U. S. 24; and Talcott v. Railroad Co., (Sup.) 21 N. Y. Supp. 318; and do not think they have any application to the present case.

The case of Switzerland Marine Ins. Co. v. Louisville, C. & L. Ry. Co., 13 Int. Rev. Rec. 342, is a charge to a jury that the item "baggage" does not include articles of merchandise for sale or for use as samples, and not designed for the use of the passenger, and that, if the passenger has such articles checked and received by the carrier as baggage, the carrier will not be liable for them if lost or injured, unless it was informed or was presumed to have known that the articles were merchandise, or unless it was the established custom or usage of the defendant to receive and transfer them as baggage, or unless they were lost by the gross negligence of the defendant. After a verdict and judgment for the plaintiff the case was brought to this court by a writ of error, and affirmed here by a divided court. 131 U. S. 440, 9 Sup. Ct. Rep. 800.

*The decree of the circuit court must be reversed, and the case be remanded to it, with a direction to dismiss the petition of the interveners.

(148 U. S. 566)

KREMENTZ v. S. COTTLE CO.

(April 10, 1893.)

No. 161.

PATENTS FOR INVENTIONS—ANTICIPATION—COLLAR BUTTONS.

1. Letters patent No. 298,303, granted May 6, 1884, to George Krementz, for a new and improved collar button, having a hollow head and stem, and formed out of a single continuous plate of sheet metal, are not anticipated by patent No. 171,882, granted January 4, 1876, to Stokes, for a stud fastening with a solid flat head, intended to resist a great strain, nor by patent No. 177,353, granted May 9, 1876, to Keats, for a button intended to be fastened to eyelet holes, not made of a continuous piece of metal, but having seams in the post, a base plate composed of two separate parts, and a head open on the under side.

2. Upon the question whether the Krementz device involved invention, it was shown that it combined strength with lightness and economy of material; that its advantages were at once recognized by the trade, so that large quantities were sold; and that the person charged with infringement of the patent, who was skilled in the art, had only patented buttons composed of two parts soldered together. *Held*, that the device was patentable, and not merely the result of the application of the ordinary skill of the calling to the Stokes and Keats devices. 39 Fed. Rep. 323, reversed.

Appeal from the circuit court of the United States for the southern district of New York.

Suit by George Krementz against the S. Cottle Company for infringement of complainant's patent. The bill was dismissed for want of novelty in the patent, (39 Fed. Rep. 323,) and complainant appeals. Decree reversed.

C. E. Mitchell and Louis C. Raegener, for appellant. Edwin H. Brown, for appellee.

*Mr. Justice SHIRAS delivered the opinion of the court. *557

This is an appeal from a decree of the circuit court of the United States for the southern district of New York, dismissing a bill filed to restrain the infringement of letters patent of the United States, No. 298,303, granted May 6, 1884, to George Krementz, of Newark, N. J., for a new and improved collar button.

Complainant's evidence, tending to show that the collar button made by the defendants was within the claim of the patent in suit, and constituted an infringement, was not contradicted or disputed, but it was held by the court below that the patent was invalid for want of novelty. 39 Fed. Rep. 323.

In his specification the patentee states that his invention consists in a collar button having a hollow head and stem, the said button being formed and shaped out of a single continuous plate of sheet metal. The method or process of making the button is thus described:

"By means of suitable dies a metal plate is pressed into the shape shown in Fig. 2, that is, the plate is provided with a hollow stem, B, the sides of which are pressed together at about the middle, in some suitable manner, to form a head, C, at the end of the stem, as in Fig. 3. Then the head is pressed towards the base plate or back, D, whereby the head will be upset, and will have the shape shown in Figs. 4 and 5. By this operation the head is hardened. The base plate or back, D, is then rounded out and finished, and its edge turned over, as shown in Fig. 5." *558

In the accompanying diagram, Fig. 1 is a side view of the completed button. Figs. 2, 3, 4, and 5 are cross-sectional elevations of the same in the different stages of the operation of making it.

Fig. 1.

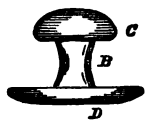


Fig. 2

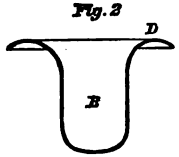


Fig. 3.

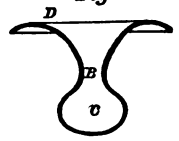


Fig. 4.

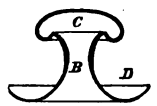
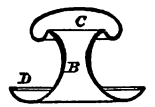


Fig. 5.



The advantages attributed to the invention are the doing away with soldered joints, the lightness of the hollow stem and head, as compared with buttons having solid stems and heads, and the cheapness arising from the use of less material, with equal or superior strength, which, when gold is used, is quite appreciable.

The learned judge in the court below contented himself with comparing Krementz's invention with two earlier patents,—one to Stokes, No. 171,882, granted January 4, 1876, and one to Keats, No. 177,353, granted May 9, 1876,—in which patents, he thinks, are to be found the special features claimed by Krementz.

*559 *The Stokes patent was for an improvement in making a stud fastening known as "Thomson's Unbreakable Busk Fastening," and whereby, instead of fastening the parts of the stud together by rivets, the entire busk was made out of one piece of metal, by striking up or raising the stud out of a strip of malleable sheet metal. The structure thus produced is a solid, rivet-like, and flat head, intended to resist a great strain, and evidently not designed to be used as a collar button, where a well-defined, round head, adapted to be used where there is no strain, is necessary and essential.

In the Keats process the button is not made of a continuous piece of sheet metal, but has side seams in the post, and has a base plate composed of two separate parts, and the head is open on the under side. It could not be used as a collar button, but is intended to be permanently fastened, either to eyelet holes, or to the fabric with which it is connected.

We cannot see in these devices, taken separately or together, an anticipation of the Krementz button. Indeed, the court below concedes that "Krementz was the first to make a stud from a single, continuous piece of metal, in which the head was hollow and round in shape."

The learned judge was, however, of the opinion that "any competent mechanic, versed in the manufacture of hollow sheet-metal articles, having before him the patents of Stokes and Keats, could have made these improvements and modifications, without exercising invention, and by applying the ordinary skill of the calling."

It is not easy to draw the line that separates the ordinary skill of a mechanic, versed in his art, from the exercise of patentable invention, and the difficulty is specially great in the mechanic arts, where the successive steps in improvements are numerous, and where the changes and modifications are introduced by practical mechanics. In the present instance, however, we find a new and useful article, with obvious advantages over previous structures of the kind. A button formed from a single sheet of metal, free from sutures, of a convenient shape, and uniting strength with lightness, would seem to come fairly within the meaning of the patent laws. *The tools to be used in making the button are not described, but they are not claimed to be new; and the method or process of manufacture is described with sufficient particularity to enable any one skilled in the art to follow it. Buttons made of several pieces are liable to break at the soldered joints, and it is stated by an experienced witness that the metal, by the process of soldering, becomes soft, and liable to bend. The different pieces are set together by hand, and are not always uniform, or put together truly.

The view of the court below, that Krementz's step in the art was one obvious to any skilled mechanic, is negatived by the conduct of Cottle, the president of the defendant company. He was himself a patentee, under letters granted April 16, 1878, for an improvement in the construction of collar and sleeve buttons, and put in evidence in this case. In his specification he speaks of the disadvantages of what he calls "the common practice to make the head, back, and post of collar and sleeve buttons separate, and to unite them by solder." His improvement was to form a button of two pieces, the post and base forming one piece, and then solder to the post the head of the button, as the other piece. Yet, skilled as he was, and with his attention specially turned to the subject, he failed to see, what Krementz afterwards saw, that a button might be made of one continuous

sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength, and requiring less material.

It was also made to appear that the advantages of the new button were at once recognized by the trade and by the public, and that very large quantities have been sold.

The argument drawn from the commercial success of a patented article is not always to be relied on. Other causes, such as the enterprise of the vendors, and the resort to lavish expenditures in advertising, may co-operate to promote a large marketable demand. Yet, as was well said by Mr. Justice Brown in the case of Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co., 47 Fed. Rep. 894, "when the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention."

Loom Co. v. Higgins, 105 U. S. 580, was a case where the patented device consisted in a slight modification of existing mechanism, and it was contended that this slight change did not constitute a patentable invention; but this view did not prevail, the court saying:

"It is further argued, however, that, supposing the devices to be sufficiently described, they do not show any invention, and that the combination set forth in the fifth claim is a mere aggregation of old devices, already well known, and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed,—one which would occur to any mechanic skilled in the art; but it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light to even the most skillful persons. It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who was the first to see it, to understand its value, to give it shape and form, to bring it into notice, and urge its adoption, is a question to which we shall shortly give our attention.

"At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day, when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if these elements were separately known before, was invention sufficient to form the basis of a patent."

Consolidated Safety Valve Co. v. Crosby, etc., Valve Co., 113 U. S. 157, 5 Sup. Ct. Rep. 513; Magowan v. Packing Co., 141 U. S. 332, 12 Sup. Ct. Rep. 71; Barbed-Wire Patent, 143 U. S. 275, 12 Sup. Ct. Rep. 443; Gandy v. Belting Co., 143 U. S. 587, 12 Sup. Ct. Rep. 598,—are all to the same effect.

In the very recent case of Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. Rep. 825, where there was a contest between two patents, with but a slight difference between them, the court said:

"Trifling as this deviation seems to be, it renders it possible to adopt the Augur device to any side-spring wagon of ordinary construction. While the question of patentable novelty in this device is by no means free from doubt, we are inclined, in view of the extensive use to which these springs have been put by manufacturers of wagons, to resolve that doubt in favor of the patentee, and sustain the patent."

We think, therefore, we are within the principle and reasoning of these cases in reversing the decree of the court below dismissing the bill, and in remanding the record, with directions to proceed in the case in conformity with this opinion.

(148 U. S. 657)

GIOZZA v. TIERNAN, Sheriff.

(April 10, 1893.)

No. 185.

INTOXICATING LIQUORS — CONSTITUTIONALITY OF LICENSE LAWS.

The Texas law, (2 Sayles' Civil St. p. 124, art. 3226a, § 4) requiring an applicant for liquor license to execute in advance a bond, in the penalty of $5,000, payable to the state, and conditioned that he will not sell liquor to any person after having been notified by an officer, or by certain relatives of such person, not to do so, any of whom are authorized to sue on the bond in case of a breach, and further imposing a state and county occupation tax, and requiring payment of all taxes a year in advance, is not in conflict with the fourteenth amendment to the constitution of the United States, providing that the privileges and immunities of citizens shall not be abridged by state laws, and that no state shall deprive any citizen of property without due process of law, nor deny to any person the equal protection of the laws.

Appeal from the circuit court of the United States for the eastern district of Texas.

Application by Francois Giozza for a writ of habeas corpus to release him from the custody of Patrick Tiernan, sheriff of Galveston county, by whom he was held under

a capias issued from the state criminal court. The circuit court remanded the prisoner, who thereupon appealed to this court. Affirmed.

Statement by Mr. Chief Justice FULLER:

Francois Giozza was indicted in the criminal district court of Galveston county, Tex., upon the charge of having pursued the occupation of selling spirituous, vinous, and malt liquors, in quantities of less than one quart, without having first obtained a license therefor, and was tried, convicted, and fined in the sum of $450. He thereupon carried the case, by appeal, to the court of appeals of Texas,—the court of last resort in criminal cases,—which affirmed the judgment. Subsequently he was arrested and held in custody by Patrick Tiernan, as sheriff of Galveston county, by authority of a capias issued by the criminal court, until the fine and costs were paid. Thereupon he applied for and obtained from the circuit court of the United States for the eastern district of Texas a writ of habeas corpus.

The petition for the writ set forth that, by the laws of the state, no person is permitted to obtain a license to pursue the occupation of selling liquor until such person has given a bond, in the sum of $5,000, payable to the state of Texas, and containing, among other conditions, the condition, in *658 substance, that the person giving such bond will not sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to any person, after having been notified in writing, through the sheriff or other peace officer, by the wife or mother or daughter or sister of such person, not to sell to such person; that such bond may be sued on at the instance of any person so notifying, and aggrieved by the violation of such condition in said bond, and such person so notifying shall be entitled to recover the sum of $500 as liquidated damages for an infraction of such condition, etc. And petitioner charged that it was not competent for the legislature of the state of Texas to impose the condition above stated as a condition precedent to the obtaining of a license to pursue said occupation, and that the statute, in so far as it imposed such condition, operated as a denial of the equal protection of the laws, and deprived petitioner of his property without due process of law, and was repugnant to the fourteenth amendment of the constitution of the United States. Petitioner further alleged that, in order to obtain a license to pursue the occupation aforesaid, all persons desiring to engage therein are required to pay the occupation tax imposed thereon in advance, for a period not less than 12 months, and to pay the tax imposed by the state and by the commissioners' courts of the several counties, and by the cities and towns wherein such occupation is carried on, and to obtain a license from the county clerk of the county in which said occupation is carried on, for which license the sum of 25 cents is required to be paid, while all other persons pursuing all other occupations than the one pursued by petitioner are permitted by the laws of said state to pay the occupation tax on said occupations for each three months or quarterly, and no persons pursuing other taxable occupations than that pursued by appellant in cities and towns are required to pay the occupation tax imposed by such cities or towns as a prerequisite to obtaining a license to pursue such occupations, and no persons pursuing any taxable occupations other than that pursued by petitioner are required to obtain a license from such county clerk, or to pay therefor any sum.

Petitioner charged that, under the laws aforesaid, he was denied the equal protection of the laws and deprived of his property without due process of law, and that those laws were repugnant to the constitution and laws of the United States.

The petition further averred that the laws of the state, of which petitioner complained, had been pronounced and adjudged by the court of appeals to be valid laws, and not contrary to, and not inhibited by, the constitution of the United States.

A copy of the indictment was annexed to the petition, wherefrom it appeared that Giozza was charged with unlawfully and willfully pursuing the occupation aforesaid without first having obtained a license, and that he had not paid the tax thereon, and was indebted to the state in the sum of $300 occupation tax, and to the county in the sum of $150 occupation tax; the commissioners' court of Galveston county having levied a tax on said occupation of one half the amount levied by the state thereon.

The sheriff made due return that he held Giozza in his custody by the authority aforesaid, and attached thereto copies of the indictment, the capias, and the judgment of the court of appeals.

Upon the hearing the circuit court adjudged that Giazzo was not unlawfully restrained of his liberty and remanded him to the custody of the sheriff, and thereupon brought the case to this court by appeal.

The statute in question provided in its first section for the levy upon any person, firm, or association of persons engaged in the occupation of selling spirituous, vinous, or malt liquors, or medicated bitters, of an annual tax of $300 for selling such liquors or bitters in quantities less than one quart. Under the second section the commissioners' court had power to levy and collect taxes upon the occupations named, equal to one half of the state tax, and cities and towns were empowered to levy an additional tax. By the third section, all the taxes were required to be paid in advance for a period of not less than 12 months. The fourth section required the giving of a bond, as sufficiently stated in the petition. Under sec-

660 tion 5, the county clerks in the several counties were authorized to issue licenses upon payment by the applicant of all occupation taxes levied by or under the act. The evidence of the payment of the taxes upon such application was the receipt of the county collector of taxes. For issuing the license the clerk was entitled to receive a fee of 25 cents for each license. 2 Sayles' Tex. Civil St. p. 124, art. 3226a.

Article 110 of the Texas Penal Code reads: "Any person who shall pursue or follow any occupation, calling, or profession, or do any act, taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum;" and by article 112 it is provided that any person prosecuted shall have the right, at any time before conviction, to have the prosecution dismissed, on payment of the taxes and costs of prosecution, the procuring of the license, etc. Willson, Crim. Tex. St. pt. 1, p. 47.

Section 20 of article 16 of the constitution of Texas is as follows: "The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town, or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

Section 42 of the same article provides that "the legislature may establish an inebriate asylum for the cure of drunkenness and reform of inebriates."

It was contended, also, that the court should take judicial notice that in 1887 a vote was taken upon a proposed amendment to the state constitution, prohibiting the manufacture, sale, and exchange of intoxicating liquors except for medical, sacramental, and scientific purposes, which was rejected by a large majority.

J. M. Burroughs, for appellant. C. A. Culberson, for appellee.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered *661 the opinion of the court.

*As upon the face of the petition it appeared that the validity of the statute of which appellant complains was drawn in question in the state court on the ground of its repugnancy to the constitution of the United States, and the decision was in favor of its validity, the remedy which should have been sought was by writ of error. But since the circuit court held that petitioner was not illegally restrained of his liberty, and the contention was that the proceedings against him were wholly void because the statute regulating the sale of liquors was void, we will not dispose of the case on the narrower ground.

Irrespective of the operation of the federal constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitution. There is nothing in the constitution of Texas restricting the power of the legislature in reference to the sale of liquor, and it is well settled that the legislature of that state has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions, and limitations as the legislature may deem proper. Ex parte Bell, 24 Tex. Ct. App. 428, 6 S. W. Rep. 197; Bell v. State, 28 Tex. Ct. App. 96, 12 S. W. Rep. 410. In these cases, and in the case before us, the law in question was held to be within the legislative power; and, so far as the state constitution is concerned, that conclusion is not re-examinable here. But it is contended that the act conflicts with the provisions of the fourteenth amendment,—that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States, *and the right to *662 sell intoxicating liquors is not one of the rights growing out of such citizenship. Bartemeyer v. Iowa, 18 Wall. 129.

The amendment does not take from the states those powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all, under like circumstances, in the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order. Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. Rep. 357; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930.

Nor in respect of taxation was the amendment intended to compel the state to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates, or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one, as against another of the same class. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. Rep. 533; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. Rep. 593; Pacific

Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. Rep. 250. And due process of law, within the meaning of the amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577.

This statute affects all persons in Texas engaged in the sale of liquors, in exactly the same manner and degree. Whether considered as imposing restrictions upon the sale in the exercise of the police power of the state, or as levying taxes upon occupations under authority of the legislature in that behalf, petitioner was not arbitrarily deprived of his property, nor denied the equal protection of the laws.

Repeated decisions of this court have determined that such legislation is not in violation of the constitution. Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. Rep. 13; Eilenbecker v. Plymouth Co., 134 U. S. 31, 10 Sup. Ct. Rep. 424; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. Rep. 8, 97.

The decree of the circuit court is affirmed.

(148 U. S. 562)

UNITED STATES v. UNION PAC. RY. CO. et al.

(April 10, 1893.)

No. 149.

PUBLIC LANDS—AID TO RAILROADS—KANSAS PACIFIC AND DENVER PACIFIC GRANTS.

1. By the act of July 1, 1862, (12 St. p. 489, c. 120,) as amended by the act of July 2, 1864, (13 St. p. 356, c. 216,) a Kansas corporation, thereafter known as the Union Pacific Railroad Company, Eastern Division, and later as the Kansas Pacific Railway Company, was authorized to build a railroad from the Missouri river westward to connect with the Union Pacific at its eastern terminus, which was to be at some point on the 100th meridian; and a land grant of alternate sections within 20 miles of each side of the road was given to said corporation. By the act of July 3, 1866, (14 St. p. 79, c. 159,) it was authorized to so change the line of its definite location as to make the connection not more than 50 miles west of the meridian of Denver. Thereafter the line was located westward to Denver; thence northward to connect with the Union Pacific at Cheyenne. The act of March 3, 1869, (15 St. p. 324, c. 127,) authorized the said corporation to contract with a Colorado corporation for the building and operation of that part of its road lying between Denver and Cheyenne, and to grant the perpetual use of its right of way and other property to the Colorado corporation. It was further provided that each corporation should receive patents for alternate sections along their respective lines in like manner as had been formerly provided for the Kansas corporation. It was made the duty of the two corporations to build and operate a continuous line from Kansas City by way of Denver to Cheyenne, and all existing provisions for the operation of the Union Pacific, its branches and connections, as a continuous line, were continued in force. *Held*, that the act of 1869 recognized the location to Cheyenne by way of Denver as valid under the act of 1866, and that the line was continuous from the Missouri to its connection with the Union Pacific, within the meaning of said act. 37 Fed. Rep. 551, affirmed.

2. There were not two separate grants, each terminating at Denver, by lines drawn at right angles to the course of the respective roads, thus excluding lands lying to the southwest, (being on the exterior of the right angle made by the two roads;) but there was one continuous grant, which included such lands. The fact that a land-grant road makes a curve or right angle does not render the grant inoperative at that point, for there is no requirement that the sections granted shall be reached by a line run at right angles to the road.

3. A uniform construction put upon a land-grant act by the land office and department of the interior for 18 years, and under which lands have been put upon the market and sold, should have considerable weight in determining the meaning of doubtful language in the statute.

Appeal from the circuit court of the United States for the district of Colorado.

In equity. Bill by the United States against the Union Pacific Railway Company and 173 others for the cancellation of certain land patents. Upon demurrers and a plea the bill was dismissed. 37 Fed. Rep. 551. Complainant appeals. Affirmed.

Statement by Mr. Justice BROWN:

"This case arose upon demurrers and a plea to a bill in equity filed by the United States against the Union Pacific Railway Company and 173 other corporations and individuals to procure the surrender and cancellation of certain land patents issued to the Kansas Pacific Railway and the Denver Pacific Railway & Telegraph Company, and for a decree declaring all conveyances of such lands clouds upon the title of the United States.

The bill averred, in substance, that by an act of congress of July 1, 1862, (12 St. p. 489,) incorporating the Union Pacific Railroad Company, such company was authorized to construct a road from a point on the 100th meridian of longitude, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, to the western boundary of Nevada, and was granted every odd-numbered section of land, amounting to 5 alternate sections of land per mile, afterwards extended to 10 sections by the act of July 2, 1864, (13 St. p. 356,) on each side of said railroad, on the line thereof, and within the limits of 10 miles (subsequently increased to 20) on each side of the road; and that whenever the company should have completed 40 consecutive miles of its road (afterwards reduced to 20, by the same act of 1864) patents should issue for such public lands as had been granted to it, and had been earned in accordance with the provisions of the act.

By the same act it was further provided that the Leavenworth, Pawnee & Western Railroad Company, which had been chartered by the territory of Kansas in 1855, was authorized to construct a line of road

from the Missouri river, at the mouth of the Kansas river, to the aforesaid point on the 100th meridian. The corporate name of the said Leavenworth, Pawnee & Western Railroad Company of Kansas was, subsequently to the passage of this act, changed to that of the Union Pacific Railroad Company, Eastern Division.

On July 3, 1866, congress passed another act, (14 St. p. 79,) amending those of July 1, 1862, and July 2, 1864, and providing that the Union Pacific Railway Company, Eastern Division, should be authorized to so change the line of its definite location as to connect with the Union Pacific Railroad at a point not more than 50 miles westward from the meridian of Denver, in Colorado.

The bill further averred that after the passage of this act of July 3, 1866, the Union Pacific Railway Company, Eastern Division, so changed its line of definite location as to make the same extend from its point of beginning at Kansas City, Mo., westward, and substantially in a direct line to the city of Denver, Colo., and from that point northward and substantially in a direct line to a connection with the Union Pacific Railroad at Cheyenne, Wyo., and proceeded to build its road on that line towards Denver.

Before the Union Pacific had completed its line to Denver, and on March 3, 1869, congress passed another act, (15 St. p. 324,) authorizing the Union Pacific Railway Company, Eastern Division, to contract with the Denver Pacific Railway & Telegraph Company, a Colorado corporation, for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver and its point of connection with the Union Pacific Railroad at Cheyenne, and to adopt the roadbed already graded by the said Denver Pacific Railway & Telegraph Company as said line, and to grant to said Denver Pacific Railway & Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all its rights and privileges subject to all *565 the obligations pertaining to said part of its line. It was also made the duty of such road to extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed a continuous line of railroad and telegraph from Kansas City by way of Denver to Cheyenne. It was further declared (section 2) that "all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same way as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division." It was further provided that each of said companies should receive patents to alternate sections of land along their respective lines of road, as therein defined, in like manner, and within the same limits, as provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division. Upon the same day a joint resolution was passed, (15 St. p. 348,) authorizing the Union Pacific Railway Company, Eastern Division, to change its name to the Kansas Pacific Railway Company.

In pursuance of these acts the new Kansas Pacific Railway Company entered into a contract with the Denver Pacific of the nature and for the purpose set out and authorized by the acts, and in pursuance thereof the Kansas Pacific completed its line to Denver, and the Denver Pacific completed its line from Denver to Cheyenne.

The bill thereupon charges that in procuring the passage and accepting the terms of the act of March 3, 1869, the Kansas Pacific abandoned its intention of building a line of road to connect with the Union Pacific at Cheyenne, and, therefore, that Denver became the terminus of its road, and the company surrendered all its rights to that portion of the land grant lying beyond its terminus at Denver, and by operation of this act sections of public land within prescribed limits were granted to the Denver Pacific as a new and independent grant; that, the Kansas Pacific and the Denver Pacific having completed their lines of road, they respectively became entitled to certain portions of the land grant independently of each other, notwithstanding the fact that, through their connections at *566 Denver, they formed a continuous line of railway from Kansas City to Cheyenne; and their rights to public lands, under the several acts aforesaid, extended only laterally along the lines of said roads respectively, and were comprised and limited by lines drawn through the terminus of each of said roads at right angles to the general direction of the lines of said roads. The bill then referred to a map, Exhibit A, as showing the lines of said roads as connected at the city of Denver, their general courses and directions as they extend eastwardly and northwardly from the city of Denver, and the lines by which the rights of said respective companies to public lands, under the acts aforesaid, are limited; that west of the legal terminal limit of the Kansas Pacific land grant, and south of the legal terminal limit of the Denver Pacific land grant, lies a large triangular tract of land of about 200,000 acres, substantially within a radius of 20 miles of the point of connection of the two roads at Denver, which the bill alleges was not within the legal limit of the land grant to either of the two companies, and to the odd-numbered sections of which they asserted claim, and for which they procured patents from the interior department, the surrender and cancellation of which said patents it was the object of the bill to secure.

The bill further alleged the consolidation, in January, 1880, of the Kansas Pacific and

the Denver Pacific and the Union Pacific Railroad Companies into one corporation, under the corporate name of the Union Pacific Railway Company, which became the successor in interest of the three prior corporations; that certain persons, who were made defendants to the bill, claimed title to certain lands of this tract by direct or mesne conveyances from these companies, of the exact nature of which titles plaintiff is ignorant; that under an act of March 3, 1887, providing for the adjustment of land grants made by congress to aid in the construction of railroads, etc., the secretary of the interior ascertained that the lands described in the bill had been erroneously and illegally patented, as herein set out, and thereupon made a demand upon the [95] Union Pacific Railway Company, as successor in interest to the others, for a reconveyance of the tracts of land so erroneously patented, which was refused.

The persons claiming title under these patents having been made parties to the bill, it prayed that the patents and other outstanding deeds and other evidences of title be decreed to be void and surrendered for cancellation as clouds upon the plaintiff's title, and for such other relief as might seem proper.

To this bill demurrers were filed by most or all the defendants, except one Standley, who filed a plea setting up divers statutes and decisions in the land office, upon which it is claimed the patents rested, but which need not be specifically stated. Upon the hearing upon these demurrers and plea the court made an order sustaining them, (37 Fed. Rep. 551,) and, the plaintiff having elected to stand by its bill as originally filed, it was further ordered that the same be dismissed. Thereupon the plaintiff appealed to this court.

Asst. Atty. Gen. Maury, for the United States, appellant. John F. Dillon and Harry Hubbard, for appellees.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The object of this bill is to procure the surrender and cancellation of certain patents issued for a triangular tract of land of about 200,000 acres in extent, lying upon the outside of the right angle, or elbow, made by the junction at Denver of the Kansas Pacific Railway, whose general course is east and west, with the Denver Pacific Railway & Telegraph Company, whose general course is north and south. These roads are now consolidated under the name of the Union Pacific Railway Company.

[95] By the original act of July 1, 1862, incorporating the Union Pacific Railroad Company, (12 St. p. 489,) this company was empowered to construct a road from a point on the 100th meridian, between certain north and south limits, to the western boundary of Nevada, and by the same act a Kansas corporation was empowered to construct its line from the Missouri river westwardly to the initial point of the Union Pacific at the 100th meridian, and to connect with the latter road at that point. Subsequently, and in 1866, the Kansas corporation, whose name had meantime been changed to the Union Pacific, Eastern Division, was authorized to so change its line as to connect with the Union Pacific at a point not more than 50 miles westward from the meridian of Denver. Acting upon this, the company did change its line so as to make the same extend from Kansas City westward in a direct line to Denver, and thence northward in a direct line to Cheyenne. By the original act the Union Pacific was to receive a grant of 5 alternate sections of land for every mile (subsequently raised to 10) on each side of the road, and, as the Kansas corporation was to construct its road "upon the same terms and conditions in all respects" as the Union Pacific, it followed that it was entitled to the same land grant. The act authorizing the Kansas corporation to change its line of road (14 St. p. 79) provided that, upon the filing of a map showing the general route of the road, the lands along the entire line thereof, so far as the same might be designated, should be reserved from sale by order of the secretary of the interior, showing clearly that it was designed to preserve the land grant to which the road was entitled under the original act.

In this condition of things the act of 1869 was passed, which authorized this corporation, then known as the Union Pacific, Eastern Division, to contract with the Denver Pacific, a Colorado corporation, for the construction of that portion of its line between Denver and Cheyenne, (hereby clearly recognizing the validity of the change of location,) to adopt its roadbed, to grant the Denver Pacific a "perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations appertaining to such part of its line." Even supposing that the act of 1866 did not, upon its face, authorize the change that was actually made,—that is, westwardly to Cheyenne, by the way of Denver,—it is clear that by the act of March, 1869, this line was recognized as a proper compliance with the act of 1866, and as a valid and continuous line from Kansas City to Cheyenne.

The position of the government in this connection is that the act of 1869 separated the grant of lands to the Denver Pacific from that in aid of the Eastern Division of the Union Pacific, and thereby made them two distinct and independent lines of road, each with its own land grant. This construction would disentitle the Kansas Pacific

Company to any lands west of its terminus at Denver, or west of a north and south line across its 20-mile limit, and the Denver Pacific to any lands south of its terminus at the same place, leaving a triangular piece of about 200,000 acres to revert to the government. These are the lands in dispute.

We do not, however, so read the act. It did not declare that the Union Pacific, Eastern Division, should end at Denver, or that the Denver Pacific should begin at Denver, but simply that the former might contract with the latter for the construction, operation, and maintenance of a part of its line. Under the interpretation contended for, if that part had been between the 100th meridian and Denver, instead of between Denver and Cheyenne, it would thereby have made a distinct and independent line of road, though running in the same direction.

It is true that, under the original act of 1862, the grant was limited to the odd-numbered sections "on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road," but it does not follow that, if the road makes a curve or right angle, the grant ceases in any way to be operative at that point. The railroad is entitled to its grant of 10 alternate sections to each mile of road, and is entitled to have it selected within the limits of 20 miles on each side; but there is no requirement that the lands shall be reached by a line run at right angles to the road. Considerable light is thrown upon the interpretation of the statute of 1869 by the phraseology of section 2, which provides that the Union Pacific, Eastern Division, shall extend its line to Denver, "so as to form with that part of its line herein authorized to be constructed" by the Denver Pacific "a continuous line of railroad and telegraph from Kansas City by way of Denver to Cheyenne," and that "all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the Union Pacific Railway Company, Eastern Division." So far from this language indicating that this was not to be considered a single line, it is difficult to see how congress could have expressed more clearly, by inference, that they were not to be treated as independent roads. This construction is also reinforced by the amendatory act of June 20, 1874, (18 St. p. 111,) which provides that "for all the purposes of said act, [of 1862,] and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, 1869."

Indeed, it is difficult to avoid the conclusion that the act of 1862 being a grant in praesenti, the rights of the Union Pacific, Eastern Division, to the lands upon each side of its road became fixed from the moment it proceeded, under the act of 1866, to establish its line of definite location so as to make the same extend from Kansas City westwardly to Denver, and thence northwardly to Cheyenne; and, in fact, that was practically the ruling of this court in Missouri, etc., Ry. Co. v. Kansas Pac. R. Co., 97 U. S. 491, 496–498. But, however this may be, it is entirely clear that the act of 1869 should not be construed to have the effect of breaking the continuity of the line unless its language imperatively requires it. So far from this being the case, the very title of the act, "to authorize the transfer of lands" granted to the Union Pacific to the Denver Pacific, "and to expedite the completion of railroads to Denver," indicates that it was never intended to operate as a forfeiture, or as a reduction in amount, of any lands to which the Union Pacific, Eastern Division, had become entitled by filing its line of definite location, or to create distinct lines of road, but was merely designed to permit the Union Pacific to contract with the Denver Pacific for the construction, operation, and maintenance of a portion of its line. It is true that by the third section, which authorizes the "said companies" to mortgage "their respective portions of said road," and provided that "each of said companies shall receive patents to the alternate sections of land along their respective lines," the two corporations were thereby recognized as independent, yet, at the same time, it recognized them as two corporations engaged in the construction of the same line of road, and evidently contemplated a division between them of the land grant appropriated to such line. The special proviso of section 3 was doubtless inserted to entitle the Denver Pacific to take patents for its portion of the land granted, direct from the United States.

In addition to all this, the facts set forth in the plea of Joseph Standley, which, for the purposes of this case, may be taken as true, indicate very strongly an acquiescence of the interior department from the date of the act of March 3, 1869, down to December, 1887, a period of over 18 years, in the construction of the act contended for by the defendant. The plea set forth that in compliance with the act of 1866 the Union Pacific, Eastern Division, filed with the secretary of the interior a map of the general route of its line from the western boundary of Kansas, through Denver, to Cheyenne, and that the secretary of the interior on the same day directed the withdrawal of lands in Colorado on the designated line of said route; that, in pursuance of said direction, the commissioner of the land office prepared a diagram showing the line of route, and the map of the land grant,

*574 and forwarded the same to the register and receiver of the land office at Denver, directing the odd-numbered sections to be withdrawn on account of this grant; that, included in said diagram, are all the lands mentioned in the bill; that these lands were so withdrawn in accordance with these instructions; that this map of the general route was the only one ever filed; that the directions to withdraw these lands were never vacated; that on August 21, 1869, the Denver Pacific filed its map of definite location of the section between Denver and Cheyenne, which was approved by the secretary of the interior; that on May 26, 1870, the Kansas Pacific also filed its map of definite location between the boundary of Kansas and Denver, which was approved by the secretary of the interior; that, under his directions, the commissioner of the general land office prepared maps showing the limits of the land grants; that included in these maps were all the lands described in the bill; and that in 1870, a contest having arisen between the two roads as to the ownership of certain sections, an adjustment was had by the department of the interior of their several rights.

The plea further avers that, in 1873, in a case then pending in the general land office between the Kansas Pacific and one William Hodge and John Tracy, the commissioner of the land office formally decided that the act of 1869 did not sever the original grant to the Union Pacific, but that the grant was a continuous one through Denver to Cheyenne; that his ruling in that particular was affirmed in 1874 by the acting secretary of the interior; and that this was the uniform construction put upon the act until 1887, when the department reversed its former decision, and for the first time held that the lands covered by the bill were not included within the land grant to either road.

If there were any doubts with regard to the interpretation of the act of 1869, the construction placed upon it by the land department for 18 years, under which construction these lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight.

We have no doubt of the correctness of the conclusion reached by the court below, and its decree is therefore affirmed.

(148 U. S. 503)

STATE OF VIRGINIA v. STATE OF TENNESSEE.

(April 3, 1893.)

No. 3. Original.

CONSTITUTIONAL LAW—"COMPACT" BETWEEN STATES — ADOPTION OF BOUNDARY SETTLEMENT — IMPLIED CONSENT OF CONGRESS — ACQUIESCENCE—COLONIAL CHARTERS.

1. The mere selection of parties to settle a boundary line between two states, and a legislative adoption of their report by one of the states, does not amount to a "compact" or "agreement" between states, which they are forbidden by the constitution to make without the consent of congress, until the one state has adopted the report in consequence of its adoption by the other, nor even then unless the boundary established leads to the increase or decrease of the political power or influence of the states affected.

2. The consent of congress to such an agreement may be implied from circumstances, and need not be given in express terms. The fact that congress observed the boundary as thus settled in the assignment of districts for judicial, revenue, election, and federal appointment purposes, for a long succession of years, sufficiently establishes such consent.

3. The charter from the British crown to the original proprietors of the Carolinas provided for the beginning of their northern boundary at a point "within or about 36 deg. 30 min. northern latitude, and so west in a direct line." Several efforts were made to establish this line after the colonies became states, but it remained in dispute until the state of Tennesssee was formed from the western part of the state of North Carolina, after which the states of Virginia and Tennessee appointed a joint commission to settle the boundary, and in the year 1803 the two states adopted a report of the commission by which the boundary was settled, but not upon the exact parallel of latitude mentioned in the British charter, the effect of which was to include within the state of Tennessee a strip of land several miles wide, which, if the parallel in question had been followed, would have lain within the state of Virginia. *Held*, that the state of Virginia, having acquiesced in such boundary for more than 85 years, could not require a new boundary to be run upon the parallel described.

4. Under such circumstances, the boundary should not be disturbed because of errors in the demarcation of the line adopted, nor because of misapprehension of facts in respect of such demarcation.

5. The call "within or about the 36 deg. 30 min. northern latitude, and so west in a direct line," did not require that the parallel of latitude mentioned should be strictly followed.

Bill in equity by the state of Virginia against the state of Tennessee to establish the boundary between the two states.

R. Taylor Scott, R. W. Ayers, and W. F. Rhea, for complainant. G. W. Pickle, N. M. Taylor, Thos. Curtin, C. J. St. John, A. L. Demoss, and A. S. Colyer, for defendant.

*Mr. Justice FIELD delivered the opinion of the court.

This is a suit to establish by judicial decree the true boundary line between the states of Virginia and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between states, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts.

The state of Virginia, as the complainant,

summoning her sister state, Tennessee, to the bar of this court,—a jurisdiction to which the latter promptly yields,—sets forth in her bill the sources of her title to the territory embraced within her limits, and also of the title to the territory embraced by Tennessee.

The claim of Virginia is that by the charters of the English sovereigns, under which the colonies of Virginia and North Carolina were formed, the boundary line between them was intended and declared to be a line running due west from a point on the Atlantic ocean on the parellel of latitude 36 deg. and 30 min. N., and that the state of Tennessee, having been created out of the territory formerly constituting a part of North Carolina, the same boundary line continued between her and Virginia; and the contention of Virginia is that the boundary line claimed by Tennessee does not follow this parallel of latitude, but varies from it by running too far north, so as to unjustly include a strip of land about 113 miles in length, and varying from 2 to 8 miles in width, over which she asserts and unlawfully exercises sovereign jurisdiction.

*505 On the other hand, the claim of Tennessee is that the *boundary line, as declared in the English charters, between the colonies of Virginia and North Carolina, was run and established by commissioners appointed by Virginia and Tennessee after they became states of the Union, by Virginia in 1800, and by Tennessee in 1801, and that the line they established was subsequently approved in 1803 by the legislative action of both states, and has been recognized and acted upon as the true and real boundary between them ever since, until the commencement of this suit, a period of over 85 years; and the contention of Tennessee is that the line thus established and acted upon is not open to contestation as to its correctness at this day, but is to be held and adjudged to be the real and true boundary line between the states, even though some deviations from the line of the parallel of latitude 36 deg. and 30 min. N. may have been made by the commissioners in the measurement and demarcation of the line.

In order to clearly understand and appreciate the force and effect to be accorded to the respective claims and contentions of the parties, a brief history of preceding measures should be given, with reference to the charters and legislation under which they were taken.

On the 23d of May, 1609, James the First of England, by letters patent, reciting previous letters, gave to Robert, Earl of Salisbury, Thomas, Earl of Suffolk, and divers other persons associated with them, a charter which organized them into a corporation by the name of the "Treasurer & Company of Adventurers & Planters of the City of London," for the first colony of Virginia, and granted to them all those lands and territories lying "in that part of America called 'Virginia,' from the point of land called 'Cape or Point Comfort,' along the seacoast to the northward 200 miles, and from the said point of Cape Comfort along the seacoast to the southward 200 miles, and all that space and circuit of land lying from the seacoast of the precinct aforesaid up into the land throughout, from sea to sea, west and northwest;" and "also all the islands lying within 100 miles along the coast of both seas of the precinct aforesaid."

On the 24th of March, 1663, Charles the Second of England granted to Edward, Earl of Clarendon, and others of his subjects, all that territory within his dominion of America "extending from the north end of the island called 'Lucke Island,' which lieth in the Southern Virginia seas, and within six and thirty degrees of the northern latitude, and to the west as far as the South seas, and so southerly as far as the river Mathias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so west in a direct line as far as the South seas aforesaid," and gave them full authority to organize and govern the territory granted under the name of the "Province of Carolina."

*506 *On the 30th of May, 1665, Charles the Second granted to the above proprietors of Carolina a charter, confirming the previous grant, and enlarging the same so as to include the following described territory: All that province and territory within America "extending north and eastward as far as the north end of Currituck river or inlet, upon a straight westerly line to Wyonoke creek, which lies within or about the degrees of thirty-six and thirty minutes northern latitude; and so west in a direct line as far as the South seas; and south and westward so far as the degrees of twenty-nine inclusive of northern latitude; and so west in a direct line as far as the South seas."

The northern and southern settlements of Carolina were separated from each other by nearly 300 miles, and numerous Indians resided upon the intervening territory; and, though the whole province belonged to the same proprietors, the legislation of the settlements was by different assemblies, acting at times under different governors. Early in 1700 the northern part of the province was sometimes called the "Colony of North Carolina," although the province was not divided by the crown into North and South Carolina until 1732. Story, Const. § 137. Previously to this division the settlements on the borders of Virginia, and of what was called the "Colony of North Carolina," had largely increased, and disputes and altercations frequently occurred between the settlers, growing out of the *unlocated boundary* 507 between the provinces. Virginians were charged with taking up lands, under titles of the crown, south of the proper limits of their province, and Carolinians were charged

with taking up lands which belonged to the crown with warrants from the proprietors. The troubles arising from this source were the occasion of much disturbance to the communities, and various attempts were made by parties in authority in the two provinces to remove the cause of them. Previously to January, 1711, commissioners were appointed on the part of Virginia and North Carolina to run the boundary line between them, and proclamations were made forbidding surveys of the grounds until that line within the disputed limits should be marked. But these efforts for the settlement of the difficulties were unavailing.

In January, 1711, commissioners were again appointed, but failed, for want of the requisite means to accomplish their intended object.

In 1728 an attempt to settle the difficulties was renewed, but, as on previous occasions, it failed. The commisssioners of the colonies met, but they could not agree at what place to fix the latitude 36 deg. 30 min. N., nor upon the place called "Wyonoke," and they broke up without doing anything. The governors of North Carolina and Virginia then entered into a convention upon the subject of the boundary between the two provinces, and transmitted it to England for approval. The king and council approved of it, and so did the lords and proprietors, and returned it to the governors to be executed. The agreement was as follows:

"That from the mouth of Currituck river, setting the compass on the north shore thereof, a due west line shall be run and fairly marked; and, if it happen to cut Chowan river between the mouth of Nottaway river and Wiccacon creek, then the same direct course shall be continued towards the mountains, and be ever deemed the dividing line between Virginia and Carolina; but, if the said west line cuts Chowan river to the southward of Wiccacon creek, then from that point of intersection the bounds shall *505 be allowed to continue up the middle of Chowan river to the middle of the entrance into said Wiccacon creek, and from thence a due west line shall divide the two governments. That, if said west line cuts Blackwater river to the northward of Nottaway river, then from the point of intersection the bounds shall be allowed to be continued down the middle of said Blackwater to the middle of the entrance into said Nottaway river, and from thence a due west line shall divide the two governments.

"That, if a due west line shall be found to pass through islands, or cut out small slips of land, which might much more conveniently be included in one province or other, by natural water bounds, in such case the persons appointed for running the line shall have the power to settle the natural bounds, provided the commissioners on both sides agree thereto, and that all variations from the west line be punctually noted on the premises or plats, which they shall return to be put upon the record of both governments."

Commissioners were appointed by Virginia and North Carolina to carry this agreement into effect. They met at Currituck inlet in March, 1728. The variation of the compass was then found to be 3 deg. 1 min. and 2 sec. W. nearly, and the latitude 36 deg. 31 min. The dividing line between the provinces struck Blackwater 176 poles above the mouth of Nottaway. The variation of the compass at the mouth of Nottaway was 2 deg. 30 min. The line was afterwards extended to Steep Rock creek, 320 miles from the coast, by Commissioners Joshua Fry and Peter Jefferson, on the part of Virginia, and Daniel Weldon and William Churton, on the part of North Carolina.

In 1778 and 1779, Virginia and North Carolina, having become, by their separation in 1776 from the British crown, independent states, again took up the question of the boundary between them, and appointed commissioners to extend and complete the line from the point at which the previous commissioners, Fry and Jefferson and others, had ended their work, on Steep Rock creek, to Tennessee river. The commissioners undertook the work with which they were charged, but they could not find the line on Steep Rock creek, owing, as they supposed, to the large amount of timber which had decayed since it was marked. The report of their labors was signed only by the Virginia commissioners. Their report was, in substance, that after running the line as far as Carter's valley, 45 miles west of Steep Rock creek, the commissioners of Carolina conceived the idea that the line was further south than it ought to be, and, on trial, it appeared that there was a slight variation of the needle, which the Virginia commissioners thought arose from their proximity to some iron ore, that various expedients to harmonize the action of the commissioners were unavailing, and the Carolina commissioners, agreeing that they were more than two miles too far south of the proper latitude, measured off that distance directly north, and ran the line eastwardly from that place, superintended by two of the Carolina and one of the Virginia commissioners, while from the same place it was continued westwardly, superintended by the others, for the sake of expediting the business. The Virginia commissioners subsequently became satisfied that the first line run by them was correct, and they therefore continued it from Carter's valley, where it had been left, westward to Tennessee river. The North Carolina commissioners carried their line as far as Cumberland mountains, protesting against the line run by the Virginia commissioners.

This was in 1779 and 1780. The line adopted by the Virginia commissioners was known as the "Walker Line," and the line

adopted by the commissioners of North Carolina was known as the "Henderson Line." Walker's line was approved by the legislature of Virginia in 1791, but it never received the approval of the legislature of Tennessee. Previously to the appointment of these commissioners, and on the 6th of May, 1776, the state of Virginia, in a general convention, with that generous public spirit which on all occasions since has characterized her conduct in the disposition of her claims to territory under different charters from the English government, had declared that the territories within the charters erecting the colonies of Maryland, Pennsylvania, North Carolina, and South Carolina were thereby ceded and *510 forever confirmed to the people of those colonies, respectively. On the *25th of February, 1790, North Carolina ceded to the United States the territory which afterwards became the state of Tennessee, and which was admitted into the Union on the 1st of June, 1796. Subsequently the states of Virginia and Tennessee both took steps for the final settlement of the controversy as to the boundary between them. On the 10th of January, 1800, the house of delegates of the general assembly of Virginia adopted the following resolution:

"Whereas, it is represented to the present general assembly that the people living between what are called 'Walker's' and 'Henderson's' lines, so far as the same run between the state of Tennessee and this state, do not consider themselves under either the jurisdiction of that or this state, and therefore refuse the payment of any taxes to either of said states, or to the collectors of either for the general government, because the state of North Carolina, on the 25th of February, 1790, ceded the said state of Tennessee, then called the 'Southwestern Territory,' to the government of the United States; and therefore the act entitled 'An act concerning the southern boundary of this state,' passed on the 7th of December, 1791, in this legislature, to establish the line commonly called 'Walker's Line' as the boundary between North Carolina and this state, could only bind the state of North Carolina as far as her territorial limits extended on the line of this state, and could not bind the said Southwestern Territory, which had previously been conveyed, as aforesaid; and

"Whereas, since the said cession, the general government hath erected the said Southwestern Territory into an independent state, by their act, June 1st, 1796, whereby it has become the duty of the said state of Tennessee and of this state to settle all differences between them with respect to the said boundary line:

"Resolved, therefore, that the executive be authorized and requested to appoint three commissioners, whose duty it shall be to meet commissioners to be appointed by the state of Tennessee, to settle and adjust all differences concerning the said boundary line, and to establish the one or the other of the *511 said lines, as the case may be, or to run any other line which may be agreed on, for settling the same; and that the executive be also requested to transmit a copy of this resolution to the executive authority of the state of Tennessee."

On the 13th of January, 1800, this resolution was agreed to by the senate.

On the 13th day of November, 1801, the general assembly of Tennessee passed an act on the same subject, the first section of which is these words:

"Be it enacted by the general assembly of the state of Tennessee, that the governor, for the time being, is hereby authorized and required, as soon as may be convenient after the passing of this act, to appoint three commissioners on the part of this state, one of whom shall be a mathematician capable of taking latitude, who, when so appointed, are hereby authorized and empowered, or a majority of them, to act in conjunction with such commissioners as are or may be appointed by the state of Virginia to settle and designate a true line between the aforesaid states."

The second section is as follows:

"And whereas, it may be difficult for this legislature to ascertain with precision what powers ought of right to be delegated to the said commissioners: Therefore,

"Be it enacted, that the governor is hereby authorized and required, from time to time, to issue such power to the commissioners as he may deem proper for the purpose of carrying into effect the object intended by this act, consistent with the true interest of the state."

On the 22d day of January, 1803, a report having been made by the commissioners, which is copied into the act, the legislature of Virginia ratified what had been done in the following act:

"Whereas, the commissioners appointed to ascertain and adjust the boundary line between this state and the state of Tennessee, in conformity to the resolution passed by the legislature of this state for that purpose, have proceeded to the execution of that business, and made a report thereof in the words, following, to wit:

*512 * * "The commissioners for ascertaining and adjusting the boundary line between the states of Virginia and Tennessee appointed pursuant to public authority on the part of each, namely, General Joseph Martin, Creed Taylor, and Peter Johnson, for the former, and Moses Fisk, General John Sevier, and General George Rutledge, for the latter, having met at the place previously appointed for that purpose, and not uniting, from the general result of their astronomical observations, to establish either of the former lines called "Walker's" and "Henderson's," unanimously agreed, in order to end all controversy respecting the subject, to run a due west line

equally distant from both, beginning on the summit of the mountain generally known by the name of "White Top Mountain," where the northeastern corner of Tennessee terminates, to the top of Cumberland mountain, where the southwestern corner of Virginia terminates, which is hereby declared to be the true boundary line between the said states, and has been accordingly run by Brice Martin and Nathan B. Markland, the surveyors duly appointed for that purpose, and marked under the directions of the said commissioners, as will more at large appear by the report of the said surveyors, hereto annexed, and bearing equal date herewith.

" '(2) And the said commissioners do further unanimously agree to recommend to their respective states that individuals having claims or titles to lands on either side of the said line, as now fixed and agreed on, and between the lines aforesaid, shall not, in consequence thereof, in anywise be prejudiced or affected thereby; and that the legislatures of their respective states should pass mutual laws to render all such claims or titles secure to the owners thereof.

" '(3) And the said commissioners do further agree unanimously to recommend to their states, respectively, that reciprocal laws should be passed confirming the acts of all public officers, whether magistrates, sheriffs, coroners, surveyors, or constables, between the said lines, which would have been legal in either of the said states had no difference of opinion existed about the true boundary line.

*513 " '(4) This agreement shall be of no effect until ratified by *the legislatures of the states aforesaid. Given under our hands and seals, at William Robertson's, near Cumberland Gap, December the eighth, eighteen hundred and two. (Dec. 8th, 1802.)

" 'Jos. Martin. [L. S.]
" 'Creed Taylor. [L. S.]
" 'Peter Johnson. [L. S.]
" 'John Sevier. [L. S.]
" 'Moses Fisk. [L. S.]
" 'George Rutledge. [L. S.]'

"(5) And whereas, Brice Martin and Nathan B. Markland, the surveyors duly appointed to run and mark the said line, have granted their certificate of the execution of their duties, which certificate is in the words following, to wit: 'The undersigned surveyors, having been fully appointed to run the boundary line between the states of Virginia and Tennessee, as directed by the commissioners for that purpose, have agreeably to their orders run the same, beginning on the summit of the White Top mountain, at the termination of the northeastern corner of the state of Tennessee, a due west course to the top of the Cumberland mountains, where the southwestern corner of Virginia terminates, keeping at an equal distance from the lines called "Walker's" and "Henderson's," and have had the new line run as aforesaid marked with five chops, in the form of a diamond, as directed by the said commissioners. Given under our hands and seals, this eighth day of December, eighteen hundred and two. (8th December, 1802.)

" 'B. Martin. [L. S.]
" 'Nat. B. Markland. [L. S.]

"And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this commonwealth:

"(6) Be it therefore enacted by the general assembly of the commonwealth of Virginia, that said boundary line between this state and the state of Tennessee, as laid down, fixed, and ascertained by the said commissioners above named in their *said report above recited, shall be, and is hereby, fully and absolutely, to all intents and purposes whatsoever, ratified, established, and confirmed on the part of this commonwealth as the true, certain, and real boundary line between the said states.

"(7) All claims or titles derived from the government of North Carolina or Tennessee which said lands, by the adjustment and establishment of the line aforesaid, have fallen into this state, shall remain as secure to the owners thereof as if derived from the government of Virginia, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

"(8) The acts of all public officers, whether magistrates, sheriffs, coroners, surveyors, or constables, heretofore done or performed in that portion of the territory between the lines called 'Walker's' and 'Henderson's' lines which has fallen into this state by the adjustment of the present line, and which would have been legal if done or performed in the states of North Carolina or Tennessee, are hereby recognized and confirmed.

"(9) This act shall commence and be in force from and after the passing of a like law on the part of the state of Tennessee."

And on the 3d of November, 1803, Tennessee passed the following ratifying act:

"Whereas, the commissioners appointed to settle and designate the true boundary between this state and the state of Virginia, in conformity to the act passed by the legislature of this state for the purpose, on the thirteenth day of November, one thousand eight hundred and one, have proceeded to the execution of said business, and made a report thereof in the words following, to wit:

"[Here follows the report named in the Virginia act.]

"And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this state:

"(1) Be it enacted by the general assembly of the state of Tennessee, that the said boundary line between this state and the state of Virginia, as laid down, fixed, and ascertained by the said commissioners above

named in their said report above recited, shall be, and is hereby, fully and absolutely, to all intents and purposes whatsoever, ratified, established, and confirmed on the part of this state as the true, certain, and real boundary line between the said states.

"(2) Be it enacted, that all claims or titles to lands derived from the government of Virginia, which said lands, by the adjustment and establishment of the line aforesaid have fallen into this state, shall remain as secure to the owners thereof as if derived from the government of North Carolina or Tennessee, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

"(3) Be it enacted, that the acts of all officers, whether magistrates, sheriffs, coroners, surveyors, or constables, heretofore done or performed in that portion of territory between the lines called 'Walker's' and 'Henderson's' lines which has fallen into this state by the adjustment of the present line, and which would have been legal if done or performed in the state of Virginia, are hereby recognized and confirmed."

This line thus run was accepted by both states as a satisfactory settlement of a controversy which had, under their governments and that of the colonies which preceded them, lasted for nearly a century. As seen from the acts recited, both states, through their legislatures, declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established, and confirmed as the true, certain, and real boundary line between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed from by the government of either, but be respected, maintained, and enforced by the governments of both. All modes of legislative action which followed it indicated its approval. Each state asserted jurisdiction on its side up to the line designated, and recognized the lawful jurisdiction of the adjoining state up to the line on the opposite side. Both states levied taxes *516 on the lands on their respective sides, and granted franchises to the people resident thereon. The people on the south side voted at state and municipal elections for representatives and officers of Tennessee, and the people on the north side at such state and municipal elections voted for representatives and officers of Virginia. The courts of the two states exercised jurisdiction, civil and criminal, on their respective sides, and enforced their process up to that line; and the legislation of congress, in the designation of districts for the jurisdiction of courts, and in prescribing limits for collection districts and for purposes of election, made no exception to the boundary as thus established. 12 St. pp. 432, 433.

The line was marked with great care by the commissioners of the states, with five chops on the trees, in the form of a diamond, at such intervals between them as they deemed sufficient to identify and trace the line. Not a whisper of fraud or misconduct is made by either side against the commissioners for the conclusions they reached and the line they established. It is true that in the year 1856 (54 years after the line was thus settled) Virginia, reciting that the line as marked by the commissioners in 1802 had, by lapse of time, the improvement of the country, natural waste and destruction, and other causes, become indistinct, uncertain, and to some extent unknown, so that many inconveniences and difficulties occurred between the citizens of the respective states, and in the administration of their governments, passed an act for the appointment of commissioners, to meet commissioners to be appointed by Tennessee, to again run and mark said line, not to run and mark a new line; and provided that where there was no growing timber on any part of the line by which it might be plainly marked, if the old marks were gone, the commissioners should cause monuments of stone to be permanently planted on the line, at least one at every five miles or less, where it might seem best to the commissioners to do so, that the line might be readily identified for its entire length. The whole purpose of the act, as is evident on its face, was not to change the old boundary line, but only to more perfectly identify it. Tennessee responded to that invitation, and appointed commissioners to act with those from Virginia. The commissioners together re-run and re-marked the line as it was established in 1802, and planted such additional monuments as were deemed necessary; and they reported to their respective legislatures that they had "accurately run, re-marked, and measured the old line of 1802, with all its offsets and irregularities as shown in the surveyor's report" therein incorporated, and on the accompanying map therewith submitted. The legislature of Tennessee approved of the action of the commissioners, but Virginia withheld her approval and called for a new appointment of commissioners to re-run and re-mark the line, which was refused by Tennessee as unnecessary. No complaint as to the correctness of the line run and established in 1802 was made by Virginia until within a recent period. She now by her bill asks that the compact entered into between her and the state of Tennessee, as set forth in the act of the general assembly of Virginia of January 22, 1803, and which became operative by similar action of the legislature of Tennessee on the 3d of November following, be declared null and void, as having been entered into between the states without the consent of congress; and prays that this court will establish the true boundary line between those states due east and west, in latitude 36 deg. and 30 min. N., in ac- *517

cordance with what it alleges to be the ancient chartered rights of that commonwealth, and the laws creating the state of Tennessee and admitting it into the Union.

The constitution provides that "no state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Is the agreement, made without the consent of congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms "agreement" or "compact," taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects placed under their entire control.

There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York, which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie canal, it would hardly be deemed essential for that state to obtain the consent of congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of congress, which might not be at the time in session. If, then, the terms "compact" or "agreement" in the constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of congress must be obtained, to what compacts or agreements does the constitution apply?

We can only reply by looking at the object of the constitutional provision, and construing the terms "agreement" and "compact" by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. "Noscitur a sociis" is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words; and the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, (section 1403,) referring to a previous part of the same section of the constitution in which the clause in question appears, observes that its language "may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation,' and upon the ground that the sense of each is best known by its association ('noscitur a sociis') to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;" and that "the latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other." And he adds: "In such cases the consent of congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

Compacts or agreements—and we do not perceive any difference in the meaning, except that the word "compact" is generally used with reference to more formal and serious engagements than is usually implied

in the term "agreement"—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two states, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining state. It is a legislative declaration which the state and individuals affected by the recognized boundary line may invoke against the state as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it; for example, as made upon a similar declaration of the border or contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the constitution, or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of federal authority. If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary, or rather for its adoption afterwards, the consent of congress may well be required. But the running of a boundary may have no effect upon the political influence of either state; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the states to the general government. There was, therefore, no compact or agreement between the states in this case which required, for its validity, the consent of congress, within the meaning of the constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the states. Such ratification was mutually made by each state in consideration of the ratification of the other.

The constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a state is admitted into the Union, notoriously upon a compact made between it and the state of which it previously composed a part, there the act of congress admitting such state into the Union is an implied consent to the terms of the compact. Knowledge by congress of the boundaries of a state and of its political subdivisions may reasonably be presumed, as much of its legislation is affected by them, such as relate to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced.

In the present case the consent of congress could not have preceded the execution of the compact, for until the line was run it could not be known where it would lie, and whether or not it would receive the approval of the states. The preliminary agreement was not to accept a line run, whatever it might be, but to receive from the commissioners designated a report as to the line which might be run and established by them. After its consideration each state was free to take such action as it might judge expedient upon their report. The approval by congress of the compact entered into between the states upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings. The line established was treated by that body as the true boundary between the states in the assignment of territory north of it as a portion of districts set apart for judicial and revenue purposes in Virginia, and as included in territory in which federal elections were to be held, and for which appointments were to be made by federal authority in that state, and in the assignment of territory south of it as a portion of districts set apart for judicial and revenue purposes in Tennessee, and as included in territory in which federal elections were to be held, and for which federal appointments were to be made for that state. Such use of the territory on different sides of the boundary designated in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of congress to the boundary line; but the exercise of jurisdiction by congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of as-

sent to it by that body as can usually be obtained from its most formal proceedings.

Independently of any effect due to the compact as such, a boundary line between the states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in Penn v. Lord Baltimore, 1 Ves. Sr. 444, 448; Boyd v. Graves, *523 4 Wheat. 513; Rhode Island v. Massachusetts, 12 Pet. 657,* 734; U. S. v. Stone, 2 Wall. 525, 537; Kellogg v. Smith, 7 Cush. 375, 382; Chenery v. Waltham, 8 Cush. 327; Hunt, Bound. (3d Ed.) 306.

As said by this court in the recent case of the State of Indiana v. Kentucky, 136 U. S. 479, 516, 10 Sup. Ct. Rep. 1051, it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change; and this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected; and there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on this subject, says: "The tranquility of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." Book 2, c. 11, § 149. And *524 Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called 'prescription,' is justly applicable as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." Part 2, c. 4, § 164.

There are also moral considerations which should prevent any disturbance of long-recognized boundary lines,—considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life.

Notwithstanding the legislative declaration of Virginia in 1803 that the line marked by the joint commissioners of the two states was ratified as the true and real boundary between them, and the repeated reaffirmation of the same declaration in her laws since that date, notably in the Code of 1853, in the Code of 1860, and in the Code of 1887; notwithstanding that the state has in various modes attested to the correctness of the boundary, by solemn affirmations in terms, by legislation, in the administration of its government, in the levy of taxes and the election of officers, and in its acquiescence for over 85 years, embracing nearly the lives of three generations,—she now, by her bill, seeks to throw aside the obligation from her legislative declaration, because, as alleged, not made upon the express consent in terms of congress, although such consent has been indicated by long acquiescence in the assumption of the validity of the proceedings resulting in the establishment of the boundary, and to have a new boundary line between Virginia and Tennessee established running due east and west on latitude 36 deg. 30 min. N.* But to this position there is, in addition to what has already been said, a conclusive answer in the language of this court in Poole v. Fleeger, 11 Pet. 185, 209. In that case Mr. Justice Story, after observing that "it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories, and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundary," adds: "This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the constitution of the United States. So far from there being any pretense of such a general surrender of the right, it is expressly recognized by the con-

stitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of congress." The constitution in imposing this limitation plainly admits that with such consent a compact as to boundaries may be made between two states; and it follows that when thus made it has full validity, and all the terms and conditions of it are equally obligatory upon the citizens of both states.

The compact in this case, having received the consent of congress, though not in express terms, yet impliedly, subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. Nor is it any objection that there may have been errors in the demarcation of the line which the states thus by their compact sanctioned. After such compacts have been adhered to for years, neither party can be absolved from them upon showing errors, mistakes, or misapprehension of their terms, or in the line established; and this is a complete and perfect answer to complainant's position in this case.

It may also be stated that if the work of the joint commissioners, under the laws of 1800 and 1801, approved by the legislative action of both states in 1803, could be left out of consideration, and a new line run, *It would not follow that the parallel of latitude 36 deg. 30 min. N. would be strictly followed. The charter of Charles the Second designates the northern boundary line of the province of North Carolina as extending from Currituck river or inlet upon a straight westerly line to Wyonoke creek, which lies within or about 36 deg. 30 min. N. latitude, from which it is evident that that parallel was only to be the general direction of the line, not one to be strictly and always followed without any variations from it. The purpose of the declaration in the charter of Charles the Second was only that the northern boundary line was to be run in the neighborhood of that parallel. The condition of the country at the time the charter was granted (1665) would have made the running of a boundary line strictly on that parallel a matter of great difficulty, if not impossible. Nor did the needs of grantor or chartered proprietors call for any such strict adherence to the parallel of latitude designated. That neither party expected it is evident from the agreement made between the governors of Virginia and North Carolina as to running the boundary line between them, and sent to England for approval by the king and council. That agreement provided that, if the west line run should be found to pass through islands or to cut out small slips of land, which might much more conveniently be included in one province than the other by natural water bounds, in such case the persons appointed to run the line should have power to settle natural water bounds, provided the commissioners on both sides agreed, and that all variations from the west line should be noted on the premises, or on plats which they should return, to be put on record by both governors. A possible—indeed, a probable—variation from the line of the parallel of latitude, or the straight line, designated, was contemplated by both Virginia and Tennessee. With full knowledge of the line actually designated, and of the ancient charter to Carolina, and of the description in the constitution of Tennessee, in appointing the joint commissioners, they provided that they should settle and adjust all differences concerning the boundary line, and establish either the Walker or Henderson line, or run any other line which might be agreed on for settling the same; and that *527 means any line run and measured with or without deviations from time to time from a straight line, or the line of latitude mentioned as might in their judgment be most convenient as the proper boundary for both states. It was made with numerous variations from a straight line, and from the line of the designated parallel of latitude for the convenience of the two states, and, with the full knowledge of both, was ratified, established, and confirmed as the true, certain, and real boundary line between them. And when, 56 years afterwards, in consequence of the line thus marked becoming indistinct, it was re-run and re-marked, by new commissioners under the directions of the statutes of 1800 and 1801, in strict conformity with the old line. The compact of the two states establishing the line adopted by their commissioners, and to which congress impliedly assented after its execution, is binding upon both states and their citizens. Neither can be heard at this date to say that it was entered into upon any misapprehension of facts. No treaty, as said by this court, has been held void on the ground of misapprehension of facts, by either or both of the parties. Rhode Island v. Massachusetts, 4 How. 635.

The general testimony, with hardly a dissent, is that the old line of 1802 can be readily traced throughout its whole length; and, moreover, that line has been recognized by all the residents near it, except those in the triangle at Denton's valley and in another district of small dimensions, in which it is stated that the people have voted as citizens of Virginia, and have recognized themselves as citizens of that state. That fact, however, cannot affect the potency and conclusiveness of the compact between the states by which the line was established in 1803. The small number of citizens whose expectations will be disappointed by being included in Tennessee are secured in all their rights of property by provisions of the compact passed especially for the protection of their claims.

Some observations were made upon the argument of the case upon the propriety and necessity, if the line established in 1803 be sustained, of having it re-run and re-marked,

so as hereafter to be more readily identified and traced. But a careful examination of the testimony of the numerous witnesses in the case (most of them residing in the neighborhood of the boundary line) as to the marks and identification of the line originally established in 1802, and re-run and re-marked in 1859, satisfy us that no new marking of the line is required for its ready identification. The commissioners appointed under the act of Virginia of 1856, and under the act of Tennessee of 1858, found all the old marks upon the trees in the forest through which the line established ran, in the form of a diamond; and whenever they were indistinct, or, in the judgment of the commissioners, too far removed from each other, new marks were made upon the trees, or, if no trees were found at particular places to be marked, monuments in stone were planted. Besides this, the state of Virginia does not ask that the line agreed upon in 1803 shall be re-run or re-marked, but prays that a new boundary line be run on the line of 36 deg. 30 min. Tennessee does not ask that the line of 1803 be re-run or re-marked. Nevertheless, under the prayer of Virginia for general relief, there can be no objection to the restoration of any marks which may be found to have been obliterated or become indistinct upon the line as herein defined.

Our judgment, therefore, is that the boundary line established by the states of Virginia and Tennessee by the compact of 1803 is the true boundary between them, and that, on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made at any time during the present term for the restoration of such marks without any change of the line. A decree will therefore be entered declaring and adjudging that the boundary line established between the states of Virginia and Tennessee by the compact of 1803 is the real, certain, and true boundary between the said states, and that the prayer of the complainant to have the said compact set aside and annulled, and to have a new boundary line run between them on the parallel of 36 deg. 30 min. N. latitude should be and is denied, at the cost of the complainant.

And it is so ordered.

(149 U. S. 17)

BOGK v. GASSERT et al.

(April 17, 1893.)

No. 179.

APPEAL—PRACTICE—MORTGAGES—EVIDENCE.

1. Defendant waives his motion for a nonsuit, and cannot base any claim of error upon it, where, after it is overruled, he proceeds with his defense, and introduces testimony.

2. A defendant who has testified to conversations between the parties, for the purpose of showing that a deed absolute on its face was intended as a mortgage, cannot object on appeal that plaintiff was allowed to testify in rebuttal to the same matters, although Code Mont. § 628, provides that parol evidence shall not be admitted to show the terms of agreements that have been reduced to writing, except in cases of ambiguity, mistake, or fraud.

3. An assignment of error that the court erred in "adopting the theory announced throughout the instructions,"—that the transaction in question "could not amount to a mortgage unless there was a personal liability on the part of the defendant,"—is too general to be considered.

4. A general exception to the refusal of a series of instructions taken together, and constituting a single request, is improper, and will not be considered on appeal, if any one of the propositions be unsound.

5. Defendant conveyed land to plaintiff by a deed absolute, and plaintiff executed a contemporaneous agreement to reconvey upon the payment of a specified sum of money on a given date. While the consideration for the deed was inadequate, there was no mention of a debt in either instrument, nor was any evidence of indebtedness included in the transaction. Two days thereafter defendant accepted a lease of the same land from plaintiff, upon the expiration of which plaintiff brought this action. *Held*, that the instruments did not, as a matter of law, constitute a mortgage, but their effect was a question for the jury, upon all the evidence in the case. 19 Pac. Rep. 281, affirmed. Teal v. Walker, 4 Sup. Ct. Rep. 420, 111 U. S. 242, distinguished. Wallace v. Johnstone, 9 Sup. Ct. Rep. 243, 129 U. S. 58, followed.

6. An instruction as to the effect of such deed in case the jury found that it was procured by fraud or mistake is properly refused, where there is no evidence of either.

In error to the supreme court of the territory of Montana. Affirmed.

Statement by Mr. Justice BROWN:

This was an action at law instituted by Henry Gassert, Jacob Reding, and James H. Steele, as plaintiffs, against Gustavus Bogk, as defendant, upon a lease of certain premises in the city of Butte, and also certain mining claims in Silver Bow county, wherein plaintiffs prayed judgment against defendant for the restitution of the premises, and for damages for the detention thereof at the rate of $500 per month.

The facts of the case are substantially as follows:

Gustavus Bogk, the defendant below, was the owner of a lot of ground in Butte City, Mont., upon which stood a public house known as the "Virginia Chop House." He was also the owner of some mining claims, five in number, located in Summit valley, Silver Bow county, Mont. Having become involved in debt, and unable to hold the property, on May 19, 1885, he sold and conveyed by deed in fee, duly executed, an undivided half interest in the property to James H. Steele, one of the plaintiffs, for the sum of $7,500; and, upon the same day, by another similar deed, he sold and conveyed the other half interest to Gassert and Reding, the other plaintiffs, for a like sum. These two amounts were paid to Bogk, and disbursed under his direction. By a separate and independent instrument, in writing, of the same day, the plaintiffs, Gassert, Reding, and Steele, agreed to reconvey the property to Bogk, if, on or before the

end of one year thereafter, he would pay to Steele the sum of $8,967.50, and to Gassert and Reding a like sum. This sum of $17,935, in the aggregate, was the purchase price of the property, $15,000, with interest compounded thereon monthly for one year. The agreement of reconveyance recited the previous sale of the property, but made no mention whatever of any loan of money.

Two days afterwards, namely, on May 21, 1885, Bogk took a lease of the property from Gassert, Reding, and Steele for the term of one year, at a nominal rent of $450, payable on or before December 1, 1885, with a privilege of working the mines for his own use and benefit. Bogk never offered to repurchase the property, or tendered to the plaintiffs the sum of $17,935, or any other sum.

*Under this condition of things, the lease having expired, plaintiffs demanded possession of the property, and, upon the refusal of Bogk to comply with the demand, brought action before a justice of the peace, under a statute of Montana providing for summary proceedings against tenants holding over. Upon a plea of title interposed by Bogk, the suit was transferred to the district court of the proper judicial district, in accordance with the requirements of the statute, and was there tried before a jury. Plaintiffs proved the deeds of conveyance, the agreement to reconvey, the lease by them to Bogk, the rental value of the property, and then rested. Notice to quit, and failure to surrender the premises, had been averred in the complaint, and, not being denied by the answer, under the provisions of the Code of Procedure in Montana, were taken as admitted. Thereupon counsel for defendant moved for a nonsuit upon the ground that the plaintiffs had not shown that they were ever entitled to the possession of the premises, or that the defendant had entered into possession under the lease, or that notice to quit, or demand for the surrender of the premises, had ever been given to defendant. The court overruled the motion for a nonsuit, and defendant excepted. The trial thereupon proceeded, and defendant introduced witnesses showing the value of the city property to be from $18,000 to $25,000, and the other property to be from $22,000 to $25,000, making in all the lowest estimate at $40,000, and the highest at $50,000; that the negotiations commenced for a loan; that the object was to raise money to pay off mortgages, judgments, liens, etc., upon the property; that plaintiffs never had possession of any of it; that interest was computed upon the amount advanced; that the lease was given to secure the representation of the mining property, and pay the taxes; and that the transaction was intended as a mortgage.

Plaintiffs thereupon introduced certain evidence in rebuttal, and the jury returned a verdict for the plaintiffs, awarding them restitution of the property, and $2,175 as rent of the premises from May 21, 1886. Upon this verdict judgment was entered, the case appealed to the supreme court of the territory, and the judgment affirmed. 19 Pac. Rep. 281. Defendant thereupon appealed to this court.

E. W. Toole and Wm. Wallace, Jr., for plaintiff in error. M. F. Morris and W. W. Dixon, for defendants in error.

*Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The action in this case was upon the lease of a city lot and certain mining claims, and a judgment was demanded for the restitution of the premises, and for damages for detention. The answer set forth, in substance, that the lease was one of a series of contemporaneous agreements, consisting of two deeds, an agreement to reconvey, and a lease; that the deeds were intended as a mortgage, and that the rental of $450 named in the lease was the amount which it was understood would be necessary to pay the taxes upon the property, and the annual assessment work upon the mining claims, and that, upon payment thereof by defendant, Bogk, the object of the lease should be fully satisfied and discharged; that the defendant paid this sum; and that the said lease became void, and of no binding force.

The trial took place before a jury, and the assignment of error relates to the rulings of the court made in the course of such trial. We proceed to consider them in their order.

1. That the court erred in overruling defendant's motion for a nonsuit. In this connection the bill of exceptions shows that the plaintiffs put in evidence the deeds from Bogk and wife to the plaintiffs, the agreement to reconvey, the lease, with oral testimony of the rental value, and then rested. Defendant thereupon moved for a nonsuit upon the ground that plaintiffs had failed to prove that they were ever at any time in, or entitled to, the possession of the premises; that defendant ever entered into possession under or by virtue of said lease; and that plaintiffs totally failed to prove a demand to have been made for the possession of the premises, or ever served or gave notice to quit upon the defendant. This motion was overruled. Defendant excepted, and proceeded to introduce testimony in defense.

The practice in Montana (Comp. St. § 242) permits a judgment of nonsuit to be entered "by the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of er-

ror, if it be refused; but he has no right to insist upon his exception after having subsequently put in his testimony, and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link; and, if not, he may move to take the case from the jury upon the conclusion of the entire testimony. Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493; Insurance Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. Rep. 685; Railway Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. Rep. 321; Insurance Co. v. Smith, 124 U. S. 405, 425, 8 Sup. Ct. Rep. 534; Bradley v. Poole, 98 Mass. 169; Railroad Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. Rep. 591.

2. The second error assigned is to the admission of the conversation of the parties at the time of the execution of the instrument. Exception was duly taken upon the trial to the admission of this testimony. This exception does not seem to have been incorporated in either of the bills of exceptions, but in a "statement on appeal," which appears to have been settled and signed by the judge in the same manner as a bill of exceptions, and to have been treated as such by the supreme court of the territory. The Code of Civil Procedure of Montana provides (section 432) for a statement of the case to be used on appeal, which shall state specifically the
*24 particular errors*or grounds upon which the appellant intends to rely, and which seems to take the place of an ordinary bill of exceptions. Under this Code, (section 628,) "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties, and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: First, where a mistake or imperfection of the writing is put in issue by the pleadings; second, where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 632, or to explain an extrinsic ambiguity, or establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between the parties."

In this case Bogk had been called upon as a witness for himself, and testified that he had applied to these parties for a loan, not a sale; that he wanted money to pay off parties whom he owed; that he first spoke to Gassert or to Steele, but there was a dispute whether he should pay 1 per cent. or 1½ per cent., "but it should have been made in a deed with a bond to me for a deed back again to me. I wanted it for a year, to pay off these parties, and give them a mortgage for it. That was the first agreement." But the plaintiffs demanded a deed with an offer to give a bond for a deed back again, "so you can release it,—pay it off at any time." "Steele and Harry Gassert said this to me; said, 'We want a deed, but will give you a bond to convey back at any time.' * * * At the time of the negotiation of this loan, I promised to repay the $15,000 to the plaintiffs just as soon as I made a sale of my mines. I had these mines so that I thought I could make a sale of them, and calculated to pay it that way. I promised to pay it inside of a year. The interest was put altogether for a year, but I agreed to pay this interest every month, but through my sickness, and bad luck I had, I could not succeed, and could not pay it. The agreement was this way: If I should pay the interest, they should give me a
25 written paper and credit for the amount, if it was paid in installments as agreed between us. This lease, which was read in evidence, was made to secure the representation of two of my mining claims, the Eva and Leaf, which were then unpatented, and to secure the payment of the taxes on my property, which would probably be $250, and $200 for representing, making in all $450, which this lease was given to secure and nothing else; which representation work I did for that year, 1885, and I have paid the taxes. * * * There was nothing at all said in these interviews between me and plaintiffs, or their agents or attorneys, as to the sale of my property. They said, give them a deed and they would give me a bond for a deed back again. The negotiation between us was to loan me money. There was no price set to any piece or pieces of this property. It was a loan on all the property together. They made me no proposition pending these negotiations to purchase my property,—to buy it of me."

In rebuttal, Steele and Gassert were put upon the stand and asked as to the conversation which took place at the attorney's office at the time the deeds and contract to reconvey were made. This conversation was admitted, and defendant excepted. Now, while this might have been improper as original testimony, it would have been manifestly unfair to permit Bogk to give his version of the transaction, gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their version of it. The defendant himself, having thrown the bars down, has evidently no right to object to the plaintiffs having taken advantage of the license thereby given to submit to the jury their understanding of the agreement. The Code is merely in affirmance of the common-law rule, and was evidently not intended to apply to a case of this kind.

3. Error is also imputed to the court "in adopting the theory announced throughout the instruction given on the part of the de-

fendants [in error] that the transaction could not amount to a mortgage unless there was a personal liability on the part of the plaintiff [in error, defendant below] upon which a recovery could be had, and error in giving conflicting *instructions upon said matter." This assignment is obviously too general. No exception was taken to any "theory" announced by the court; but, if there were, it would not be valid, since the theory of the court must be expressed in particular language, and the exception should be taken to such language. Different persons may derive different theories from the same language, and in this very assignment error is charged in giving conflicting instructions upon the same matter.

4. Error is also assigned in not giving either of the instructions 2, 6, and 7, as requested by defendant. Upon the trial, the court was requested by the plaintiffs to give, and did give, seven instructions, to which defendant excepted; but, as no error is assigned here upon such refusal, we are not at liberty to consider them. Defendant also requested 12 instructions, all of which were given, except the 2d, 6th, and 7th, "to which action of the court," says the bill of exceptions, "the defendant then and there objected, for the reason that said instructions numbered two, six, and seven correctly state the law as applicable to the facts in evidence, and are necessary in order that the jury may arrive at a correct conclusion; but notwithstanding said objection the court refused to give said instructions two, six, and seven, to which action the defendant, by his counsel, excepted," etc.

This exception, as well as the one taken to the granting of the plaintiffs' requests, is open to the objection so often made, that a general exception taken to a refusal of a series of instructions taken together, and constituting a single request, is improper, and will not be considered if any one of the propositions be unsound. Johnston v. Jones, 1 Black, 209, 220; Rogers v. Marshal, 1 Wall. 644; Harvey v. Tyler, 2 Wall. 328; Beaver v. Taylor, 93 U. S. 46; Worthington v. Mason, 101 U. S. 149; Moulor v. Insurance Co., 111 U. S. 335, 4 Sup. Ct. Rep. 466. This is not only the rule in this court, but also in the courts of Montana, (Woods v. Berry, 7 Mont. 195, 14 Pac. Rep. 758,) although since this case was decided, and at a session of the legislature in 1887, the law was changed so that the giving or refusal to give instructions are deemed excepted to, and no exception need be taken.

*The first of these instructions, (No. 2,) stripped of its verbiage, assumes that an absolute deed and a separate written contract to reconvey, both under seal, bearing even date, executed and delivered at the same time, between the same parties, and relating to the same land, the agreement to reconvey being conditioned upon the payment by the grantor to the grantee of a certain sum of money within a certain period, constitute in law and fact a mortgage, and will not convey any interest in the premises, or entitle the grantee to the possession of the land described.

There is, undoubtedly, a great conflict of authority upon this point. The case of Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. Rep. 420, is relied upon as sustaining this position. In this case one Goldsmith borrowed of Walker $100,000, and gave his note therefor. At this time Goldsmith was the owner of certain lands in Oregon, and he and Teal were the joint owners of certain other lands. These parties executed three several deeds of these lands, absolute on their face, but intended as a security for the note, as appeared by a defeasance in writing executed upon the same day as the note. This instrument, after reciting the execution of the note, declared the legal title of the lands conveyed to be in trust; that Teal and Goldsmith should retain possession of the lands until said note should become due and remain unpaid 30 days, and, upon default being made in the payment of such note, they would surrender the lands to Hewitt, the trustee in the deed, who should take possession of them, and, upon 30 days' notice in writing, should sell the same at public auction. These instruments were construed to constitute a mortgage. In delivering the opinion of the court, Mr. Justice Woods said, (page 247, 111 U. S., and page 423, 4 Sup. Ct. Rep.:) "The execution of all the deeds, and the execution of the defeasance, which applied to all the deeds, occurred on the same day, and was clearly one transaction, the object of which was to secure the note for $100,000 made and delivered by Goldsmith to Walker." Here it will be observed that there was a debt, a note, a deed absolute on its face, and a defeasance conditioned upon the prompt payment of the debt.

The case of Wallace v. Johnstone, 129 U. S. 58, 9 Sup. Ct. Rep. 243, is more nearly in point. The petition in this case alleged that defendant Wallace, by deed of warranty, conveyed certain lands to plaintiffs and one Leighton; that on the same day the grantees delivered to defendant Ford a contract in writing, giving him the option for 60 days of purchasing the land in question, upon payment of the sum of $5,876, which contract on the same day was assigned to Wallace. Neither of the defendants ever paid anything on the lands, and neither exercised the option of repurchasing, and their rights had thus become forfeited. Defendant answered, admitting the deed and contract, but alleging that, taken together, they were understood by the parties as constituting a mortgage for the security of the money received by him at that time, which was in reality a loan, and that the transaction was to avoid the effect of the usury laws of Iowa. He therefore prayed for a right to redeem. In delivering the opinion of the court,

Mr. Justice Lamar said: "If this question could be determined by an inspection of the written papers alone, the transaction was clearly not a mortgage, but an absolute sale and deed, accompanied by an independent contract between the vendee and a third person, not a party to the sale, to convey the lands to him upon his payment of a fixed sum within a certain time. Upon their face there are none of the indicia by which courts are led to construe such instruments to be intended as a mortgage or security for a loan; nothing from which there can be inferred the existence of a debt, or the relation of borrower and lender between the parties to the deeds, or between the parties to the contract. * * * A deed of lands, absolute in form, with general warranty of title, and an agreement by the vendee to reconvey the property to the vendor or a third person upon his payment of a fixed sum within a specified time, do not of themselves constitute a mortgage, nor will they be held to operate as a mortgage, unless it is clearly shown, either by parol evidence or by the attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, to have been intended by the parties as a security for a loan or an existing debt." The purport of this case is that, in the absence of proof of a debt, or of other explanatory testimony, the parties will be held to have intended exactly what they have said upon the face of the instruments.

In the case under consideration there is no mention made, in either of the three instruments, of a debt, a loan, a note, or anything from which the relation of borrower and lender can be inferred; and the case in this particular is distinguishable from that of Teal v. Walker, and is more nearly analogous to that of Wallace v. Johnstone, It is true that in Wallace v. Johnstone there was a deed with the usual covenants of warranty, and that the contract to reconvey was made with a third person; but, as the contract was immediately assigned by such third person to the grantor in the deed, it is not perceived that the case is affected by either of these circumstances. The inadequacy of price was undoubtedly great, but this would not, of itself, authorize the court to take the question from the jury. In this connection it might be reasonably urged that defendant, having not only made an absolute deed of the premises, but having, two days thereafter, taken a lease of the same from his grantees, was thereby estopped to deny their title, but we do not find it necessary to express an opinion upon that point. The case was evidently a proper one to go to the jury, who were left to determine the question whether the instruments were intended as a mortgage, and were instructed that if they found them to be such the plaintiffs could not recover. The case seems to have been fairly tried, and the defendant has no just cause for complaint.

In the second of these instructions, (No. 6,) the defendant requested the court to charge "that if the jury believes from the evidence that the defendant was induced to sign and execute the alleged lease in evidence herein by the deceit, misrepresentation, trick, or fraud of the plaintiffs, or that the defendant executed the same by and under an innocent mistake or misapprehension as to the facts, then said lease is invalid and void, and you will find for the defendant." As there was no evidence in the case of deceit or misrepresentation or fraud, or even of the fact that the defendant executed the instruments under a mistake of fact, the request was properly refused. All his evidence amounts to is that he wanted a loan of money, and that the plaintiffs insisted upon a deed and an agreement to reconvey, instead of a mortgage. But defendant did not claim to have been imposed upon, deceived, or defrauded, and he had no right to a request based upon this hypothesis.

The disposition we have made of these requests renders it unnecessary to consider the other, and the judgment of the court below is therefore affirmed.

(148 U. S. 691)

PAM-TO-PEE et al. v. UNITED STATES. POTTAWATOMIE INDIANS v. UNITED STATES.

(April 17, 1893.)

Nos. 1,125 and 1,133.

INDIANS — POTTAWATOMIE CLAIM — DISTRIBUTION.

1. The treaty of September 26, 1833, (7 St. p. 431,) between the United States and the United Nation of the Chippewa, Ottawa, and Pottawatomie Indians, whereby the latter ceded lands on Lake Michigan in consideration of an equal area west of the Mississippi, and an annuity of $14,000 a year for 20 years, provided that a just proportion of such annuity money, and moneys due under former treaties, should be paid, west of the Mississippi, to such portion of the nation as should have removed thither within three years, and after that time the whole amount should be paid at the reservation west. On the following day, supplementary articles were made between the United States and the chiefs and headmen of the said nation, ceding certain other lands in Michigan. 7 St. p. 442. It was agreed that these Indians should be considered parties to the treaty of the preceding day, and further, that there should be paid by the United States an annuity of $2,000 a year for 20 years in addition to the 20-year annuity of $14,000 a year. *Held*, that the two agreements constituted, practically, one treaty, and that the Indians who remained east, and those who removed west, of the Mississippi, were entitled to share in the additional annuity of $2,000 a year, in the ratio of their numbers.

2. Under Act March 19, 1890, (26 St. p. 24, c. 39,) referring the claim of the Pottawatomie Indians of Michigan and Indiana to the court of claims for adjudication, that court had no authority to convert the perpetual annuities provided for in the several treaties into a sum for present payment.

3. The persons who were entitled to share

in the award made by the court of claims did not clearly appear from the record, nor from the opinion filed by that court, (27 Ct. Cl. 403,) which decided that the distribution should be made by the executive branch of the government. *Held*, that under these circumstances this ruling should not be disturbed on appeal.

Appeals from the court of claims.

Petitions by Phineas Pam-to-pee and others, and by the Pottawatomie Indians, against the United States, under Act March 19, 1890, (26 St. p. 24, c. 39,) to recover moneys alleged to be due under certain treaties. The court of claims rendered a decree for petitioners, but disallowed some of their claims. 27 Ct. Cl. 403. Petitioners appeal. Affirmed.

Statement by Mr. Justice SHIRAS:

The questions involved in this case grow out of the stipulations of certain treaties entered into between the United States and the Pottawatomie Indians within the period covered by the years 1795 to 1846, inclusive. In some of the treaties, various tribes united with the Pottawatomies, but the tribes were recognized by the government as being distinct from one another, and their respective rights and duties under the treaties were therein defined and set forth. In others the Pottawatomie Indians were included in the tribe designated as the "United Nation of Chippewa, Ottawa, and Pottawatomie Indians," but the government seems to have dealt with the United Nation as though it were identical with the Pottawatomie tribe, and we shall so consider it in the present case. By the various treaties the Indians ceded lands to the government, and received for the same other lands, money, etc., and also pledges of specified annuities. By a treaty made on September 26, 1833, the said United Nation ceded to the United States a tract of land on the western shore of Lake Michigan, containing 5,000,000 acres, and received as the consideration for the cession a reservation 5,000,000 acres in extent, west of the Mississippi river, various sums of money, and the promise from the government of $280,000, to be paid in annuities of $14,000 a year for 20 years. It was provided by the treaty that a just proportion of the annuity money named therein, as well as a just proportion of the annuities stipulated for in the former treaties, should be paid, west of the Mississippi, to such portion of the nation as should have removed thither within three years, and that after the expiration of that time the whole amount of the annuities should be paid at the reservation west. On the day following the execution of that treaty an article supplementary thereto was made on behalf of the chiefs and headmen of the nation, by which they ceded to the United States certain lands in the territory of Michigan, south of the Grand river, containing about 164 sections. It was agreed that the Indians making this cession should be considered as parties to the treaty of the preceding day, and be entitled to participate in the benefits of the provisions therein contained, as part of the United Nation. To the supplemental article another provision was added, as follows:

"On behalf of the chiefs and headmen of the United Nation of Indians who signed the treaty to which these articles are supplementary, we hereby, in evidence of our concurrence therein, become parties thereto.

"And, as since the signing of the treaty a part of the band residing on the reservations in the territory of Michigan have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties, and that arising from the sale of the reservation on which they now reside, shall be paid to them at l'Arbre Croche."

Upon the basis of provisions contained in the various treaties, claims for unpaid annuities have been presented to congress from time to time on behalf of Indians alleged to represent the part of the band mentioned in the last provision of the said supplemental article, and for the purpose presumably, of having all questions connected with those claims finally settled, congress passed an act, which was approved March 19, 1890, (26 St. p. 24,) entitled "An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana." The act is as follows:

"Whereas, representatives of the Pottawatomie Indians of Michigan and Indiana, in behalf of all the Pottawatomie Indians of said states, make claim against the United States on account of various treaty provisions which, it is alleged, have not been complied with, therefore,

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the court of claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon. Power is hereby granted the said court to review the entire question of difference de novo, and it shall not be estopped by the joint resolution of congress approved twenty-eighth July, eighteen hundred and sixty-six, entitled 'Joint resolution for the relief of certain Chippewa, Ottawa, and Pottawatomie Indians,' nor by the receipt in full given by said Pottawatomies under the provisions of said resolution, nor shall said receipt be evidence of any fact except of payment of the amount of money mentioned in it; and the attorney general is hereby directed to appear in behalf of the government, and if the said court shall decide against the United States the attorney general may,

within thirty days from the rendition of the judgment, appeal the cause to the supreme court of the United States; and from any judgment that may be rendered the said Pottawatomie Indians may also appeal to said supreme court: provided, that the appeal of said Pottawatomie Indians shall be taken within sixty days after the rendition of said judgment, and the said courts shall give such cause precedence.

"Sec. 2. That said action shall be commenced by a petition stating the facts on which said Pottawatomie Indians claim to recover, and the amount of their claims, and said petition may be verified by a member of any 'business committee' or authorized attorney of said Indians as to the existence of such facts, and no other statements need be contained in said petition or verification."

On behalf of the Pottawatomie Indians of Michigan and Indiana, John Critcher filed a petition in the court of claims, April 14, 1890, averring that he was the authorized attorney of the said Indians, as, he stated, would appear by an agreement between himself and the business committee of the Indians, dated September 29, 1887, and claiming certain unpaid annuities under the said treaties. The claimants exhibited a table showing by periods of five years, from 1836 to 1872, inclusive, an enumeration of the Indians in Michigan, and of those west of the Mississippi, from which it appeared that the average number of the former during that time was 291, and of the latter, 2,812. The petition contains a statement in detail of the various annuities claimed to be due, and asks for a judgment against the United States in the sum of $223,035.46, as being in the ratio of 291 to 2,812 to the entire amount alleged to have been pledged to all the Pottawatomie Indians under the various treaties, plus the amount of $38,000, the sum of the annuities for 19 years under the treaty of 1833. The latter sum was claimed on the assumption that the claimants should receive, of the annuities arising from the cession of their lands in southern Michigan, not a just proportion, but the whole amount. The claimants averred that the main tribe of Indians moved to their reservation west of the Mississippi, and that the part of the band which was to remove to the north did so remove in obedience to the terms of the provision supplementary to the treaty of 1833; that they are the representatives of that part of the band, and as such are entitled to all the benefits secured by the said supplemental provision.

On November 5, 1890, another petition was filed in the name of Phineas Pam-to-pee and 1,371 other Pottawatomie Indians of Michigan and Indiana, by John B. Shipman, their attorney, alleging that they were entitled to share in the annuities secured to the Pottawatomie Indians by the said treaties, that they were not represented in the petition first filed, and that the attorney named in that petition had no authority to act for them in the premises. This petition was filed on behalf of certain Indians, citizens of the United States, who were individually described by name and residence, alleged to be all the Pottawatomie Indians, so far as could be ascertained, resident in the said states, except not exceeding 250, from 91 of whom they alleged that the attorney named in the first petition derived his authority to act. The claimants stated, however, that their petition was intended for the benefit of all Indians included in the provisions of the act of congress who might choose to take part in the proceedings in the said court. They averred that the Indians designated in the act, or their ancestors, were parties to all the said treaties, and entitled to share per capita in the annuities secured thereby to the Pottawatomies, and that the conditions imposed upon them by the treaties had been complied with. The claimants alleged that they were entitled to a just proportion of all the annuities provided for by the treaties in question. They interpreted the last provision of the treaty of 1833, as did the claimants in the first petition, to be that the Indians exempted from the requirement of removal west should receive the entirety of the annuity stipulated for in that provision. Under the treaty of 1833 they, therefore, claimed the sum of $38,000, being $2,000 per year for the 19 years the same remained unpaid. They also contended that the perpetual annuities provided for should be capitalized, and the amounts thereof, in the sum of $446,000, added to the sum of the past unpaid determinate and perpetual annuities, namely, $2,021,200. Under a treaty made subsequent to 1833, to wit, on June 17, 1846, with the said Indians who emigrated west, the petitioners claimed that the Indians who remained in Michigan were entitled to the sum of $446,974.80. It is averred that by that treaty the said reservation west of the Mississippi was ceded to the United States by the said Indians, who were promised therefor, in addition to a perpetual annuity of $300, the sum of $850,000, less certain deductions provided for in the treaty; that after making such deductions the balance remaining was $643,000, which was to be held by the government as a trust fund for the Indians, and was to bear interest at 5 per cent., payable annually for 30 years, and until the nation should be reduced below 1,000 souls; that the first installment of interest became payable in 1849; that the total amount of interest up to and including the year 1890 was $1,350,300, and the value of the same as a capitalized annuity was $643,000, making an aggregate of $1,993,300. The petitioners averred that, when the final provisions of the treaty of 1833 were executed, the number, as nearly as they could ascertain, of the Indians removing west of the Mississippi was 3,840, and the number of those remaining in Michigan was 1,110. They therefore alleged

that the gross amounts stated, with the exception of the said amount of $38,000, should be apportioned between the Indians who removed west, and those who remained in Michigan, in the ratio of 3,840 to 1,110. They deduct from the total of the amounts ascertained as above the sum of $75,162.50, which they admit that the Indians remaining in Michigan received from the government under the treaties of July 29, 1829, and September 26, 1833, and under the act of congress of July 28, 1866, leaving the sum of $963,058.50. This is the amount alleged to be due the Indians exempted from the requirement of removal west, upon the assumption that their number has remained the same as it was in 1833. The petitioners claimed to represent the Indians only who went north, whose number they alleged to have been the difference between 1,110 and the number of those who remained in southern Michigan, and therefore the petitioners asked for a judgment for themselves in the sum of $804,383.80.

On January 8, 1891, the United States moved the court of claims to consolidate the cases, and on January 19, 1891, made a motion to dismiss the case presented by the last-named petition. The motions were reserved to be decided on the trial, and the court ordered that the cases be tried together. Upon the trial the motion to consolidate the cases was allowed, and the motion to dismiss the second case overruled. The court was of opinion that the purpose of the act of March 19, 1890, was to have all questions of difference arising from the claims of the Pottawatomie Indians of Michigan and Indiana settled in an authoritative and judicial form, and that any proceeding which would accomplish that purpose, irrespective of technical rules of pleading, was proper under the act of congress. It was further observed by the court that in each case it appeared that by special appointment the attorneys named in the petitions represented some of the Pottawatomie Indians who remained in the states of Michigan and Indiana, and that the essential requirements of the statute were thus fulfilled.

After due proceedings were had in the consolidated case, the court of claims, on March 28, 1892, (27 Ct. Cl. 403,) found, in substance, the following facts: In obedience to the last provision of the article supplementary to the treaty of September 26, 1833, a few of the Pottawatomie Indians of Michigan and Indiana removed to the northern part of the peninsula of Michigan, but the great body of them remained in southern Michigan. To this failure to remove the government did not object, and did not force them to remove. Within the period from 1843 to 1866, inclusive, the Indians remaining in southern Michigan were there paid, by government agents, an aggregate amount of $75,162.50, $39,000 of which was the amount provided for by the joint resolution of congress referred to in the act giving the court of claims jurisdiction in this case. The remaining amount, $36,162.50, was paid to the Indians as their proportion of annuities secured to them by the treaties of July 29, 1829, and the supplemental provision of the treaty of 1833. During the said period, as shown by a table in the office of the second auditor of the treasury, the average number of Indians in southern Michigan was 253, and of those west of the Mississippi, 2,834, and payments were made to the Indians in Michigan in this ratio. None of the Indians so paid permanently removed to the northern part of Michigan. During the period from 1836 to 1872 the average number of Indians in Michigan who remained under the treaty of 1833 was 291, and the average number west of the Mississippi was 2,812. A number of other Indians residing on the reservation in Michigan in 1833 remained in the state of Michigan. Those Indians, and the 291 who stayed on account of their religious creed, numbered in all 1,100. Many of the Indians who were in Michigan at the time the treaty of 1833 was made were dissatisfied with the requirement that they should emigrate west with the main tribe, and refused to go. It was necessary for the government to use force to compel them to leave, and in the struggle caused by this attempt to enforce the treaty many of the Indians, in evading the officers and agents of the government, scattered into different portions of the state, and many went to the northern portion. Those Indians did not come within the supplemental provisions of the said treaty, as construed by the agents of the United States. What their number was cannot be ascertained, but they outnumbered the Indians who remained by consent of the government as coming within the final provision of the treaty of 1833. The United States never made any tender to any Indians at l'Arbre Croche, nor in the northern part of Michigan. The agents of the government did not insist upon the removal of the Indians as a condition of their right of payment at any time.

Since 1835 the Pottawatomie Indians of Michigan and Indiana have received no payments of annuities provided for by the treaties of the following dates: August 3, 1795, (article 4;) September 30, 1809, (article 3;) October 2, 1818, (article 3;) August 29, 1821, (article 4;) September 20, 1828, (article 2;) October 20, 1832, (article 3;) October 26, 1832, (article 3.) Of the annuities promised by the treaties of October 16, 1826, (article 3,) and June 17, 1846, they have received no payments. The court also finds, specifically, that the said Indians have not been paid any money of an annuity of $2,000 under the treaty of October 16, 1826, for the year 1848, nor of an annuity of $1,000 under the treaty of September 20, 1828, for the year 1848, nor of an annuity of $15,000 under the treaty of October 20, 1832, for the years from 1843 to 1852, inclusive, nor of an annuity of $20,000

under the treaty of October 26, 1832, for the year 1852, nor of an annuity of $15,000 under the treaty of October 27, 1832, for the year 1844.

*699 *The claimants in both cases included in the list of treaties under which they requested the court to find annuities to be due them for the time subsequent to 1836 the last-named treaty, to wit, that of October 27, 1832, but the court made no finding with regard to payments made thereunder, except as to the year 1844.

Upon the foregoing facts the court determined, as a conclusion of law, that the Pottawatomie Indians of Michigan and Indiana were entitled to recover the sum of $104,626, and gave judgment for the said Pottawatomie Indians in that amount. From that judgment the claimants in both petitions appealed to this court.

John B. Shipman, for Phineas Pam-to-pee and others. Geo. S. Boutwell and John Critcher, for Pottawatomie Indians of Michigan and Indiana. Asst. Atty. Gen. Parker, for United States.

Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The act of March 19, 1890, entitled "An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana," conferred jurisdiction upon the court of claims to "try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon." The act granted power to said court to "review the entire question of difference de novo," and provided for an appeal to this court by either party.

In pursuance of the provisions of this statute, on the 14th of April, 1890, a petition was filed in the court of claims by the Pottawatomie Indians, by their agent and attorney, John Critcher, and on the 5th of November, 1890, another petition by the Pottawatomie Indians, by their agent and attorney, John B. Shipman.

*700 The United States objected to the filing of two petitions, *and the court below, overruling a motion to dismiss the later petition, consolidated the causes, and dealt with them as one. The two classes of claimants unite in the appeal to this court.

They agree in complaining of the insufficiency of the sum allowed the Indians by the decree of the court below; but they disagree, as between themselves, in respect to the division of the moneys awarded by the decree. The Indians represented by John Critcher claim the entire fund. Those represented by John B. Shipman claim a right to participate in the fund, and claim likewise, as we understand them, that only 91 Indians are really represented in the first petition. We shall first consider the merits of the appeal as against the United States, and afterwards deal with the question of distribution.

The first controverted question is as to whom is due the annuity of $2,000 for 20 years, granted by the last clause of the supplemental treaty of September 27, 1833. The petitioners claim the entire amount, $38,000. The United States contend that this amount is distributable between the Indians who went west under the provisions of the treaty of September 26, 1833, and those who remained in Michigan under the supplemental treaty of September 27th, in proportion to their respective numbers.

To answer this question, we must resort to the language of the treaties. The fourth article of the treaty of September 26, 1833, is as follows:

"A just proportion of the annuity money, secured as well by former treaties as the present, shall be paid, west of the Mississippi, to such portion of the nation as shall have removed thither during the ensuing three years. After which time the whole amount of the annuities shall be paid at their location west of the Mississippi." 7 St. p. 431.

The articles supplementary, of September 27th, provided as follows, (7 St. p. 442:)

"Article 1. The said chiefs and headmen cede to the United States all their land situate in the territory of Michigan south of Grand river, being the reservation at *Notawasepe, of 4 miles square, contained in the 3d clause of the 2d article of the treaty made at Chicago on the 29th day of August, 1821, and the ninety-nine sections of land contained in the treaty made at St. Joseph on the 19th day of September, 1827; and also the tract of land on St. Joseph river opposite the town of Niles, and extending to the line of the state of Indiana, on which the villages of To-pe-ne-bee and Pokagon are situated, supposed to contain about 49 sections.

"Article 2. In consideration of the above cession, it is hereby agreed that the said chiefs and headmen, and their immediate tribes, shall be considered as parties to the said treaty to which this is supplementary, and be entitled to participate in all the provisions therein contained as a part of the United Nation; and, further, that there shall be paid by the United States the sum of $100,000, to be applied as follows." (Here follows a specific disposition of $60,000 of it.)

And then this is added:

"And $40,000 to be paid in annuities of $2,000 a year for twenty years, in addition to the $280,000 inserted in the treaty, and divided into payments of $14,000 a year.

"Article 3. All the Indians residing on the said reservations in Michigan shall remove therefrom within three years from this date, during which time they shall not be disturbed in their possession, nor in hunting upon the lands as heretofore. In the mean time no interruption shall be of-

fered to the survey and sale of the same by the United States. In case, however, the said Indians shall sooner remove, the government may take immediate possession thereof."

On page 445 appears the following, signed by eight Indians, but not signed by the commissioners:

"On behalf of the chiefs and headmen of the United Nation of Indians who signed the treaty to which these articles are supplementary, we hereby, in evidence of our concurrence therein, become parties thereto. "And as, since signing of the treaty, a part of the band residing on the reservations in the territory of Michigan have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties, and that arising from the sale of the reservation on which they now reside, shall be paid to them at l'Arbre Croche."

The court below held, with the United States, that under these provisions these claimants were entitled, not to the whole, but to "a just proportion" of this annuity provided for in the supplemental articles of September 27, 1833; and in this view we concur.

It was admitted that the one year's annuity, $2,000, had been paid, leaving to be paid $38,000, of which amount the court awarded in favor of the claimants, as "a just proportion thereof," the sum of $3,653.60. The court arrived at this particular sum by taking the number of the Indians who went west at 2,812, and the number of those who were permitted to remain east as 291.

It is claimed that the court below erred in this method of computation, because it gives an interest to Indians who were not entitled, under the supplemental treaty of September 27, 1833, to participate in this fund. An examination of that treaty shows that the annuity of $2,000 for 20 years was in part consideration of the cession by the Indians who took part in it of 49 sections of reservations on which they were then settled; and it is claimed, with considerable force, that the proceeds of the sale of such reservations, so far as this annuity was concerned, should be distributed among the Indians on whose behalf the supplemental treaty was made, to the exclusion of those who had made the treaty of the day before.

However, we think the court below was right in refusing to adopt this view of the case, and in regarding the two treaties as substantially one, and that, therefore, this annuity was distributable among both classes, giving to those who were permitted to remain east "a just proportion thereof."

The conclusion arrived at by the court below, in its eighth finding, was that, under the several treaties, and upon the entire account, there had accrued to the entire tribe—those who had gone west, and those who had remained in Michigan and Indiana—the sum of $1,432,800; that the portion of this that belonged to the petitioners was $134,368.26. To this is to be added the proportion awarded the petitioner of the $2,000 annuity under the supplemental treaty of September 27, 1833; being, as we have already seen, $3,653.60. The court below further awarded the petitioners, as their proportionate share of the money due and unpaid of the perpetual annuities under the treaties of September 26 and 27, 1833, the sum of $41,626. As against these sums, the court below charged the petitioners with the sum of $75,162.50, which amount, it is admitted, has been received. The court below was urged to decree that the perpetual annuities under said treaties should be reduced to a cash basis, as of the present time, and be now paid. Such a disposition of these annuities would be a very convenient one, and all the claims of the petitioners would thereby be finally closed. But the court properly held that no power had been given it to convert the perpetual annuities into a sum for present payment, and that matter must be left to be hereafter dealt with by congress.

As the United States took no appeal, the several contentions on their behalf are not before us for consideration.

Accepting, as we must do, the facts of the case as found by the court below, we perceive no error in its decree establishing the sum due to the petitioners.

How the moneys so awarded shall be distributed among the several claimants, it is not easy for us to say. The findings of the court below, and the contradictory statements of the several briefs filed by the appellants, have left this part of this subject in a very confused condition. The court says:

"The second section provides that said action shall be commenced by petition, stating the facts, and that the same may be verified by a 'business committee' or authorized attorney of said Indians. Each of the petitions in this proceeding is verified by the affidavit of the attorney appearing in each case, and in that particular are identical. In each case it appears that by special appointment the attorneys represent some of the Pottawatomies who remained in the states of Indiana and Michigan, under the supplementary article to the treaty of September 27, 1833. In this view of the statute, the court allows the motion of the defendants to consolidate the cases, made on the 8th day of January, 1891, and overrules the motion to dismiss cause No. 16,842, made on the 19th of January, 1891.

"This brings the issue by both petitioners to the consideration of the court, to be disposed of upon one broad ground of the right

of all the Pottawatomies of Michigan and Indiana. Congress have recognized, by the very title of the act, a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana;' and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the government which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians."

On the other hand, it is contended, with great show of reason, by the petitioners who are represented in case No. 1,125, (16,842 in the court below,) that the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty in disposing of this part of the subject is that we have neither findings nor concessions that enable us to deal with it intelligently.

It is to be observed that the court below found as a fact (see finding 10) that the average proportion between the Indians who removed west and those who remained was as 2,812 of the former to 291 of the latter, and the court used that relative proportion of numbers as a factor in computing the amount due the petitioners.

The petitioners, however, number 1,371 in case No. 1,125, but the number represented in No. 1,133 (16,473 in the court below) is not precisely stated. It is alleged in the brief filed in behalf of petitioners in case No. 1,125 that only 91 Indians are actually represented in case No. 1,133, and that the other 200 Indians are among those represented in case No. 1,125.

But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians, or what number of Indians, entitled to distribution, are represented by the respective attorneys or agents.

Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable by the head, and as such has been the practice of the government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. U. S. v. "Old Settlers," 148 U. S. —, 13 Sup. Ct. Rep. 650.

The decree of the court below is affirmed.

(148 U. S. 4)

RICHMOND & D. R. CO. v. POWERS et al.

(April 17, 1893.)

No. 200.

RAILROAD COMPANIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — CROSSING RAILWAY AT STATION.

In an action against a railroad company for death by wrongful act, plaintiff's testimony was that deceased, after leaving a train at a small way station, stopped to help a family, including two small children, to alight from the car, and started towards the station, purposing to spend the night there. In so doing he stepped upon an intervening track, which had been leveled up with earth for crossing, and was struck by a train which was moving rapidly without ringing a bell. The family that deceased had assisted barely escaped, and two members thereof testified that they did not know that they were walking upon a track, and had no idea that an engine was approaching. There was no light except a bonfire and the locomotive headlights. There was some conflicting testimony as to these facts, but the jury gave a verdict for plaintiffs. *Held*, that defendant was not entitled to an instruction that deceased was guilty of contributory negligence.

In error to the circuit court of the United States for the northern district of Georgia.

Action in the city court of Atlanta, Ga., by Maggie L. Powers, Homer W. Powers, and Lula W. Powers, by their next friend and guardian ad litem, C. F. Reed, against the Richmond & Danville Railroad Company, to recover for the death of plaintiffs' father, caused by defendant's negligence. Defendant removed the cause to a federal court, where verdict and judgment were given for plaintiffs. Defendant brings error. Affirmed.

Statement by Mr. Justice BREWER:

On April 11, 1886, W. D. Powers was run over by a train belonging to the Richmond & Danville Railroad Company, at a station known as "Lula," and so injured that he died in a few hours. This action was brought to recover damages therefor. The plaintiffs are his children, and the proper parties, under the Georgia statutes, to maintain the action. It was commenced in the city court of Atlanta, Ga., and thence removed by the defendant to the circuit court of the United States for the northern district of Georgia. A trial was had in November, 1888, which resulted in a verdict and judgment in favor of the plaintiffs for $9,800. On the trial the defendant asked the following instruction:

"The undisputed fact exists in this case that the deceased man, Powers, being at the time about forty-five years of age, and, so far as the evidence discloses, in full possession of all his faculties, deliberately stepped upon the railroad track immediately in front of an engine which was running towards him at the rate of five or six miles an hour, and not more than ten feet off, and was almost instantly run over and killed.

"To say that this was an ordinarily careful act, or that this conduct was not negligence on his part, would do violence to a plain and

well-settled principle of law. Admitting that he was a passenger, and therefore not bound, as a traveler on the highway approaching a crossing would be bound, to listen and to look both ways before attempting to cross the track, still the immediate presence, within a few feet, of a moving locomotive, would, it seems to me, have awakened all the senses of an ordinarily careful man, and would have warned him, in more ways than one, that he ought not to put himself on the track, right in front of it.

"It cannot be doubted that this was a careless and dangerous step. If he had been ordinarily careful, he would not have been killed or injured, even if the defendant was negligent. There is nothing in the other testimony in the case which relieves him from the consequences of this act of negligence. If he had not died, and had brought suit, he could not have recovered, nor can these plaintiffs recover, under these facts, and it is therefore your duty, under the law, to find a verdict for the defendant."

This instruction was refused, and exception duly taken.

Henry Jackson and Pope Barrow, for plaintiff in error. Hoke Smith, for defendants in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The only error assigned is in the refusal of the court to instruct the jury, as requested, substantially, that the deceased was guilty of such contributory negligence as to prevent a recovery. It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. Railroad Co. v. Stout, 17 Wall. 657; Railroad Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569.

No objection is made to the instructions which were given, no suggestion that the law as to negligence and contributory negligence was not properly stated to the jury; so we have the question whether the facts, as developed by the testimony, were such as to compel a declaration, as a matter of law, by the court, that there was contributory negligence on the part of the deceased, such as to prevent a recovery. What are the facts, as disclosed by the testimony? Lula is a station in Hall county, Ga., at which, at that time, both the north and south bound trains of the defendant's road stopped for supper. Deceased was a passenger on the north-bound train. There were two tracks in front of the station and eating house. The south-bound train arrived first, and ran along the inner track,—the one nearest to the station. After its passengers had all gone in to supper, it moved back towards the north, and left the space in front of the station and eating house open. Soon afterwards the north-bound train came in, and passed up on the outer track. This was about 8 o'clock in the evening. The deceased did not intend to go any further than Lula, and expected to spend the night there. The two tracks were from eight to ten feet apart. The earth between the rails on the inner track had been leveled up, covering the ties, so as to make a smooth place for walking upon. There was no light, other than the headlights of the locomotives, and from a bonfire of pine knots near the eating house. After the north-bound train had stopped, and other passengers had left the train for the purpose of going in to supper, deceased started with two satchels, one in each hand, across the track to go to the eating house or hotel; and just at that time the south-bound train moved up, and ran upon and injured him. In reference to the foregoing facts there was no dispute.

Further than that, there was testimony tending to show that as deceased was leaving the train a man with his wife and two children, five and seven years of age, started to get off the car; that deceased, putting down his satchels, stopped to help them off; that there was no conductor, brakeman, or other officer of the company present to render any assistance; that, after they were safely off the car, deceased took up his satchels, and they all started, nearly together, in the direction of the eating house, at an angle across the inner track; that while thus walking the south-bound train came along, without ringing a bell, at a rapid speed; that the engineer, being on the right hand of the engine, could not see any one on the left side of the track for quite a distance in front of the engine, and the fireman was so occupied that he could not see the track at all; that, just as the engine neared the party, somebody called out, and the man who had been helped off the train by the deceased jumped, with his wife, pushing the children over, and barely landing on the platform as the engine passed by, while deceased, who was at his side, but a trifle in the rear of the others, was caught by it, and run over. It did not appear that any of the party had ever been at Lula before, or knew of the existence of an inner track, or the situation or surroundings, although it did appear that the deceased had been traveling on the railroad. The man and his wife who thus narrowly escaped testified that they did not know there was a track upon which they were walking; that no bell was rung, and that they had no thought of an approaching train until the outcry, upon which they jumped, and barely saved themselves. What the deceased heard and saw and knew is not af-

firmatively shown, but the entire circumstances of the injury tend to show that he was as ignorant as they in respect to these matters. They had moved but a few steps from the car towards the eating house before the deceased was struck. Upon such facts as these, is it not a question, upon which minds might differ, as to whether the deceased was guilty of contributory negligence? Do not these facts tend, at least, to show that he was exercising due care? His tarrying behind the other passengers was owing simply to his effort to help those who needed help, and in discharging a duty resting upon the officers of the company, and neglected by them. After they had all alighted from the car, they started together in the direction of the eating house, as disclosed by the bonfire, without knowledge of an intervening track, or without thought of an approaching train. No bell was run, no warning given, until the moment of the accident, and then too late for all of the party to save themselves.

It seems as though there could be but one answer to these questions. If these facts do not establish due care on his part, they at least tend very strongly to prove it. It is true that there was testimony tending to show a different state of facts; that the bell of the engine was rung as it moved down the track in front of the station house; that it was moving at a very slow rate of speed,—not faster than a man would walk; that the deceased, on alighting, put down his satchels, waiting for some one from the hotel to come and help him carry them; and that he was there some minutes before he started for the hotel. And, indeed, there was some testimony tending to show that there were no such persons present as the family who claimed that they were helped off the train by deceased. But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court, and, unless it were affirmatively shown that the deceased, when he left the car, and started towards the eating house, knew that he was walking along a track, and that there was danger from another train, and with such knowledge neither looked nor took precautions to satisfy himself whether there was present danger therefrom, it surely cannot be held that there was, as a matter of law, contributory negligence on his part.

There was no error in refusing the instruction, and the judgment is affirmed.

(149 U. S. 30)

PAULSEN et al. v. CITY OF PORTLAND et al.

(April 17, 1893.)

No. 183.

SEWERS—ASSESSMENTS—NOTICE—DUE PROCESS OF LAW.

1. The charter of the city of Portland, Or., (chapter 10, § 121,) which in general terms grants to the council power to construct sewers, and to assess the cost thereof upon the property benefited thereby, is not open to the objection that it deprives the citizen of his property without due process of law because it contains no express provision for notice of such assessment; for the power generally conferred is subject to all constitutional restrictions, of which the requirement of notice is one. 19 Pac. Rep. 450, affirmed.

2. An ordinance passed pursuant to this section ordered the construction of a sewer, declared that certain territory in the city should be drained thereby, and should constitute the district upon which its cost should be assessed, and provided for a board of viewers to apportion the cost among the property owners, directing them to hold meetings at stated times and places to hear all who had an interest in the proceedings. *Held*, that a provision for notice to property owners was implied therein, and it could not be objected that the ordinance was void for failure to embody an express provision therefor; especially after the viewers have given notice, and recited the same in their report, which has been duly confirmed by the council.

In error to the supreme court of the state of Oregon. Affirmed.

Statement by Mr. Justice BREWER:

On March 5, 1887, the common council of the city of Portland passed an ordinance, No. 5068, providing for the construction of a sewer in the north part of the city, and known as "Tanner Creek Sewer." In pursuance of that and subsequent ordinances the sewer was constructed, and the cost thereof cast by a special assessment upon the lots and blocks within a prescribed district. The validity of this assessment was challenged by this suit, the plaintiffs being lot owners in the sewer district. The suit was commenced in the circuit court of the state of Oregon, for the county of Multnomah. That court sustained a demurrer to an amended complaint, and dismissed it, and this decree of dismissal was affirmed by the supreme court of the state. 16 Or. 450, 19 Pac. Rep. 450. The burden of the complaint rested upon these allegations:

"Said ordinance numbered 5068, approved March 5, 1887, is unconstitutional and void, in this:

"§ 121 of chapter 10 of the charter of the said city of Portland, providing for the construction of sewers, under and by virtue of which said ordinance numbered 5068 was passed, is in violation of the fourteenth amendment to the constitution of the United States, as it provides for taking private property for public use without due process of law; and said ordinance numbered 5068 is also unconstitutional and void, as it determines arbitrarily and absolutely that the property therein described is benefited by said Tanner Creek sewer without giving to the owners of said property any notice or opportunity to be heard upon that question. Said ordinance numbered 5162, approved August 19, 1887, is unconstitutional and void upon the same grounds as those upon which said ordinance numbered 5068 is unconstitutional and void as aforesaid, and also because said ordinance numbered 5162 pro-

vides for an assessment of the property therein named for the construction of said Tanner Creek sewer without providing for any notice to the owners whose property is therein and thereby assessed.

"Said ordinances, and each of them, and said assessment, were and are unconstitutional, illegal, and void, because—and these plaintiffs aver the fact to be as now stated—plaintiffs had not, nor had any of them, any notice of the said proceedings of the said common council, or any opportunity to be heard as to whether or not their property, or the property of any of them, was or could be benefited by said sewer, or as to the amount that was or should be assessed upon the several parcels of property named in said ordinance numbered 5162.

"Said ordinances, and each of them, and said assessment, were and are illegal and void, for the reason—and these plaintiffs aver the fact to be—that said common council and the said viewers, and each of them, knew that a large proportion of the property described in said ordinances, including the property of these plaintiffs, was and is a long distance away from said Tanner Creek sewer, and never would or could be benefited by said sewer, and that a considerable portion of said property was lower in elevation than the bottom of said sewer, and that it was physically impossible for said property to be drained into said sewer or to be benefited by it in any way.

"And said ordinances and assessment, and each of them, were and are a gross abuse of power by said common council, and in fraud of the rights of these plaintiffs.

"Said assessment is illegal and void, and in violation of section 121 of chapter 10 of the charter of the said city of Portland, because—and these plaintiffs aver the fact to be—that said assessment was not made upon the property directly benefited by said sewer, but was made indiscriminately upon a large section of the city of Portland, and without reference to the benefits to the property therein contained."

Section 121 of the city charter is as follows:

"The council shall have the power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvement of streets, prescribed in sections 112 and 113 of chapter 10 of this act, shall not apply to the construction of such sewers and drains; and, when the council shall direct the same to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in the case of street improvements: provided, that the council may, at its discretion, appoint three disinterested persons to estimate the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby, and in the construction of any sewer or drain in the city shall have the right to use and divert from their natural course any and all creeks or streams running through the city into such sewer or drain." Sess. Laws Or. 1882, p. 171.

Section 5 of Ordinance 5068 commences: "Sec. 5. The streets and property within the district bounded and described as follows shall be sewered and drained into the Willamette river through the sewer in this ordinance provided and ordered to be constructed along Tanner creek and North Eighth street, from B street, near the intersection of North Fourteenth street to the Willamette river, to wit: Beginning;" and then, after defining the boundary of the sewer district, declares: "And as the lots and blocks, and parts of lots and blocks, included within said district as above defined, will be drained and sewered both by surface drainage and underground sewerage, by and through the sewer in this ordinance ordered to be located, constructed, and put down, the said lots and blocks, and parts of lots and blocks aforesaid, are hereby declared to be directly benefited by such sewer, and subject to assessment therefor, in proportion to the benefits received thereby, as provided in section 121 of the city charter of the said city."

Section 12 is as follows:

"Sec. 12. That R. L. Durham, Charles G. Schramm, and H. W. Monastes, disinterested persons, be, and they are hereby, appointed viewers to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of property benefited thereby in accordance with the provisions of section 121 of the charter of said city, and report the same to the common council within sixty (60) days from the date of the approval of this ordinance by the mayor. Said viewers shall hold stated meetings in the office of the auditor and clerk of said city, and all persons interested may appear before said viewers, and be heard in the matter of making said estimate."

Ordinance 5162 contains these provisions:

"The city of Portland does ordain as follows:

"Section 1. The common council of the city of Portland having, by Ordinance No. 5068, provided for the construction of a sewer, together with the necessary catch-basins, manholes, lampholes, and branches along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, and thence along North Eighth street to North Front street, and thence northeasterly to low water in the Willamette river;

"And having therein and thereby appointed three disinterested freeholders, viz., R. L. Durham, H. W. Monastes, and Charles G. Schramm, to estimate the proportionate

share of the cost of such sewer, to be assessed to the several owners of the property benefited thereby, and said assessors having made their report to the common council, which report, being satisfactory, is hereby adopted, said report being in words and figure as follows, to wit:

" 'To the Hon., the Common Council of the City of Portland—

" 'Gentlemen: The undersigned, appointed by your honorable body to assess the cost of constructing a brick sewer along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, thence along North Eighth street to North Front street, thence northeasterly to low water in the Willamette river, as provided by Ordinance No. 5068, would respectfully beg leave to submit this our report.

" 'We met at the office of the auditor and clerk, and were furnished with the plans, specifications, and contract, from which we have ascertained the probable costs to be $35,652.20, thirty-five thousand six hundred and fifty-two & 20-100 dollars.

" 'In accordance with the requirements of said Ordinance No. 5068, we gave notice of our first stated meeting June 25, 1887, at 6:30 o'clock P. M., (by publication of such notice in the Daily News, the official paper of the city,) at which time we met and proceeded with our work, adjourning from day to day until the final completion of our labors. We have assessed the cost of constructing said sewer to the several lots, parts of lots, and tracts of land included within the boundaries defined by you in your Ordinance No. 5068, in the several amounts as shown by the following tabulated statement: [Omitted, per stipulation.]'

"Sec. 2. The auditor and clerk is hereby directed to enter a statement of the assessment hereby made in the docket of city liens, and cause notice thereof to be published in the manner provided by the city charter.

"Passed the common council, August 17, 1887.

"W. H. Wood, Auditor and Clerk.

"Approved August 19, 1887."

George H. Williams, for plaintiff in error.

Wm. T. Muir, for defendant in error.

*Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The question is that of notice to the taxpayer. It is insisted that the supreme court held that section 121 did not provide for notice; that such construction of the state statute is binding upon this court; and that we must consider the case as though no notice was provided for. It is not entirely clear what construction has been placed upon section 121 by the supreme court of Oregon. In the case of Strowbridge v. City of Portland, 8 Or. 67, 83, (decided in 1879,) the provisions of the city charter in these respects being then substantially like those in the act of 1882, it was said by Judge Boise, delivering the opinion of the court:

"The elaborate manner pointed out in the charter for acquiring the authority to construct street improvements does not apply to the construction of sewers.

"The latter may be laid when, in the judgment of the city council, the same shall be necessary.

"They may be made without previous notice, the council alone being the judge of their necessity."

This language is quoted with approval by Chief Justice Thayer, in delivering the opinion of the court in this case. But on the petition for a rehearing, which was denied by two judges to one, each of the judges in favor of denying gave a brief opinion, and Judge Strahan in his says:

"But it is objected that neither the charter nor ordinance expressly provides for notice, and that, therefore, though notice may have been in fact given, the constitutional objection of want of notice is not met.

"Sections 95, 96, 97, 98, and 99 of the charter all provide for and regulate notice in cases of improvement of streets, and 'section 121,' which authorizes sewers, provides, among other things: 'And, when the council shall direct the same [costs] to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in the case of street assessments.'

"The charter expressly provides for notice in case of street assessments, and section 121 makes the provisions applicable in case of sewers where the expense is ordered by the council to be made a charge on the property directly benefited."

In the subsequent case in the same court of Association v. City of Portland, decided in 1892, and reported in 31 Pac. Rep. 482, it was held that "the provision that such expense shall be assessed in the same manner as is provided in the case of street improvements necessarily makes such sections in regard to street improvements, with the exceptions noted, a part of section 121, for that purpose." It would seem from this that the final construction placed by the supreme court was to the effect that the charter requires notice as much in the matter of sewers as of street improvements.

But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should

in terms be expressed either the necessity for, or the time or manner of, notice. The city is a miniature state; the council is its legislature; the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for, when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus, in the case of Gilmore v. Hentig, 33 Kan. 156, 5 Pac. Rep. 781, it was held that "where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same." See, also, Cleveland v. Tripp, 13 R. I. 50; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. Rep. 230; Williams v. Mayor, etc., 2 Mich. 560; Gatch v. City of Des Moines, 63 Iowa, 718, 18 N. W. Rep. 310; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co., 17 W. Va. 812, 835.

But it is further insisted that, even if the general grant of power in a charter to do a work of this kind is sufficient without an express provision in it as to notice to the taxpayers, the city in the execution of that power must by ordinance provide for notice and prescribe its terms, and that these ordinances contained no such provision. Here, again, we are met with an apparent difference in opinion of the two judges of the supreme court of Oregon, concurring in the judgment in favor of the city. The chief justice seems to consider the matter of notice immaterial, relying upon the doctrine of stare decisis, that the right of the city to carry through such a work without any notice had been settled years before in the Strowbridge Case; while Judge Strahan makes these observations:

"In addition to this, section 12 of Ordinance No. 5068 provides that the viewers shall hold stated meetings at the office of the auditor and clerk of said city, and all persons interested may appear before said viewers, and be heard in the matter of making said estimates.

"I think it would be a reasonable construction of this ordinance to hold that the right to be heard implies that notice shall be given, and, if this be so, the ordinance does provide for notice by necessary implication. "That which is implied in a statute is as much a part of it as what is expressed." Minard v. Douglas Co., 9 Or. 206.

But what was in fact done by the city? By Ordinance 5068 it ordered the construction of a sewer, and directed what area should be drained into that sewer, and created a taxing district out of that area. For these no notice or assent by the taxpayer was necessary. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So, also, the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion. Willard v. Presbury, 14 Wall. 676; Spencer v. Merchant, 125 U. S. 345, 355, 8 Sup. Ct. Rep. 921. By the same ordinance the city also provided that the cost of the sewer should be distributed upon the property within the sewer district, and appointed viewers to estimate the proportionate share which each piece of property should bear. Here, for the first time in proceedings of this nature, where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost, the taxpayer has a right to be heard. The ordinance named a place at which the viewers should meet, directed that they should hold stated meetings at that place, and that all persons interested might appear and be heard by them in the matter of making the estimate. The viewers, upon their appointment, gave notice by publication in the official paper of the city of the time of their first meeting. Notice by publication is a sufficient notice in proceedings of this nature. Lent v. Tillson, 140 U. S. 316, 328, 11 Sup. Ct. Rep. 825. As the form of the notice and the time of its publication are not affirmatively disclosed in the complaint, it must be assumed that there was no defect in respect to these matters. The precise objection is that, although proper and sufficient notice may have been given, it was not in terms prescribed by the ordinance appointing the viewers. But, as held by the supreme court of Oregon in the case referred to, (Minard v. Douglas Co., 9 Or. 206,) that which is implied in a statute is as much a part of it as that which is expressed; and where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held, and directs that all persons interested in the matter may be heard before it, it is, as said by Judge Strahan, not a strained interpretation that it is implied thereby that some suitable notice shall be given to the parties interested. 41

But, further, the viewers made formal report to the council of what they had done, stating that they had, in accordance with the requirements of Ordinance 5068, given notice by publication, and the council, in subsequent Ordinance 5162, recites that their report is satisfactory and adopted. In other words, the council by this latter ordinance approved the construction placed by the viewers upon the first, to the effect that it required notice. It would seem that, when notice was in fact given,—notice whose sufficiency is not chal-

lenged,—a construction put by the council upon the scope and effect of its own ordinance should be entitled to respect in any challenge of the regularity of the proceedings had under that ordinance. It is settled that, if provision is made "for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." McMillen v. Anderson, 95 U. S. 37; Davidson v. New Orleans, 96 U. S. 97; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. Rep. 921. If, before the viewers had in fact met, yet after they had published notice, the council had passed an ordinance reciting an approval of that act of notice, it could hardly be doubted that the full requirements of law as to notice were satisfied. Because this approval was not made until after the hearing before the viewers, is it thereby worthless,—of no validity? And can this court say, when those proceedings have been sustained by the supreme court of the state, that rights guarantied by the federal constitution have been stricken down, and that these individuals have been deprived of their property without due process of law?

Another matter may be mentioned: The second section of Ordinance 5162 directed the ordinary publication of notice of the assessment. The charter (section 102) required a "docket of city liens," in which was entered,—First, the description of each piece of property assessed; second, the name of the owner, or that the owner is unknown; and, third, the sum assessed upon such piece of property, and the date of the entry. And *423 by section 104 it was provided that "a sum of money assessed for the improvement of a street cannot be collected until, by order of the council, ten days' notice thereof is given by the auditor, by publication in a daily newspaper published in the city of Portland. Such notice must substantially contain the matters required to be entered in the docket of city liens concerning such assessment."

Now, without deciding that this notice is sufficient notice to bring the proceedings within "due process of law," it is worthy of remark that during the 10 days of publication, made as required by said section 104 and section 2 of Ordinance 5162, the plaintiffs did not challenge the regularity of the proceedings, or apply to the council for an inquiry into the justness of the apportionment, nor did they commence any suit until a month after the time when warrants for the collection of delinquent assessments had been ordered by the council. In other words, only after payment had been made by a portion of the taxpayers did these plaintiffs ask any relief.

Without continuing this inquiry any further, we are of the opinion that, notwithstanding the doubt arising from the lack of express provision for notice in Ordinance 5068, it cannot be held, in view of the notice which was given, of the construction placed upon this ordinance by the council thereafter, and of the approval by the supreme court of the proceedings as in conformity to the laws of the state, that the provisions of the federal constitution requiring due process of law have been violated.

The judgment is therefore affirmed.

Mr. Justice FIELD did not hear the argument or take part in the decision of this case.

(148 U. S. 60)

MEXIA et al. v. OLIVER.

(April 17, 1893.)

No. 182.

HUSBAND AND WIFE—CONVEYANCE OF WIFE'S SEPARATE PROPERTY—EVIDENCE.

1. Under Sayles' Civil St. Tex. art. 559, providing that no conveyance of a wife's separate property shall take effect unless made by her and her husband jointly, and acknowledged by her privily, and apart from her husband, a conveyance of such property by the husband for himself, and as attorney for his wife, by virtue of a power of attorney privily acknowledged by her, is void, unless the deed itself is privily acknowledged by her, as provided by the statute. Cannon v. Boutwell, 53 Tex. 626, and Peak v. Brinson, 11 S. W. Rep. 269, 71 Tex. 310, followed.

2. In an action to recover possession under the Texas procedure, where the petition demands judgment for the land, and the notice thereon says the action is brought to try title, although the question may be technically not one of title, but merely whether a boundary was changed by the authority and ratification of the wife, such a power of attorney and deed are not admissible in evidence to prove such authority and ratification.

3. The admission of improper evidence, against the objection of a party, is reversible error, unless it appears beyond doubt from the record that his rights could not have been prejudiced thereby.

In error to the circuit court of the United States for the northern district of Texas.

Action by Sarah R. Mexia and E. A. Mexia, her husband, against T. J. Oliver, for the possession of certain land. Verdict and judgment were given for defendant. Plaintiffs bring error. Reversed.

A. H. Evans and W. S. Fleppin, for plaintiffs in error. S. L. Samuels, for defendant in error.

*Mr. Justice BLATCHFORD delivered the opinion of the court. *424

This is an action at law, brought in the circuit court of the United States for the northern district of Texas by Sarah R. Mexia and her husband, Enrique A. Mexia, citizens of Mexico, against T. J. Oliver, a citizen of Texas, for the possession of a piece of land. The "first amended original petition" in the suit, filed November 30, 1888, is indorsed with a notice to the de-

fendant that the action is brought as well to try title as for damages. The petition states that on January 1, 1878, the plaintiffs were seised and possessed, in fee, in right of said Sarah R. Mexia, of the following described tract of land, situated in Limestone county, Tex., being some 4,000 acres, more or less, out of 11 leagues of the land granted originally to Pedro Varella, "beginning at a stake and mound on the eastern boundary of the Pedro Varella 11-league grant, 2,253 varas south, 45° east, from the northeast corner of said 11-league grant, said stake and mound being also the southeast corner of a 6,000-acre tract in the name of Jose M. Cabellero out of said 11-league grant, as the same was originally surveyed and established in June, 1855, by G. H. Cunningham, surveyor, at the instance of E. A. Mexia, agent for J. M. Cabellero and plaintiffs' vendors; thence south, 45° west, with the south boundary line of said 6,000-acre tract, * * * (according to a block of surveys made by G. H. Cunningham in 1856 in sectionizing and subdividing said 11-league grant, and set apart to plaintiff Sarah R. Mexia by deed of partition between Adelaide M. Hammekin, George L. Hammekin, Sarah R. Mexia, and E. A. Mexia, dated March 30, 1874;)" thence proceeding with the boundary around said land to the place of beginning,—"said boundaries including sections Nos. 1, 2, 3, 4, 5, and a part of section No. 6, of the subdivision and partition of the said Pedro Varella 11-league grant, as shown on the records of the said Limestone county." The petition sets forth, also, that on February 11, 1850, "Adelaide M. Hammekin, joined by her husband, George L. Hammekin, being at that time the owners of said 11-league grant, made, executed, and delivered to one Jose M. Cabellero a conveyance for 6,000 acres of said 11-league grant, out of the northeast corner of same, before any actual survey was made of said 6,000-acre tract, and that the same was never actually surveyed on the ground until the month of June, 1855, at which time said 6,000-acre tract was actually surveyed on the ground, and cut off from said 11-league grant, and the south or southwest boundary line thereof was well established on the ground in accordance with the field notes as hereinbefore set forth, and the same has ever since been held and regarded and acquiesced in as the south boundary of said 6,000-acre tract, and as the division line between the same and the remainder of said 11-league grant on the south and west thereof, and from that time to the present said line and survey has been acquiesced in by the adjacent owners of the land north and south of said line;" that said survey was made, and said line thus established, by G. H. Cunningham, then surveyor of the land district in which said land was situated, and this was done by request and authority of said J. M. Cabellero and the said Hammekins, and said survey and lines were afterwards ratified, and ever since acquiesced in, by them and their vendees; that such title as the defendant claims under is derived from Cabellero under said conveyance for 6,000 acres; that the defendant will claim and insist in this cause that the south boundary line of said 6,000-acre tract, in the name of Cabellero, should be at a point about 277 varas further south than as heretofore established, and as claimed by the plaintiffs; that on January 1, 1878, the defendant illegally entered on the land, and ejected the plaintiffs therefrom, to their damage in the sum of $10,000; and that the land claimed is of the value of $20,000. The petition prays judgment for the land, damages, and costs, for a writ of possession, and for other relief.

The defendant filed a "first amended original answer" on April 17, 1889, by which he demurred to the plaintiffs' first amended original petition as insufficient in law, denied all the allegations of the petition, pleaded not guilty, and alleged that he had been in quiet, peaceable, continuous, and adverse possession for more than three years before the filing of the suit, of so much of the land described in the petition as was included within the boundaries following, to wit: "In Limestone county, about 6 miles above the town of Springfield, on the northern or left of the river Navasota, being a part of the 11-league grant by the states of Coahuila and Texas to Pedro Varella, and commencing on the left bank of the eastern (or northern) branch of the Navasota at the point where the original line of said 11-league grant, from the second to the third corners, crossed the said creek; thence N., 45° E., following the original line of said 11-league grant, to the original 3rd corner; thence S., 45° E., two thousand five hundred and thirty (2,530) varas, following the original line of the said 11-league grant; thence S., 45° W., being a line parallel with the first line of this survey, to the left bank of the Navasota; thence up said river to the beginning." That, as to all not included in said boundaries, he did not set up any claim. That he pleaded the three-years and the five-years statutes of limitation. That he, and those whose estate he had in the lands sued for, had adverse possession of the land described in his plea of three years' limitation, for one year next before the commencement of the suit, claiming the land in good faith. That he and they had made permanent and valuable improvements thereon, to the amount of $5,000, which he asked to have valued and allowed to him under the statute, and that, as to all land not included in the boundaries given in the answer, he made disclaimer.

The answer further alleged that on July 27, 1874, he purchased from Mrs. Maria Dolores Felicite Conti, the only daughter and

only heir of Jose M. Cabellero, the land described in the answer, paying therefor to her $5,000 cash, in gold, and received a deed, with said field notes, from her and her husband, J. M. Conti; that, if the Hammekins and said Cabellero ever agreed that the said 6,000-acre tract should be surveyed, and the same was so surveyed as to make its southern boundary 277 varas further north than the southern boundary as called for by said deed from the Hammekins to Cabellero, and they afterwards acquiesced in and ratified the same,—which is not admitted, but expressly denied,—then the defendant avers that at and before the time he paid such purchase money, and received the deed from Mr. and Mrs. Conti, he had no notice, actual or constructive, of such agreement, survey, or ratification of the survey, nor that the Hammekins or the plaintiffs claimed any right to, or interest in, said 6,000-acre tract, or any part thereof, as set out by metes and bounds in the deed to Cabellero; that the defendant was a bona fide purchaser for value of the land, as so described, and believed that he was acquiring the full and complete title to the land, as described in the deed to Cabellero, and believed that he had a right to rely on the description of said land, as set out in said deed, as correct; that on ——, 187–, he learned that Whitfield Scott claimed to have title to said land, derived from the Hammekins, and he purchased said title from Scott, paying valuable consideration therefor, and without notice, actual or constructive, at the time he paid such consideration, or received his deed from Scott, that any one else claimed title to any part of said land, and without notice, actual or constructive, of the agreement, survey, or ratification set out in the answer; that he received from Scott a deed with the same field notes as set out in said deed to Cabellero; and that in purchasing from Scott he was, as to the claims set up by the plaintiffs, a bona fide purchaser for a valuable consideration.

The plaintiffs filed their "first supplemental petition," which demurred to the defendant's first amended original answer, filed April 17, 1889, as insufficient in law, and denied all the averments contained in said answer, and, in replication to the defendant's averments and claims of title under the statutes of limitation of three and five years, said that if the defendant had possession, under title or color of title, of any of the land described in the petition, for three or five years before the suit was instituted, (all of which the plaintiffs denied,) such possession was no bar, because ever since the defendant acquired title, color of title, or possession the plaintiff, Sarah R. Mexia, had been the lawful wife of the other plaintiff, and had been a married woman for ten years before the institution of the suit, and for several years before the defendant acquired any title, color of title, or possession of any of the land described in the petition; and that she was still such lawful wife of her coplaintiff. They prayed judgment as in their petition.

No disposition appears to have been made of the demurrer to the petition or the demurrer to the answer; but the case was tried in April, 1889, before the court and a jury. A verdict was found for the defendant, whereupon a judgment was entered that the plaintiffs take nothing by their suit, and that the defendant recover his costs, with execution upon either the common property of the wife and the husband, or the separate property of the wife. The plaintiffs have sued out a writ of error from this court.

There is a bill of exceptions, which set forth that on the trial the defendant offered to introduce in evidence a power of attorney executed by Adelaide M. Hammekin to her husband, George L. Hammekin, empowering him to dispose of, in her name, certain real property belonging to her separately; that the defendant also offered to introduce in evidence a deed to the lands in controversy, made by said George L. Hammekin as attorney for his wife, and personally for himself, in which deed he acted for his wife under said power of attorney, and conveyed the 6,000-acre Cabellero tract of land, by metes and bounds, as claimed by the defendant, to Whitfield Scott, on March 18, 1875, and a deed from Scott to the defendant, dated March 20, 1875, conveying the same land conveyed to Scott by George L. Hammekin for himself and wife; and that the plaintiffs objected to the introduction of said testimony, because: "First. Said power of attorney did not vest in the husband any authority to act for the wife in executing deeds to her separate property; such a power being inconsistent with, and in contravention of, our statute requiring the signature and privy acknowledgment of the wife, joined by her husband, to convey such property. Second. The deed to Whitfield Scott, executed by George L. Hammekin for himself, and as attorney in fact for his wife, was without authority of law, was not privily acknowledged by the wife, as is required in cases of the conveyance of the separate property of the wife, and conveyed none of her title. Third. The deed from Whitfield Scott to defendant T. J. Oliver, being based upon the foregoing instruments, should fall with them, and was not evidence of any title." The court overruled the objections, and admitted the instruments in evidence, and the plaintiffs excepted. After the verdict was rendered, the plaintiffs appear to have moved the court to set aside the verdict and to grant a new trial, for the following reasons: "(1) Said verdict is contrary to the law in this case, as given in charge to the jury by the court, and is contrary to the evidence in the case, of all the legitimate, positive testimony in the case, showing clearly, and beyond a doubt, that the lower line of the Cabellero 6,000-acre tract of land was actually run upon the ground and marked

off by the surveyor, G. H. Cunningham, in 1855, and that said line was subsequently acquiesced in by said Cabellero and the Hammekins, the adjacent owners of the lands on both sides of said line, as the true division line between said tracts. (2) Because the court erred in admitting in evidence, over plaintiffs' objections, the power of attorney made by Adelaide M. Hammekin to her husband, George L. Hammekin, authorizing him to act for her in the sale and disposition of her real property, and in admitting in evidence, over plaintiffs' objection, the deed from said Adelaide M. Hammekin, acting by her said husband as attorney in fact, to Whitfield Scott, conveying the land here in controversy; said power of attorney being in contravention of the policy of our laws, as decided by our courts, and said deed, under our said decisions, being insufficient to bind a married woman, or to convey her separate property, having never been privily acknowledged by her. (3) The court erred in permitting the defendant, Oliver, and the witness Roberts to testify as to lengths of the various section lines of Pedro Varella eleven-league section; said proof being wholly immaterial to the ascertainment of whether a line had actually been run, and acquiesced in by the adjacent owners, as claimed by plaintiffs, but, on the contrary, said proof tending to confuse the minds of the jurors, and cause them to consider whether plaintiffs had their quantity of land in the various sections, instead of the true location of the division lines between the Cabellero tract and the balance of the eleven leagues." The record does not show that any disposition was made of that motion, nor is it shown by the record why the court made the rulings which it did make. We are furnished with a brief for the defendant.

It is assigned as error that the court allowed the introduction in evidence of the power of attorney from Mrs. Hammekin to her husband of the deed to Scott by the latter, acting for himself, and as agent for his wife, and of the deed from Scott to the defendant, because "(1) said power of attorney from Adelaide M. Hammekin to her husband, George L. Hammekin, could not authorize him to act for her, and as her agent, in conveying her separate property,—said instrument being void under the statute and decisions of Texas requiring the privy acknowledgment of married women to transfers of their separate real property; (2) the deed from George L. Hammekin, acting for himself and wife, to W. Scott, not being signed by her, and acknowledged by her privily and apart from her said husband, did not, under said statute and decisions, convey her separate property; and (3) said deed from Scott to defendant, being based on the foregoing invalid instruments, must fall with them."

The location of the south boundary line of the 6,000-acre tract (out of the northeast corner of the 11-league grant to Varella) conveyed by Mrs. Hammekin and her husband, in 1850, to Cabellero, appears to be the issue in the action; and the defendant claims in accordance with the call in that deed. The plaintiffs claim that, at the time of the sale of the land to Cabellero, it had not been surveyed; that there was no survey of it until June, 1855, when it was surveyed and marked on the ground by the Hammekins and Cabellero, the south boundary line being at a distance of 2,253 varas south, 45° east, from the northeast corner of the 11-league grant; and that the line thence south, 45° west, was thereafter recognized by the Hammekins and Cabellero as the true south boundary line of the Cabellero tract, and its location there was acquiesced in by the then adjacent owners of the lands; that the land south of that line was sectionized for the Hammekins in 1856 by Cunningham, the same surveyor who established the line for the Hammekins and Cabellero in 1855; that in sectionizing he began section No. 1 at the southeast corner of the Cabellero tract, at a point in the eastern boundary line of the 11-league grant 2,253 varas from the northeast corner of that grant; and that all the sections lying south of said 6,000-acre tract, being sections 1, 2, 3, 4, 5, and part of 6, were set apart to the plaintiffs by deed of partition between them and the Hammekins, dated March 30, 1874.

The defendant claims the 6,000-acre tract in accordance with the calls in the original deed conveying it from the Hammekins to Cabellero in 1850, and alleges that he acquired title to it—First, through the deed to him from Mrs. Conti, dated July 27, 1874; and, second, through the deed from the Hammekins to Scott, and that from Scott to the defendant, dated, respectively, March 18 and 20, 1875.

Article 559 of Sayles' Civil Statutes of Texas reads as follows: "The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily, and apart from her husband, before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded and certified to in the mode pointed out in chapter two, title lxxxvi., [title 86.]" Title 86, c. 2, art. 4310, provides as follows: "No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment, on an examination privily and apart from her husband, nor shall he certify to the same unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it." Arti-

cle 4311 makes requirements as to the certificate, and article 4313 prescribes the form of certificate of acknowledgment by a married woman.

*673 Article 559 has been interpreted by the supreme court of Texas in Cannon v. Boutwell, 53 Tex. 626, and Peak v. Brinson, 71 Tex. 310, 11 S. W. Rep. 269. In the first case the title of the defendant depended, as it does here, upon the validity of a power of attorney executed and privily acknowledged by the wife, authorizing the husband to sell and convey her separate property, and the validity of a deed made by the husband under the power, acting for himself and his wife; the deed being executed by him without her privy acknowledgment thereof. In its opinion the court said: "A deed or power of attorney signed by the wife alone is not such an instrument as the statute makes effective to pass her estate. The decisions under similar statutes have been uniform in holding the separate conveyance of the wife invalid, notwithstanding it may have been clearly shown that she acted with her husband's assent," citing several decisions. The opinion further said: "The statute does not attempt to provide for either conveyances or powers of attorney from the wife to the husband, and we think it would be a departure from the policy of the law, wholly unauthorized by anything in the statute, to allow the husband, by means, simply, of a general power of attorney from the wife, to dispose of her separate estate at his will." Under that decision the power of attorney from Mrs. Hammekin to her husband would appear to be ineffectual to pass to him any right to transfer her separate property, without her privy acknowledgment of the deed, and the deed from Mr. Hammekin to Scott to be invalid. The same ruling was made in Peak v. Brinson. The first case was in regard to instruments made in 1856 and 1858, while the second case applied to instruments made between 1870 and 1880.

We cannot say that these errors were immaterial, as it does not appear beyond doubt that they were errors which could not prejudice the rights of the plaintiffs. Deery v. Cray, 5 Wall. 795, 807; Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. Rep. 471. The circuit court, by overruling the objections made to the instruments in question, virtually held that they gave the defendant a valid title; and the evidence afforded by those instruments may have had the effect upon the jury of disproving the acquiescence of Mrs. Hammekin in the boundary line as claimed by *674 the plaintiffs, while it does not appear that she knew anything about the alleged sale by her husband as her attorney in fact. The acquiescence and agreement on the part of Mrs. Hammekin formed an issue in the case.

It is contended on the part of the defendant that there was no question of title in the case, and that the sole question was one of boundary; also, that the question being whether the south boundary of the 6,000-acre tract was changed from that called for in the original deed from the Hammekins to Cabellero by their request and authority and ratification, the power of attorney from Mrs. Hammekin to her husband, and their deed, were admissible to show that they and Cabellero had not changed the line; that the instruments were not offered or admitted to prove title; and that the above authorities do not apply to a question which is not one of title. But we have remarked sufficiently on this subject. The petition demands judgment for the land, and the notice on it says that the action is brought to try title.

The record is very meager, but we have arrived at a satisfactory conclusion on the case as presented.

The judgment of the circuit court is reversed, and the case is remanded to that court with a direction to grant a new trial.

(148 U. S. 372)

AMERICAN CONSTRUCTION CO. v. JACKSONVILLE, T. & K. W. RY. CO.

SAME v. PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND GRANTING ANNUITIES.

(March 27, 1893.)

Nos. 14 and 15 Original.

SUPREME COURT—MANDAMUS—CERTIORARI—CIRCUIT COURT OF APPEALS.

1. Though the judiciary act of 1789, § 13, (Rev. St. § 688,) empowers the supreme court to issue writs of mandamus "in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States," such writ cannot be used to perform the office of an appeal or writ of error to review the judicial action of an inferior court, especially when it is an interlocutory order of which a review is sought.

2. Nor, except as provided in section 6 of the judiciary act of March 3, 1891, can a writ of certiorari be made to serve the same purpose, though section 14 of the judiciary act empowers the supreme court "to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law."

3. The power of the supreme court, under section 6 of the judiciary act of March 3, 1891, to review by writ of certiorari to the circuit court of appeals cases made final in that court, extends to cases brought there by appeals under section 7 from interlocutory decrees granting or continuing injunctions, and it is left to the discretion of the supreme court to determine at what stage of the proceedings it will exercise this power; but the writ will not be issued at all in such cases unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

4. Where the circuit court of appeals, under the authority given it by section 7 of the judiciary act of March 3, 1891, to entertain an appeal from an interlocutory order "granting or continuing an injunction," entertains an appeal from an order appointing a receiver for a railroad company and enjoining the disposition of its property, and not only modifies the injunction, but also directs the circuit court to discharge the receiver and restore the property to the company, its action in the latter respect, even if erroneous, is no ground for in-

terference by the supreme court by writ of mandamus, for the appeal from the injunctional part of the decree was clearly authorized, and the case was within the jurisdiction of the circuit court of appeals.

5. Such a case is not one for the interposition of the supreme court by writ of certiorari under section 6 of the judiciary act of March 3, 1891, for this branch of its jurisdiction is to be sparingly exercised; and the decree of the circuit court of appeals was neither so important in its immediate effect, nor so far-reaching in its consequences, as to warrant the supreme court in issuing the writ.

6. The question whether the circuit court of appeals has authority to entertain an appeal from a decree setting aside an order appointing a receiver is not of such importance, even though the court has exercised such authority, as to require the interposition of the supreme court, either by mandamus or certiorari; for, even if the interlocutory order could not be the subject of a separate appeal, it might be brought before the circuit court of appeals on appeal from the final decree in the cause.

7. Where, however, upon an appeal from an order made in the circuit court by the district judge, setting aside an order made by the circuit judge, the circuit judge takes part in the decision in the circuit court of appeals, the question whether he was not disqualified to so take part under section 3 of the judiciary act of March 3, 1891, and whether the decree of the circuit court of appeals was not therefore void, is one which deeply affects the administration of justice in that court; and, in order to determine the same, the supreme court will issue a rule to show cause why a writ of certiorari should not issue, and if it should be determined upon the hearing thereof that the circuit judge was disqualified, and that the decree was therefore void, the writ will issue to bring up and quash the same.

Petitions for mandamus or certiorari to the United States circuit court of appeals for the fifth circuit, filed in the suits of the American Construction Company against the Jacksonville, Tampa & Key West Railway Company, and of the same plaintiff against the Pennsylvania Company for Insurance on Lives and Granting Annuities. Both writs denied in the first-mentioned case, and the petition dismissed. Mandamus denied in the second case, but rule granted to show cause why certiorari should not issue.

*373 *Statement by Mr. Justice GRAY:

These were two petitions to this court, each praying, in the alternative, for a writ of mandamus, or a writ of certiorari, to the United States circuit court of appeals for the fifth circuit.

In the first case (No. 14) it appeared that the following proceedings were had in the circuit court of the United States for the northern district of Florida:

On July 6, 1892, the American Construction Company, a corporation of Illinois, and a stockholder in the Jacksonville, Tampa & Key West Railway Company, a corporation of Florida, engaged in operating a railroad in that state, filed a bill in equity, in behalf of itself and of such other stockholders as might come in, against the railway company, and against its president and directors, citizens of other states, alleging that they had made a contract in its behalf, which was illegal and void, and unjust to its stockholders, and had declined to have an account taken, and praying for an account, a receiver, and an injunction.

On the filing of the bill, Judge Swayne, the district judge, made a restraining order, by which, until the plaintiff's motion for an injunction and for the appointment of a receiver could be heard and determined, the railway company and its officers and agents were enjoined and restrained from remitting, sending, or removing any of its income, tolls, and revenues from the jurisdiction of the court, and from selling, disposing of, hypothecating, or pledging any of its bonds of a certain issue at less than their par value.

On August 4, 1892, Judge Swayne, after a hearing of the parties, made an order appointing Mason Young receiver of all the property of the railway company; enjoining the railway company, its officers and agents, and all persons in possession of its property, from interfering with the possession, control, management, and operation of the property, and from obstructing the exercise of the receiver's rights and powers, or the performance of his duties; and continuing the restraining order of July 6th until the further order of the court.

On August 5th, Judge Swayne, on a petition of the receiver, and after hearing him and the parties, made an order *authorizing* him to pay certain interest and obligations of the railway company out of the income and money coming into his hands as receiver, or, if those should be insufficient for that purpose, to issue receiver's notes in payment of such interest and obligations, or, at his discretion, to borrow money on such receiver's notes for that purpose, the amount of such notes outstanding at one time not to exceed $125,000.

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On August 27th, the railway company prayed and was allowed an appeal from the orders of August 4th and August 5th to the United States circuit court of appeals for the fifth circuit, and gave bond to prosecute the appeal.

On November 18th the construction company moved the circuit court of appeals to dismiss the appeal because that court had no jurisdiction to review the action of the circuit court in making those orders or either of them.

On January 16, 1893, the circuit court of appeals, held by Circuit Judges Pardee and McCormick and District Judge Locke, denied the motion to dismiss the appeal, and entered a decree reversing and setting aside the orders appealed from, except as to the injunction; modifying the injunction so as to permit the railway company to send away money for the payment of its bonds which had been regularly sold, and for the purchase of necessary equipment and supplies, and to restrain it from disposing of, at less than their par value, such only of the bonds of

the issue mentioned as remained the property of the company; and instructing the circuit court to modify accordingly the restraining order of July 6th, continued by the order of August 4th, and to vacate the order of August 4th, appointing a receiver, to discharge the receiver, and to restore the property of the company to its officers.

On January 23d, the construction company filed a petition for a rehearing, upon the grounds, among others, that the circuit court of appeals had no jurisdiction to review an order appointing a receiver, and that its decree did not allow the receiver time to settle his accounts, nor provide for the payment of his notes in the hands of bona fide holders for value.

*375 On January 30th, the circuit court of appeals denied a rehearing, and sent down a mandate in accordance with its decree, and on February 1st the mandate was filed in the circuit court.

On February 2d, the construction company moved this court for leave to file a petition for a writ of mandamus to the circuit court of appeals to dismiss so much of the appeal of the railway company as undertook to bring before that court the action of the circuit court in appointing a receiver and in authorizing him to borrow money upon receiver's notes, or, in the alternative, for a writ of certiorari to the circuit court of appeals to bring up its decree for review by this court.

In the second case, (No. 15,) besides the facts above stated, the following facts appeared:

On July 23, 1892, the Pennsylvania Company for Insurance of Lives and for Granting Annuities, a corporation of Pennsylvania, as trustee under a mortgage of the property of the railway company to secure the payment of its bonds of the issue aforesaid, presented to Judge Pardee a bill in equity, addressed to the same circuit court, against the railway company, praying for a foreclosure of the mortgage, for the appointment of a receiver, and for an injunction.

On the same day, upon this bill, and with the consent of the railway company, Judge Pardee signed an order appointing Robert B. Cable receiver of all its property, and declaring that the appointment was provisional, to the extent that any one having an interest in the property of the railway company might show cause within 30 days why the appointment should not be confirmed, and that the appointment should not "affect or forestall any action the court or any of its judges may hereafter see proper to take on any bill heretofore filed in this court against said railroad company, wherein a receivership has also been prayed for." This bill and order were directed by Judge Pardee to be filed of July 23, 1892, and were filed by the clerk as of that day.

On July 29th, the construction company filed in the circuit court a petition of intervention, setting forth the previous proceedings in the first case, and praying that the order appointing Cable receiver might be set aside and vacated.

On August 4th, on this petition, Judge Swayne, holding the circuit court, made an order setting aside and vacating the order appointing Cable receiver, and staying all further proceedings in the cause until the further order of the court.

On August 23d, the Pennsylvania Company prayed and was allowed an appeal from that order of Judge Swayne to the United States circuit court of appeals for the fifth circuit, and gave bond to prosecute its appeal.

On November 18th, the construction company moved to dismiss this appeal because the circuit court of appeals had no jurisdiction of an appeal from that order, and because it appeared by the pleadings and papers on file that the suit was a collusive one between the appellant and the railway company.

On January 16, 1893, the circuit court of appeals, held by Circuit Judges Pardee and McCormick and District Judge Locke, denied the motion to dismiss the appeal, and entered a decree by which that order was reversed, "the stay of proceedings dissolved, the receivership restored," and the cause remanded to the circuit court, with instructions to proceed therein in accordance with the opinion rendered by the circuit court of appeals, by which it was "left with the circuit court to determine what person is the proper one to execute the office of receiver in this case, and to continue Receiver Cable, or to appoint a more suitable person in his place, as the relations of the parties and the character and condition of the property may, in the judgment of that court, require."

On January 23d, the construction company filed a petition for a rehearing, upon the following grounds:

(1) That the order appealed from was purely in the discretion of the circuit court, and not subject to appeal.

(2) That the order of July 23, 1892, appointing Cable receiver, was a nullity, because made by Judge Pardee in the state of Ohio, outside of his circuit, and while the circuit court was in session in the district where the suit was pending.

(3) That, this order being a nullity, there was no receivership to be restored, and that the circuit court of appeals had no power or jurisdiction to vacate the order of the circuit court appointing, or refusing to appoint, a receiver.

*376 (4) That if the order of July 23, 1892, was valid, the circuit judge who made it could not sit in the circuit court of appeals at the hearing of the cause, and was expressly prohibited from so doing by the following provision in the act creating that court: "Provided, that no justice or judge before whom a cause or question may have been

tried or heard in the district court or existing circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals." Act March 3, 1891, c. 517, § 3, (26 St. p. 827.)

(5) That it should be left open to the circuit court to inquire whether the suit was collusive, and thereupon either to appoint a receiver or to dismiss the bill.

On January 30th, the circuit court of appeals denied a rehearing, and sent down a mandate in accordance with its decree; and on February 1st this mandate was filed in the circuit court.

On February 2d, the construction company moved this court for leave to file a petition for a writ of mandamus to the circuit court of appeals to dismiss so much of the appeal of the Pennsylvania Company as undertook to bring before that court the action of the circuit court in vacating and setting aside the order for the appointment of a receiver, or, in the alternative, for a writ of certiorari to the circuit court of appeals to bring up its decree for review by this court.

This court gave leave to file both petitions of the American Construction Company, stayed proceedings under the mandates of the circuit court of appeals, and ordered notice to the railway company and to the Pennsylvania Company of a renewal of the motions for writs of mandamus or writs of certiorari, returnable March 6th.

The petitioner gave notice to those companies that on that day it would move accordingly for writs of mandamus or certiorari to the circuit court of appeals, as prayed for in the petitions; and would also, in the alternative, move for a writ of mandamus to the circuit court to disregard the mandates of the circuit court of appeals, except so far as they affirmed, modified, or reversed the injunction orders of the circuit court, and especially to disregard the parts of those mandates which undertook to modify or reverse any order appointing, or refusing to appoint, a receiver.

At the time so appointed the parties appeared, and the motions were argued.

W. B. Hornblower, Wm. Pennington, and Eugene Stevenson, for petitioners. John G. Johnson, Thomas Thacher, J. C. Cooper, and C. M. Cooper, opposed.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

By the constitution of the United States, in cases to which the judicial power of the United States extends, and of which original jurisdiction is not conferred on this court, "the supreme court shall have appellate jurisdiction, with such exceptions and under such regulations as the congress shall make." Const. art. 3, § 2. This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by congress. Wiscart v. Dauchy, 3 Dall. 321, 327; Durousseau v. U. S., 6 Cranch, 307, 314; Barry v. Mercein, 5 How. 103, 119; U. S. v. Young, 94 U. S. 258; The Francis Wright, 105 U. S. 381; Bank v. Peters, 144 U. S. 570, 572, 12 Sup. Ct. Rep. 767.

Under the judiciary act of 1789, and other acts embodied in the Revised Statutes, the appellate jurisdiction of this court from the circuit court of the United States was limited to final judgments at law and final decrees in equity or admiralty. Act Sept. 24, 1789, c. 20, §§ 13, 22, (1 St. pp. 81, 84;) Act March 3, 1803, c. 40, (2 St. p. 244; Rev. St. §§ 691, 692.) No appeal, therefore, lay to this court from an order of the circuit court granting or refusing an injunction, or appointing or declining to appoint a receiver pendente lite, or other interlocutory order, until after final decree. Hentig v. Page, 102 U. S. 219; Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. Rep. 32; Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. Rep. 745.

By the same statutes this court is empowered to issue writs of mandamus "in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States." Act Sept. 24, 1789, c. 20, § 13, (1 St. p. 81; Rev. St. § 688.)

But a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. Ex parte Whitney, 13 Pet. 404; Ex parte Schwab, 98 U. S. 240; Ex parte Perry, 102 U. S. 183; Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. Rep. 825. It does not, therefore, lie to review a final judgment or decree of the circuit court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. Ex parte Newman, 14 Wall. 152; Ex parte Baltimore & Ohio R. Co., 108 U. S. 566, 2 Sup. Ct. Rep. 876; In re Burdett, 127 U. S. 771, 8 Sup. Ct. Rep. 1394; In re Pennsylvania Co., 137 U. S. 451, 453, 11 Sup. Ct. Rep. 141.

Least of all can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause; for, as observed by Chief Justice Marshall, to do this "would be a plain evasion of the provision of the act of congress that final judgments only should be brought before this court for re-examination;" would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence." Bank v. Sweeny, 1 Pet. 567, 569; Insurance Co. v. Adams, 9 Pet. 573, 602.

This court, and the circuit and district courts of the United States, have also been

empowered by congress "to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Act Sept. 24, 1789, c. 20, § 14, (1 St. p. 81; Rev. St. § 716.)

*380 *Under this provision the court might doubtless issue writs of certiorari in proper cases. But the writ of certiorari has not been issued as freely by this court as by the court of queen's bench in England. Ex parte Vallandigham, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. Fowler v. Lindsey, 3 Dall. 411, 413; Patterson v. U. S., 2 Wheat. 221, 225, 226; Ex parte Hitz, 111 U. S. 766, 4 Sup. Ct. Rep. 698. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it, and not, like a writ of error, to review the judgment of an inferior court. Barton v. Petit, 7 Cranch, 288; Ex parte Gordon, 1 Black, 503; U. S. v. Adams, 9 Wall. 661; U. S. v. Young, 94 U. S. 258; Luxton v. North River Bridge Co., 147 U. S. 337, 341, 13 Sup. Ct. Rep. 356.

There is therefore no ground for issuing either a writ of mandamus or a writ of certiorari, as prayed for in these petitions, unless it be found in the act of March 3, 1891, c. 517, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." 26 St. p. 826.

By section 4 of this act "the review, by appeal, by writ of error, or otherwise, from the existing circuit courts, shall be had only in the supreme court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same;" and, by section 14, "all acts and parts of acts, relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act, are hereby repealed."

By section 5 appeals or writs of error may be taken from the circuit court directly to this court in cases in which the jurisdiction of the court below is in issue, (the question of jurisdiction alone being brought up,) in prize causes, in cases of convictions of capital or otherwise infamous crimes, and in cases involving the construction or application of the constitution of the United States,

*351 or the constitutionality of a law *of the United States, or the validity or construction of a treaty, or where the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

By section 6 the appellate jurisdiction from final decisions of the circuit court, in all cases other than those provided for in section 6, is conferred upon the circuit court of appeals, "unless otherwise provided by law;" and its judgments or decrees "shall be final" in all cases in which the jurisdiction depends entirely on the citizenship of the parties, as well as in cases arising under the patent laws, the revenue laws, or the criminal laws, and in admiralty cases.

By the same section, however, the circuit court of appeals, "in any such subject within its appellate jurisdiction," may at any time certify to this court questions or propositions of law, and this court may thereupon either instruct it on such questions, or may require the whole case to be sent up for decision; and any case "made final in the circuit court of appeals" may be required by this court, by certiorari or otherwise, to be certified "for its review and determination, with the same power and authority in the case" as if it had been brought up by appeal or writ of error.

By a further provision in the same section, (which has no special bearing on these cases,) an appeal or writ of error or review by this court is given as of right in all cases not made final in the circuit court of appeals, wherein the matter in controversy exceeds $1,000.

The only provision in the act, authorizing appeals from interlocutory orders or decrees of the circuit courts, is in section 7, which provides that where, upon a hearing in equity, "an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals;" "and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, during the pendency of such appeal."

*382 *By section 12 the circuit court of appeals has the powers specified in section 716 of the Revised Statutes,—that is to say, to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law.

The effect of these provisions is that, in any case in which the jurisdiction of the circuit court depends entirely on the citizenship of the parties, (as in the cases now before us,) and in which the jurisdiction of that court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the circuit court of appeals only; and the judgments of the latter court are final, unless either that court certifies questions or propositions of law to this court, or else this court, by certiorari or otherwise, orders the whole case to be sent up for its review and determination.

The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and

controversies arising from the rapid growth of the country and the steady increase of litigation, and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the circuit and district courts of the United States. McLish v. Roff, 141 U. S. 661, 666, 12 Sup. Ct. Rep. 118; Lau Ow Bew's Case, 141 U. S. 583, 12 Sup. Ct. Rep. 43; Id., 144 U. S. 47, 12 Sup. Ct. Rep. 517.

The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the circuit court of appeals, and making the judgments of that court final, except in extraordinary cases.

It has accordingly been adjudged that a writ of error or appeal directly to this court under section 5, in a case concerning the jurisdiction of the circuit court, does not lie *383 until after final judgment, and cannot, therefore, be taken from an order of the circuit court remanding a case to a state court; there being, as said by Mr. Justice Lamar, speaking for this court, "no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of federal courts as to extend the jurisdiction of the supreme court to the review of jurisdictional cases in advance of the final judgments upon them." McLish v. Roff, above cited; Railway Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. Rep. 123.

It has also been determined that, in the grant of the appellate jurisdiction to the circuit court of appeals, by section 6, in all cases other than those in which this court has direct appellate jurisdiction under section 5, the exception "unless otherwise provided by law" looks only to provisions of the same act, or to contemporaneous or subsequent acts expressly providing otherwise, and does not include provisions of earlier statutes. Lau Ow Bew v. United States, 144 U. S. 47, 57, 12 Sup. Ct. Rep. 517; Hubbard v. Soby, 146 U. S. 56, 13 Sup. Ct. Rep. 13.

In the same spirit the authority conferred on this court by the very provision on which the petitioners mainly rely, by which it is enacted that, "in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the supreme court to require, by certiorari or otherwise, any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court," has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. Lau Ow Bew's Case, 141 U. S. 583, 12 Sup. Ct. Rep. 43; Id., 144 U. S. 47, 12 Sup. Ct. Rep. 517; In re Woods, 143 U. S. 202, 12 Sup. Ct. Rep. 417. Accordingly, while there have been many applications to this court for writs of certiorari to the circuit court of appeals under this provision, two only have been granted—the one in Lau Ow Bew's Case, above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Cunard Steamship Co. v. Fabre, 13 Sup. Ct. Rep. 1045, an admiralty case, which *384 presented an important question as to the rules of navigation, and in which the decree of the circuit court of appeals for the second circuit reversed a decree of the district judge. (53 Fed. Rep. 288,) and was dissented from by one of the three circuit judges; and in each of those cases the circuit court of appeals had declined to certify the question to this court.

There are much stronger reasons against the interposition of this court to review a decree made by the circuit court of appeals on appeal from an interlocutory order than in the case of a final decree. Before the act of 1891, as has been seen, no interlocutory order was subject to appeal, except as involved in an appeal from a final decree. The only appeal from an interlocutory order under the act of 1891 is that allowed by section 7 to the circuit court of appeals, the same court to which an appeal lies from the final decree. The question whether a decree is an interlocutory or a final one is often nice and difficult, as appears by the cases collected in Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. Rep. 32, and in McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. Rep. 170. Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

In such an exceptional case the power and the duty of this court to require, by certiorari or otherwise, the case to be sent up for review and determination, cannot well be denied, as will appear if the provision now in question is considered in connection with the preceding provisions for the interposition of this court in cases brought before the circuit court of appeals. In the first place, the circuit court of appeals is authorized, "in every *385 such subject within its appellate jurisdiction," and "at any time," to certify to this court

"any questions or propositions of law" concerning which it desires the instruction of this court for its proper decision. In the next place, this court, at whatever stage of the case such questions or propositions are certified to it, may either give its instruction thereon, or may require the whole record and cause to be sent up for its consideration and decision. Then follows the provision in question, conferring upon this court authority, "in any such case as is hereinbefore made final in the circuit court of appeals," to require, by certiorari or otherwise, the case to be certified to this court for its review and determination. There is nothing in the act to preclude this court from ordering the whole case to be sent up, when no distinct questions of law have been certified to it by the circuit court of appeals, at as early a stage as when such questions have been so certified. The only restriction upon the exercise of the power of this court, independently of any action of the circuit court of appeals, in this regard, is to cases "made final in the circuit court of appeals,"—that is to say, to cases in which the statute makes the judgment of that court final; not to cases in which that court has rendered a final judgment. Doubtless this power would seldom be exercised before final judgment in the circuit court of appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require.

In the first of the cases now before us, the appeal was clearly well taken from the order of the circuit court, so far, at least, as the injunction was concerned. If the circuit court of appeals, on the hearing of that appeal, erred in going beyond a modification of the injunction, and in setting aside so much of the orders appealed from as appointed a receiver and permitted him to issue receiver's notes, the error was one in the judicial determination of a case within the jurisdiction of that court, and neither so important in its immediate effect, nor so far-reaching in its consequences, as to warrant this court in undertaking to control the cause at this stage of the proceedings.

In the first case, therefore, the writ of certiorari prayed for is denied, because no reason is shown for issuing it, under the circumstances of the case.

Nor do those circumstances make a case for issuing a writ of mandamus, either to the circuit court of appeals or to the circuit court. The decisions of this court upon applications for writs of mandamus since the act of 1891 affirm the principles established in the earlier decisions, before cited. In re Morrison, 147 U. S. 14, 26, 13 Sup. Ct. Rep. 246; In re Hawkins, 147 U. S. 486, 13 Sup. Ct. Rep. 512; In re Haberman Manuf'g Co., 147 U. S. 525, 13 Sup. Ct. Rep. 527; Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. Rep. 536.

In the first case, therefore, the writs of mandamus, as well as the writ of certiorari, must be denied.

The second case is governed by the same considerations as the first, except in the following respects:

(1) It is contended that the order of Judge Swayne, setting aside and vacating the order of Judge Pardee appointing Cable receiver, was not such an interlocutory order as an appeal lies from to the circuit court of appeals under section 7 of the act of 1891. 26 St. p. 828. But, if that order could not be the subject of a separate appeal, it might clearly, so far as material, be brought before the circuit court of appeals on appeal from the final decree, when rendered. If that court decided erroneously in determining the matter on an interlocutory appeal, that affords no ground for the extraordinary interposition of this court by certiorari or mandamus.

(2) It is contended that the original order of Judge Pardee was a nullity, because made by him outside of his circuit, and while the circuit court was in session in the district where the suit was pending. But that fact does not appear of record; and, if it were proved, the question whether Judge Pardee's order was invalid for that reason (though in itself a question of interest and importance) does not appear to have a material bearing, in any aspect of the case; for whether that order, or the subsequent decree of the circuit court of appeals, was valid or invalid, the question who should be appointed receiver remained within the jurisdiction of the circuit court.

(3) The more important suggestion is that the decree of the circuit court of appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by section 3 of the judiciary act of 1891, which provides that "no justice or judge, before whom a cause or question may have been tried or heard" in the circuit court, "shall sit on the trial or hearing of such cause or question in the circuit court of appeals." 26 St. p. 827. The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from his own order, but from an order setting aside his order, is a novel and important one, deeply affecting the administration of justice in the circuit court of appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error, or certiorari. U. S. v. Lancaster, 5 Wheat. 434; U. S. v. Embolt, 105 U. S. 414; Queen v. Justices of Hertford-

shire, 6 Q. B. 753; Oakley v. Aspinwall, 3 N. Y. 547; Tolland v. Commissioners, 13 Gray, 12.

The writ of certiorari authorized by the act of 1891, and prayed for in this case, being in the nature of a writ of error to bring up for review the decree of the circuit court of appeals, the question whether the writ should be granted rests in the discretion of this court; but when the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law. Harris v. Barber, 129 U. S. 366, 369, 9 Sup. Ct. Rep. 314.

For the reasons above stated, this court is of opinion that the writ of certiorari prayed for in the second case should not be granted, unless Judge Pardee was disqualified by the act of 1891 to sit at the hearing in the circuit court of appeals; but that, if he was so disqualified, the writ should be granted, for the purpose of bringing up and quashing the decree of that court; that there should therefore be a rule to show cause why a writ of certiorari should not issue on this ground, and for this purpose, only; and that the question whether the decree of the circuit court of appeals was void, by reason of Judge Pardee's having taken part in it, can more fitly be determined on further argument upon the return of that court to the rule to show cause. Ex parte Dugan, 2 Wall. 134.

If the decree of the circuit court of appeals is void because one of the judges who took part in the decision was forbidden by law to sit at the hearing, a writ of certiorari to that court to bring up and quash its decree is manifestly a more decorous, as well as a more appropriate, form of proceeding than a writ of mandamus to the circuit court to disregard the mandate of the appellate court.

The following orders, therefore, will be entered in these two cases:

In No. 14, writs of mandamus and certiorari denied, and petition dismissed.

In No. 15, writs of mandamus denied, and rule granted to show cause why a writ of certiorari should not issue to bring up and quash the decree of the circuit court of appeals.

The CHIEF JUSTICE was not present at the argument of these cases, and took no part in their decision.

(149 U. S. 60)

WILSON v. UNITED STATES.

(April 17, 1893.)

No. 1284.

CRIMINAL LAW—FAILURE OF ACCUSED TO TESTIFY IN HIS OWN BEHALF—COMMENTS OF COUNSEL—EXCEPTIONS.

1. Any reference by counsel for prosecution to the accused's failure to take the stand is improper, under Act March 15, 1878, (20 St. p. 30, c. 37,) which provides that such failure "shall raise no presumption against the defendant."

2. In a criminal trial the district attorney, in summing up the case to the jury, said: "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand, and hold up my hand before high heaven, and testify to my innocence of the crime." The court, its attention being called to this language by defendant's counsel, said: "I suppose the counsel should not comment upon the defendant not taking the stand." The district attorney replied: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." Counsel for defendant thereupon excepted. A verdict of guilty was rendered. *Held*, that the refusal or neglect of the court to prohibit any reference to the accused's failure to take the stand, and to emphatically instruct the jury not to attach any importance to such failure, was error, tending to prejudice defendant, and was sufficient ground for awarding a new trial.

3. The exception to the court's action or want of action was the proper method of objection thereto, and such an exception, when properly presented, can be considered on writ of error.

In error to the district court of the United States for the northern district of Illinois. Reversed.

Statement by Mr. Justice FIELD:

The defendant below, George E. Wilson, the plaintiff in error here, is a bookseller and publisher, carrying on his business in Chicago, Ill. He was indicted in the United States district court for the northern district of that state for a violation of section 2 of the act of congress of September 26, 1888, (25 St. p. 496,) amending section 3893 of the Revised Statutes, relating to the use of the mails to give information where and by what means obscene and lewd publications might be obtained, and was convicted and sentenced to imprisonment in the penitentiary of the state for two years. To reverse that judgment, he has brought this case to this court on writ of error.

The indictment charged, in different counts, that the defendant, by himself and another person, had deposited in the mail at Chicago, for delivery to John Hobart, at O'Fallon, Ill., and Jack Horner, at Collinsville, Ill., a letter and circular giving information where certain designated lewd and obscene books could be obtained. No attempt was made to show that the letter and circular was mailed by the defendant in person, but an attempt was made to show that some other person had done the act at the instigation or request of the defendant, and that he was responsible for it. The defendant did not request to be a witness or offer himself as such, and the district attorney of the United States, in summing up the case to the jury, commented upon the fact that he had not appeared on the stand, as follows:

"They say Wilson is a man of good character. It is a grand thing for a young man in Chicago to be the son of an honest man, because blood will tell. If the father is

honest, the chances are the son will be honest too. Men live all their lives to build up a good character, because it is a shield against the attack of infamy. They called two or three witnesses here who testified to this young man's character as being good, so far as they know; but I want to say to you, gentlemen of the jury, that, if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand, and hold up my hand before high heaven, and testify to my innocence of the crime."

To this language of the district attorney the counsel for the defendant excepted, and called the court's attention to it, and the court said: "Yes, I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the state's statutes, I do not know that it ought to be the subject of comments by counsel,"—to which the district attorney replied as follows: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf,"—to which the counsel for the defendant thereupon excepted.

The act of congress of March 16, 1878, (20 St. p. 30, c. 37,) provides "that in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him."

The objections of the defendant's counsel to the language of the district attorney in his argument to the jury in referring to the defendant's failure to appear on the stand as a witness, and testify to his innocence of the charge against him, and to the neglect of the court to forbid and condemn such reference, were embodied in a bill of exceptions, and constitute one of the grounds urged for a reversal of the judgment and the award of a new trial.

C. Stuart Beattie, for plaintiff in error. Asst. Atty. Gen. Parker, for defendant in error.

Mr. Justice FIELD, after stating the facts in the foregoing language, delivered the opinion of the court.

The act of congress permitting the defendant in a criminal action to appear as a witness in his own behalf, upon his request, declares, as it will be seen, that his failure to request to be a witness in the case shall not create any presumption against him.

To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.

At common law no one accused of crime could be compelled to give evidence in a prosecution against himself, nor was he permitted to testify in his own behalf. The accused might rely upon the presumption of the law that he was innocent of the charge, and leave the government to establish his guilt in the best way it could.

This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question permitted, upon his request, to testify in his own behalf in the case. In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established.

But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be witnesses, particularly when they may have been in some degree compromised by their association with others, declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him.

In this case this provision of the statute was plainly disregarded. When the district attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury, "I want to say to you that, if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand, and hold up my hand before high heaven, and testify to my innocence of the crime," he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by

*a failure to offer himself as a *witness; and, when counsel for defendant called the attention of the court to this language of the district attorney, it was not met by any direct prohibition or emphatic condemnation of the court, which only said: "I suppose the counsel should not comment upon the defendant not taking the stand." It should have said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.

Instead of stating, after mentioning that the United States court is not governed by the state's statutes, "I do not know that it ought to be the subject of comment by counsel," the court should have said that any such comment would tend necessarily to defeat the very prohibition of the statute; and the reply of the district attorney to the mild observation of the court only intensified the fact to which he had already called the attention of the jury: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf," which was equivalent to saying: "You, gentlemen of the jury, know full well that an innocent man would have gone on the stand, and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it." By this action of the court in refusing to condemn the language of the district attorney, and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that, if he were an innocent man, he would have gone on the stand as the district attorney stated he himself would have done.

This language of the district attorney, and this action, or rather want of action, of the court, are set forth in the bill of exceptions; and although exceptions are generally taken to some ruling, or want of ruling, by the court in the progress of the trial in the admission or rejection of evidence or the interpretation of instruments, yet they can be taken to its action or want of proper action upon any proceeding in the progress of the trial from its commencement to its conclusion, *and, when properly presented, can be considered by the court on writ of error.

The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial.

Similar statutes to the one we have been considering have been passed by several states, and the rulings upon them have been substantially in accordance with our judgment in this case.

In 1866 the legislature of Massachusetts passed an act almost identical in terms with the act of congress under consideration. It provided that, "in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, and not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant." The provision has been since re-enacted in substantially the same terms. St. Mass. 1866, c. 260; St. Mass. 1870, c. 393, § 1, cl. 3; Pub. St. c. 169, § 18, cl. 3. And in the case of Com. v. Scott, 123 Mass. 239, where the indictment against the defendants was for breaking and entering a house in the nighttime with intent to commit larceny therein, none of the defendants testified at the trial, and the prosecuting attorney, in his closing argument, commented upon this fact, when the counsel for the defendants interrupted him, and asked the judge to rule that the fact that the defendants did not testify could not be commented on by the government; but the judge, having first stated the law that the fact that they did not testify did not create any presumption against them, ruled that, inasmuch as the matter had been referred to by their counsel, the prosecuting attorney had a right to comment on the reasons given for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying, and permitted the prosecuting attorney *to proceed in his comments. The jury having rendered a verdict of guilty, the defendants alleged exceptions, and the case went to the supreme judicial court of the commonwealth. The chief justice, in delivering the opinion of the court, after referring to the fact that the government had no right to interrogate a person accused of crime, or to compel him to testify, but was bound to sustain its charge by independent evidence, observed that "the statutes allowing persons charged with the commission of crimes or offenses to testify in their own behalf were passed for their benefit and protection, and clearly recognize their constitutional privilege, by providing that their neglect or refusal to testify shall not create any presumption against them."

And, again: "The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or a consciousness of the crime charged; and the presiding judge, in permitting such a course of argument, against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying, committed an error which was manifestly prejudicial to

the defendants, and which obliges this court to set aside the verdict and order a new trial."

The Criminal Code of Illinois, after providing that in criminal cases the accused may, on his own motion, testify in the case, declares in a proviso that "his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

In the case of Austin v. People, 102 Ill. 261, 264, a reference had been made to the neglect of the accused to testify, both in the opening and concluding argument for the prosecution; and the court, in setting aside the verdict of guilty which was rendered in that case, said: "When the statute says that no presumption against the accused shall be created by his neglect to testify, it clearly meant that, in cases where the defendant should not choose to avail himself of the privilege offered by the statute, the trial should be conducted in the same manner and upon the same presumptions as if the statute had not been passed." And, again: "We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded as good ground for a new trial in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause."

This view of the effect of the objections taken to the course of the district attorney, and to the failure of the court to properly condemn it, renders it unnecessary to consider any other alleged errors.

The judgment must be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

(148 U. S. 674)

SMITH et al. v. WHITMAN SADDLE CO.

(April 17, 1893.)

No. 188.

PATENTS FOR INVENTIONS—VALIDITY — INFRINGEMENT—SADDLE.

Design patent No. 10,844, issued September 24, 1878, to Royal E. Whitman, for a design for saddles, showed a saddle having a back or cantle substantially the same as a side saddle known as the "Jenifer" tree, and that its front or pommel was substantially that of the "Granger" tree, except that "the pommel on its rear side falls nearly perpendicularly for some inches where it is joined by the line forming the profile of the seat," and the inner side of the pommel is straight. *Held*, that as the mere combination of the two parts of prior saddles would not constitute a patentable design, this perpendicular drop and straight inner side of the pommel are the material elements of the patent; and are not infringed by a saddle, similar in other respects, from which this element is absent. Reversing 38 Fed. Rep. 414.

Appeal from the circuit court of the United States for the district of Connecticut. Reversed.

Statement by Mr. Chief Justice FULLER:

The Whitman Saddle Company, a corporation organized and existing under and by virtue of the laws of the state of New York, brought this bill of complaint in the circuit court of the United States for the district of Connecticut, against Charles D. Smith and Benjamin A. Bourn, citizens of the state of Connecticut, and doing business in the city of Hartford, under the firm name and style of Smith, Bourn & Co., for the alleged infringement of a patent for a "design for saddles," No. 10,844, dated September 24, 1878.

The circuit court sustained the patent, adjudged that complainant was entitled to recover of the defendants as infringers, and rendered a decree perpetually enjoining them, and for an amount found due for profits, costs, charges, and disbursements, from which decree an appeal was taken to this court. The opinion of Judge Shipman is reported in 38 Fed. Rep. 414.

The specification and claim are as follows:

"Be it known that I, Royal E. Whitman, of Springfield, Hampden county, state of Massachusetts, have invented an improved design for saddles, of which the following is a specification:

"The nature of my design is fully illustrated in the accompanying photographic picture, to which reference is made.

"Figure I is a side profile view, and Fig. II a partial front view.

"The pommel, B, rises at the fork to a point on, or nearly on, a horizontal level with the raised and prolonged cantle. The pommel on its rear side falls nearly perpendicularly for some inches, when it is joined by the line forming the profile of the seat. The straight inner side of the pommel (marked b) is joined at c by the line, C, of the seat. The line, C, describes a gradual curve to the center of the seat, from thence gradually rising to the highest point of the cantle, D. The cantle is defined in side profile by the lines, e, f, starting from its outer end in continuous curves, which separate to define the thickness of the cantle before uniting at a point, g, near the center of the saddle, the line, f, forming the outside and rear edge of the saddle until joined by the line, h, which, leaving the line, f, at an angle, bends to form the rear bearing of the saddle. The line from the front of the pommel, B, inclines outward for some distance in a nearly straight line, m, before being rounded toward the rear to join the line, h, at the point where the stirrup strap is attached, to thus define the bottom line of the saddle, the outline given by line, m, from the pommel being the general form of the English saddle-tree known as the 'cut back.'

"A plan view of the saddle shows a center longitudinal slot extending from pommel to cantle.

"I am aware that portions of the curves employed by me have been used in the designing of saddles; but, when combined with a longitudinally-slotted tree, the lines I em-

ploy to give the profile form a new design for saddles, and giving the general idea in the front, lower, and rear lines of a sea fowl or vessel modeled upon the same curves, and by these curves and lines giving the impression of lightness, grace, and comfort that could not as well be conveyed by any others, as the impression of comfort is given by the large amount of bearing surface obtained without undue elevation above the back of the animal, combined with the large seat for the rider, and lightness and grace by the small surface of tree shown in vertical plan, coupled with the form in which it is presented.

"Now, having described my invention, what I claim is:

"The design for a riding saddle, substantially as shown and described."

The following is the picture referred to:

*677

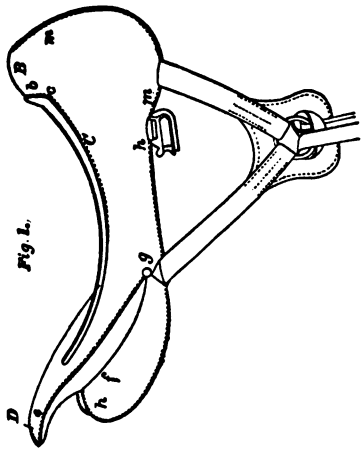

Fig. 1.

Fig. 2.

W. E. Simonds, for appellant. Saml. A. Duncan, for appellee.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

Section 4929 of the Revised Statutes provides that "any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture,—the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon *678 payment of the fee described, and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor."

The first three of these classes plainly refer to ornament, or to ornament and utility, and the last to new shapes or forms of manufactured articles; and it is under the latter clause that this patent was granted.

In Manufacturing Co. v. White, 14 Wall. 511, 524, it was said by this court, speaking through Mr. Justice Strong, that the acts of congress authorizing the granting of patents for designs contemplated "not so much utility as appearance, and that, not an abstract impression or picture, but an aspect given to those objects mentioned in the acts. * * * And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture or articles to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. Manifestly the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention, and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense." This language was used in reference to ornamentation merely, and, moreover, the word "useful," which is in section 4929, was not contained in the act of 1842, under which the patent in Manufacturing Co. v. White was granted; so that now, where a new and original shape or configuration of an article of manufacture is claimed, its utility may be also an element for consideration. Lehnbeuter v. Holthaus, 105 U. S. 94.

"But, as remarked by Mr. Justice Brown, then district judge for the eastern district of Michigan, in Northrup v. Adams, 12 O. G. 430, 2 Ban. & A. 567, which was a bill for the infringement of a design patent for a cheese safe, the law applicable to design patents "does not materially differ from that in cases of mechanical patents, and 'all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries * * * shall apply to patents for designs.' Section 4933." And he added: "To entitle a party to the benefit of the act, in either case there must be originality, and the exercise of the inventive faculty. In the one there must be novelty and utility; in the other, originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius,—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention." Many illustrations are referred to,—as, for instance, the use of a model of the Centennial building for paper weights and ink stands; the thrusting of a gas pipe through the leg and arm of the statue of a shepherd boy, for the purpose of a drop light; the painting upon a familiar vase of a copy of Stuart's portrait of Washington,—none of which were patentable, because the elements of the combination were old. The shape produced must be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. Foster v. Crossin, 44 Fed. Rep. 62. The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form, and simply put it to a new use, any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty, and the result is in effect a new creation, the design may be patentable.

In Jennings v. Kibbe, 10 Fed. Rep. 669, 20 Blatchf. 353, Mr. Justice Blatchford, when circuit judge, applied the rule laid down in Manufacturing Co. v. White, supra, stating it thus: That "the true test of identity of design is sameness of appearance,—in other words, sameness of effect upon the eye; that it is not necessary that the appearance should be the same to the eye of an expert, and that the test is the eye of an ordinary observer, the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give." Ripley v. Glass Co., 49 Fed. Rep. 927.

In this case it appeared from the evidence that among other trees and saddles that were old in the prior art was one called the "Granger" tree, which had a cut-back pommel, and a low, broad cantle, and was well known; and another called the "Jenifer tree," or "Jenifer-McClellan" saddle, which was also well known, and had a high, prominent pommel, and a high-backed cantle, or hind protuberance, in the shape of a duck's tail.

The exhibits embrace, among others, a slotted Granger saddle, the Jenifer-McClelland, the Sullivan-Black-Granger tree, and the saddle sold by defendants; the latter being substantially the Granger saddle with the Jenifer cantle.

The saddle design described in the specification differs from the Granger saddle in the substitution of the Jenifer cantle for the low, broad cantle of the Granger tree. In other words, the front half of the Granger and the rear half of the Jenifer, or Jenifer-McClellan, make up the saddle in question, though it differs also from the Granger saddle in that it has a nearly perpendicular drop of some inches at the rear of the pommel, that is, distinctly more of a drop than the Granger saddle had.

The experienced judge by whom this case was decided conceded that the design of the patent in question did show prominent features of the Granger and Jenifer saddles, and united two halves of old trees, but he said: "A mechanic may take the legs of one stove, and the cap of another, and the door of another, and make a new design which has no element of invention; but it does not follow that the result of the thought of a mechanic who has fused together two diverse shapes, which were made upon different principles, so that new lines and curves and a harmonious and novel whole are produced, which possesses a new grace, and which has a utility resultant from the new shape, exhibits no invention." And he held that this was effected by the patentee, and that the shape that he produced was, therefore, patentable. But we cannot concur in this view.

The evidence established that there were several hundred styles of saddles or saddle-trees belonging to the prior art, and that it was customary for saddlers to vary the shape and appearance of saddletrees in numerous ways, according to the taste and fancy of the purchaser. And there was evidence tending to show that the Granger tree was sometimes made up with an open slot and sometimes without, and sometimes with the slot covered and padded at the top and sometimes covered with plain leather; while it clearly appeared that the Jenifer cantle was used upon a variety of saddles, as was the open slot. Nothing more was done in this instance (except as hereafter noted) than to put the two halves of these saddles together in the exercise of the ordinary skill of workmen of the trade, and in the way and manner ordinarily done. The presence or the absence of the central open slot was not material, and we do

not think that the addition of a known cantle to a known saddle, in view of the fact that such use of the cantle was common, in itself involved genius or invention, or produced a patentable design. There was, however, a difference between the pommel of this saddle and the pommel of the Granger saddle, namely, the drop at the rear of the pommel, which is thus described in the specification: "The pommel, on its rear side, falls nearly perpendicularly for some inches, when it is joined by the line forming the profile of the seat. The straight inner side of the pommel (marked b) is joined at c by the line, C, of the seat." The specification further states: "The line from the front of the pommel, B, inclines outward for some distance in a nearly straight line, m, before being rounded toward the rear to join the line, h, at the point where the stirrup strap is attached, to thus define the bottom line of the saddle, the outline given by line, m, from the pommel being the general form of the English saddletree known as the 'cut back.'"

*683 The shape of the front end being old, the sharp drop of the pommel at the rear seems to constitute what was new and to be material. Now, the saddles of the defendants, while they have the slight curved drop at the rear of the pommel, similar to the Granger saddle, do not have the accentuated drop of the patent, which "falls nearly perpendicularly several inches," and has a "straight inner side." If, therefore, this drop were material to the design, and rendered it patentable as a complete and integral whole, there was no infringement. As before said, the design of the patent had two features of difference as compared with the Granger saddle,—one the cantle, the other the drop; and unless there was infringement as to the latter there was none at all, since the saddle design of the patent does not otherwise differ from the old saddle with the old cantle added,—an addition frequently made. Moreover, that difference was so marked that in our judgment the defendants' saddle could not be mistaken for the saddle of the complainant.

There being no infringement, the decree must be reversed, and the cause remanded, with a direction to dismiss the bill, and it is so ordered.

(148 U. S. 682)

BUSHNELL et al. v. CROOKE MINING & SMELTING CO.

(April 17, 1893.)

No. 195.

SUPREME COURT—JURISDICTION—FEDERAL QUESTION—REHEARING—MINING RIGHTS.

1. A suit in a state court to try the right of possession of a mining claim and the right to a patent therefor, although it is brought in accordance with Rev. St. § 2326, does not necessarily involve a federal question, so as to give a right of appeal to the United States supreme court.

2. A suit of this kind, turning largely upon the construction of Mills' Ann. St. Colo. § 3149, limiting mining claims to 150 feet on each side of the center, where the question submitted to the jury is in which direction the lode in controversy properly ran, and whether it crossed the side lines at a distance greater than 150 feet from the center of a conflicting claim, does not involve the construction of any federal statute, nor render it necessary to determine the rights of the parties under the federal mining laws.

3. A federal question cannot be raised for the first time by a petition for a rehearing after judgment in the highest court of a state, so as to bring the case within the appellate jurisdiction of the United States supreme court. Texas & P. Ry. Co. v. Southern Pac. Co., 11 Sup. Ct. Rep. 10, 137 U. S. 48, followed.

In error to the supreme court of the state of Colorado.

Action of ejectment in the district court of Hinsdale county, Colo., by the Crooke Mining & Smelting Company against A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, to recover possession of a mining claim, and establish plaintiff's right to a patent therefor, as provided by Rev. St. § 2326. Verdict and judgment were given for plaintiff, and a motion for a new trial was denied. Defendants took an appeal to the supreme court of Colorado, which affirmed the judgment, (21 Pac. Rep. 931,) and thereafter denied a petition for a rehearing. To correct that decision the defendants sued out this writ of error, which plaintiff now moves to dismiss. Granted.

A. R. Bushnell, for plaintiffs in error. Frederick D. McKenney, C. S. Thomas, and W. H. Bryan, for defendant in error.

*683 Mr. Justice JACKSON delivered the opinion of the court.

This was an action of ejectment, brought by the defendant in error in the district court of Hinsdale county, state of Colorado, against the plaintiffs in error, to recover possession of a certain portion of the surface location of a mining claim on Ute mountain, in said county and state. The suit grew out of conflicting and interfering locations of mining claims by the parties. The defendant in error was the owner or claimant of a mining location called the "Annie Lode," while the plaintiffs in error were the owners of a claim called the "Monitor Lode." The claim of the latter was first located, but, when the plaintiffs in error applied for a patent, the defendant in error filed an adverse claim to a portion of the same location, and thereafter, under section 2326 of the Revised Statutes of the United States, and within the time prescribed therein, the defendant in error commenced this action in the state court to recover possession of the portion of the surface location which was in

interference and in controversy between the parties.

In its complaint or declaration it is alleged that it is the owner of the Annie lode mining claim, and that defendants below had, at a certain date, entered upon, and ever since wrongfully held possession of, a part of said claim specifically described, and that the action was in support of plaintiff's adverse claim to such portion of the surface
684 location. The answer of the defendants (plaintiffs in error) interposed a general denial of all the allegations contained in the complaint or declaration.

The question presented on the trial of the controversy, under the pleadings, was purely one of fact, and had reference to the true direction which the Monitor lode or vein took after encountering a fault, obstruction, or interruption at a point south of the discovery shaft sunk thereon. It was claimed by the plaintiff below that the true vein or lode of the Monitor claim did not bear westwardly so as to cross the Annie lode, but that its true direction was southeastwardly, across the line of its location, and was not within the distance of 150 feet from the center of the Annie lode.

The court charged the jury fully and clearly upon this question of fact, as follows:

"(1) The court charges you that the defendants have applied for a patent from the United States on what is claimed by them as the Monitor lode mining claim, in Galena mining district, in this county. The plaintiff company has brought this action in ejectment in support of an adverse claim made and filed by it to a part thereof, described in the complaint as lying within the boundaries of what is claimed by the plaintiff as the Annie lode.

"(2) The court charges you that if the original locators of the Monitor lode, within the time required by law, sunk a sufficient discovery shaft thereon, posted at the point of discovery a sufficient location notice, and properly put out their boundary posts, marking their surface boundaries, and on June 20, 1875, recorded their claim in the office of the county recorder by a sufficient location certificate, in compliance with the law, and the owners thereof have ever since then performed labor or made improvements thereon each year to the amount of one hundred dollars or more, then the plaintiff company's original grantor, John Dougherty, in attempting to locate the Annie lode to include a part of such surface ground and in sinking the discovery shaft thereon in October, 1878, was prima facie a trespasser in so doing, and the plaintiff cannot recover
*685 in this action unless it shows that he was not a trespasser in so doing.

"(3) The court charges you that the plaintiff claims that the Monitor lode claim was never properly located, and that the vein on which its discovery shaft is sunk does not run down through its surface ground, as located, to the southwest, but that it runs off from its surface ground through its southeast side line at a point about —— feet from its discovery shaft, and that by reason thereof Dougherty [plaintiff's grantor] was not a trespasser in locating the Annie lode discovery shaft and a part of its surface ground within the boundary stakes of the Monitor lode."

"(9) The court charges you that the question here is: Is the course of the Monitor vein from the discovery shaft down the mountain towards the southwest, along the line claimed by defendants, or off through the southeast side line of the Monitor lode surface grounds or otherwise, as claimed by plaintiff? And the court further charges you that upon this question the presumption is that the course of the vein is as located, and the plaintiff company must prove that the course of the vein is not as located; otherwise, on this point, plaintiff cannot recover, and your verdict shall be for the defendants.

"(10) The court charges you that it is not sufficient that the plaintiff merely raises a doubt in your minds as to whether the Monitor vein runs as the lode is staked or not. The plaintiff must satisfy you by a preponderance of the testimony that the lode does not run as staked; otherwise, upon this question, you will find for the defendants.

"(11) The court charges you that the discoverer and prior locator of a lode or vein has a right to stake his lode according to his best judgment as to where it runs.

"(12) Such prior locator has a right to move and change his boundary stakes upon his lode and take his ground thereon within the legal limits to suit himself, at any time within sixty days after the date of his location or discovery notice."

"(14) The court charges you that, when a vein branches in its course, a prior locator has a legal right to follow with his location whichever branch of it he chooses at the time of making such location."

"(16) The court instructs the jury in the law of this case* that if the locators of the Monitor mine made the location on the Monitor lode or vein and staked it as running down the mountain in the direction of the Annie vein in controversy, and uniting therewith or running parallel thereto, substantially through the center of the surface ground of the Monitor lode claim, the said Monitor locators or their assignees are entitled to the whole of said claim as staked, even if the alleged Enterprise vein crosses said Monitor vein and runs in the course of the Monitor vein as staked, provided that at such crossing the said veins course so together that it is simply conjectural that said Monitor lode is crossed by said so-called Enterprise vein, and does not continue in its course as staked."

"(18) The court instructs you that it is of no consequence where the so-called Annie

vein runs, in any part of its course, if Dougherty [the plaintiff's grantor] was a trespasser in locating it. A trespasser's location is entirely void."

The court then refused to give the following instructions for the plaintiffs in error:

"(13) The court charges you that a prospector, in locating his vein, is not required to follow it through a fault or other obstruction which interposes solid country rock in its course, but in such case he may follow with his location any vein that continues on from the point of such obstruction in the general course of his original vein."

"(15) The court charges you that if a prospector, in locating his lode, discovered by a first location, secures continuous vein matter substantially along through the center of his surface ground in a continuous general direction, and so that the extension of his end lines will include between them all of his surface ground, he will hold the same, and every part thereof, against all subsequent claimants."

It thus appears that the question at issue, under the pleadings and at the trial, was as to the true course of the Monitor lode or vein down the mountain south of its discovery shaft. The jury found the following verdict in favor of the defendant in error: "We, the jury, find the issues joined for the plaintiff, and that it is the owner of and entitled to the possession of the ground described in the complaint."

*The plaintiffs in error moved for a new trial on the ground of error in the charge to the jury, and because of the refusal of the court to instruct the jury as requested, and for various reasons, such as the admission of improper testimony offered by the plaintiff below, and the refusal to admit proper testimony offered by the defendants below, and other alleged errors and irregularities committed in the progress of the trial, which are not brought under review in the present case.

A new trial being refused, an appeal was taken to the supreme court of Colorado, which held that there was no error in the instructions given to the jury, nor in the refusal to give those requested by the plaintiff in error, and affirmed the judgment of the lower court. The supreme court of Colorado rested its judgment and affirmance upon the general proposition that the trial court had correctly stated to the jury the principal point in controversy, and had left it properly to them to determine as a matter of fact what was the course of the Monitor lode. The supreme court said: "The controlling issue in the case, we think, was fully understood by the jury, and was clearly stated by the court in the 9th instruction, viz.: 'The principal point in the controversy is, upon what vein was the Monitor claim located, or what is the course of said vein? The defendants allege and seek to prove that the location was made upon a vein which runs from the discovery shaft of the Monitor across and towards the vein upon which the Annie claim was located, while the plaintiff asserts and seeks to prove that the location was made upon a vein which runs from the Monitor shaft down and nearly parallel with the Annie lode, and which enters into or connects with the Ule lode. This is the principal point in controversy, and to determine which claim is best supported by testimony and reason is the province and duty of the jury.'"

After the decision had been rendered by the supreme court of the state, a petition for rehearing was presented by the plaintiffs in error, which for the first time sought to present the question whether section 2322 of the Revised Statutes of the United States gave to the appellants "'the exclusive right of possession' and enjoyment of all other veins and lodes having their apexes within the Monitor surface ground, which would give to these appellants, beyond all question, the so-called Enterprise, that is alleged to 'cross' the Monitor on the surface; and certainly a vein that is thus our own cannot be used, by one who has no interest either in the Monitor or Enterprise title, to create any question of lode crossing between them, or any other question of conflict. Under such circumstance there is but one grant, and it is all the Monitor grant and its rights and title, and such grant is in no wise severable into a part Monitor and a part Enterprise, no separate life or vitality being given to the said so-called Enterprise."

The application for rehearing being denied, the present writ of error was brought to have the judgment of the supreme court of Colorado reviewed and reversed. The defendants in error have moved to dismiss the writ or affirm the judgment. The motion to dismiss is based upon several grounds. The principal and only ground which need be noticed, however, is that the record presents no question of a federal character such as will give this court jurisdiction to review the judgment complained of.

It is plainly manifest that neither the pleadings nor the instructions given and refused present any federal question, and an examination of the opinion of the supreme court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendants below, fails to disclose the presence of any federal question. It does not appear from the record that any right, privilege, or immunity under the constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon, by the supreme court of the state, nor does it appear, from anything disclosed in the record, that the necessary effect in law of the

judgment was the denial of any right claimed under the laws of the United States.

The decision of the supreme court of Colorado in no way brought into question the validity, or even construction, of any federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the federal statutes. It was said by the chief justice, in Cook Co. v. Calumet, etc., Canal Co., 138 U. S. 635, 653, 11 Sup. Ct. Rep. 435: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

The attempt to raise for the first time a federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the state. Texas & P. Ry. Co. v. Southern Pac. Co., 137 U. S. 48, 54, 11 Sup. Ct. Rep. 10; Butler v. Gage, 138 U. S. 52, 11 Sup. Ct. Rep. 235; Railroad Co. v. Plainview, 143 U. S. 371, 12 Sup. Ct. Rep. 530; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577.

In the case of Doe v. The City of Mobile, 9 How. 451, it was held that under the twenty-fifth section of the judiciary act this court "cannot re-examine the decision of a state court upon a question of boundary between coterminous proprietors of lands depending upon local laws."

The question involved in the present case turned largely upon the provisions of section 3149, Mills' Ann. St. Colo., and the decisions of the supreme court of that state construing the same, as shown by the case of Patterson v. Hitchcock, 3 Colo. 533, which limited the width of mining claims to 150 feet in width on each side of the center of the lode or vein at the surface. The controverted question in the case at bar turned upon which direction the Monitor lode properly ran south of the discovery shaft, and it being found by the jury that the lode or vein did not bear westwardly toward the Annie lode, but southeastwardly and across the western side line of the Monitor claim at a distance exceeding 150 feet from the center of the Annie lode, it followed that the claim of the plaintiff below was sustained, and the jury accordingly returned its verdict that the plaintiff below was entitled to the possession thereof.

The question thus presented and decided involved no construction of any federal statute, nor did it become necessary to determine the rights of the parties under the federal mining statutes.

In Roby v. Colehour, 146 U. S. 159, 13 Sup. Ct. Rep. 47, Mr. Justice Harlan, speaking for the court, said: "Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment."

Applying this rule to the case at bar, there is clearly presented no federal question, for no right, immunity, or authority under the constitution or laws of the United States was set up by the plaintiffs in error, or denied by the supreme court of Colorado, nor did the judgment of that court necessarily involve any such question, or the denial of any such right. We are therefore of opinion that the motion to dismiss is well made, and should be allowed, and it is accordingly so ordered.

Mr. Justice FIELD did not sit in this case, or take part in its decision.

(149 U. S. 43)

NATIONAL METER CO. v. BOARD OF WATER COM'RS OF CITY OF YONKERS.

(April 17, 1893.)

No. 192.

PATENTS FOR INVENTIONS—INFRINGEMENT—WATER METERS.

Reissued letters patent No. 10,806, granted February 8, 1887, to the National Meter Company, as assignee of Lewis Hallock Nash, for improvements in water meters, claimed a meter having a piston with projections, and a cylinder with recesses greater in number than the projections, so as to give the piston, rotating upon its own axis, a side-rocking movement across the center of the cylinder upon successive bearing points made by the contact of the projections and recesses. This meter was an adaptation from the Galloway rotary steam engine. Reissued letters patent No. 10,778, granted November 2, 1886, to the Hersey Meter Company, as assignee of James A. Tilden, and original letters patent No. 385,970, dated July 10, 1888, to the same grantee, and original letters patent 357,159, granted February 1, 1887, to James A. Tilden, covered a meter whose piston has no side-rocking nor rotary motion, and wherein each projection on the piston always operates in connection with one particular corresponding recess in the cylinder. The Tilden meter was an adaptation of another form of the Galloway engine, described in the English patent of December 14, 1840. *Held*, that the Tilden meter did not infringe. 39 Fed. Rep. 588, affirmed.

Appeal from the circuit court of the United States for the southern district of New York.

In Equity. Suit by the National Meter Company against the Board of Water Commissioners of the City of Yonkers for infringement of letters patent for an improvement in water meters. The bill was dis-

missed by the court below. 38 Fed. Rep. 588. Complainant appeals. Affirmed.

J. Edgar Bull, Edmund Wetmore, and Amos Broadnax, for appellant. Frederic H. Betts, Frederick P. Fish, and George L. Roberts, for appellees.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the circuit court of the United States for the southern district of New York by the National Meter Company, a New York corporation, against the Board of Water Commissioners of the City of Yonkers, another New York corporation, founded on reissued letters patent of the United States No. 10,806, granted February 8, 1887, to the plaintiff, as assignee of Lewis Hallock Nash, for improvements in water meters. The application for the reissue was filed December 18, 1886, on the surrender of original letters patent No. 211,582, granted to said Nash, January 21, 1879, for improvements in water meters; the application therefor having been filed September 4, 1878. The claims of the reissue alleged to have been infringed are claims 3, 4, 5, and 6, which are as follows:

"(3) A piston for water meters, pumps, and motors provided with internal water passages, and having alternate bearing points or projections and recesses adapted, by means of a cylinder chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually changing lines across the center of said chamber, to effect its division at two or more points on its sides into receiving and discharging spaces, c, c, which communicate with the inlet and outlet.

"(4) A piston for water meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually changing lines across the center of said chamber, to effect its division at two or more points on its sides into receiving and discharging spaces, c, c, which communicate with the inlet and outlet, said piston having a free movement within said cylinder, controlled only by the shape of the cylinder, the shape of the piston, and the flow of water through the meter.

"(5) A piston for water meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking motion within and upon continually changing lines across the center of said chamber, to effect its division at two or more points on its sides into receiving and discharging spaces, c, c, which communicate with the inlet and outlet, said piston being formed of hard rubber, and having a free movement within said cylinder controlled by the shape of the piston, the shape of the cylinder, and the flow of the water through the meter.

"(6) A piston for water meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually changing lines across the center of said chamber, to effect its division at two or more points on its sides into receiving and discharging spaces, c, c, which communicate with the inlet and outlet, combined with ports controlled by said piston itself in its motion within said chamber."

The defenses set up in the answer are: (1) That the reissue is invalid as to the said four claims, because it was applied for and secured eight years after the grant of the original patent, not for the purpose contemplated by the statute,—of correcting any error that arose from inadvertence, accident, or mistake,—but for the purpose of changing the patent so that it would claim combinations of devices which were not the subject of the claims of the original patent, nor described therein as being the inventions of Nash for which he obtained said original patent, in order that, by means of the reissue, the plaintiff might prevent the Hersey Meter Company, which manufactured the meters used by the defendant, and had assumed the defense of the suit, from carrying on its business; and, further, on the ground that Nash and the plaintiff unreasonably and fraudulently delayed undertaking to correct the alleged defects by a reissue, and did not make application for the reissue until the Hersey Company had made and sold large numbers of meters of the type in question; and that the reissue was applied for and obtained for the sole purpose of procuring a new patent for other and different inventions from those forming the subject-matter of the claims of the original patent; and, further, that the reissue was procured by deceiving the patent office, and by fraudulent and untrue representations to that office, and that any right to the reissue was forfeited by the plaintiff's delay and laches, in not applying for it until long after the plaintiff had full knowledge of all the facts upon which such application purported to be based, and long after the Hersey Company had made, sold, and introduced into use meters identical with those used by the defendant. (2) That Nash did not particularly point out and distinctly claim the part, improvement, or combination which he claimed as his invention or discovery, but, on the contrary, willfully and fraudulently made his claims in the

original patent and the reissue in ambiguous language, intended to mislead the public, with the view of making it difficult to determine the real scope of his claims, and of reserving the right to contend for such interpretation thereof as the exigencies of any particular case might, in his judgment, or that of his assignee, require. (3) Noninfringement, and that the meter used by the defendant is substantially different, in construction and mode of operation, from the meter of the reissue; and that no invention is shown or described in the reissue upon which is, or could have been, based any claim which would be infringed by the defendant's meter.

Proofs were taken, and the case was heard before Judge Wallace, who delivered an opinion (38 Fed. Rep. 588) holding that the defendant's meter did not infringe any of the claims in question, and entered a decree dismissing the bill, with costs. From that decree the plaintiff appealed to this court.

We do not find it necessary to consider the question of the validity of the reissue, because we are of opinion that the decree of the circuit court must be affirmed, on the ground that the defendant has not infringed.

The original patent had eight claims, as follows:

"(1) A piston for water meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually changing lines across the center of said chamber, to effect its division at two or more points on its sides into receiving and discharging spaces, c, c, which communicate with the inlet and outlet.

"(2) The piston of a water meter, pump, or motor constructed with alternate recesses and bearing points or projections, a and b, and a cylinder chamber having alternate wall recesses and bearing points or projections, a' and b', adapted to intermatch with each other at one or more bearing points at one side of the cylinder, and allow the projections of each part to bear upon and to pass each other at two or more points at a different side of the chamber, to allow the piston to revolve while it also rocks in constantly changing lines across the center of the cylinder chamber, for the purpose stated.

"(3) The piston of a water meter adapted to have an eccentric or side-rocking movement across the center of the cylinder chamber and a revolving motion, combined with a registering mechanism by means of a free or shifting connection acting with the continually changing, side-rocking movements of the piston while maintaining a driving relation with the dial mechanism.

"(4) The combination, with a piston having an eccentric or side-rocking motion across the center of the cylinder chamber, and a revolving motion around its own center, to divide the cylinder at two or more bearing points on its sides, of a valve controlled by the movements of said piston, and adapted to open and to close receiving and discharging ports in succession, to effect the purpose stated.

"(5) A rotary piston having a valve formed therein by opposite end ports or depressions, and adapted to act, in connection with receiving and discharging ports or passages in the cylinder chamber, to form a valve and piston, into and through which the water entering at the inlet-cylinder end ports passes through one end of the valve into the cylinder on one side thereof, and, reentering the valve from the other side of said cylinder, passes out at the opposite end ports of said valve, to effect the purpose stated.

"(6) A rotary valve piston having opposite end ports, d, d', communicating with the piston sides by diagonal passages, e, e', in combination with a cylinder having receiving and discharging ports, communicating with said opposite valve end ports and with the receiving and discharging spaces of said cylinder, whereby said valve opens some and closes others of its ports in succession, and to effect the equalization of the pressure of the water at right angles to the direction of the side-rocking and rotary movements of the said valve piston, as stated.

"(7) The inlet device, L, having side walls, a perforated end, and an open-end bearing rim, seated adjustably in and forming the inlet port, J, of the cylinder chamber, in combination with the rotary piston, against one end of which the said device bears, for the purpose stated.

"(8) The spaces or recesses, c', in the walls of the cylinder, between the bearing points, b', and the recesses, a', in combination with the piston having alternate bearing points and recesses, whereby to prevent the choking of the flow, and insure a uniform action of a piston adapted for operation with a side-rocking motion across the center of the cylinder and a rotary motion around its own center."

The meters alleged to infringe were constructed under patents granted to Hersey Bros., as assignees of James A. Tilden. The first one was No. 324,503, dated August 18, 1885, on an application filed December 22, 1884, for a rotary fluid meter. It was reissued to the Hersey Meter Company, November 2, 1886, as reissue No. 10,778, on an application for reissue filed September 30, 1886. Another patent was granted to James A. Tilden, February 1, 1887, No. 357,159, on an application filed August 15, 1885, for a water meter with a revolving, nonrotating piston. A third patent was granted to the Hersey Meter Company, as assignee of

James A. Tilden, No. 385,970, for a rotary fluid meter, July 10, 1888, on an application filed January 25, 1887. The manufacture of the alleged infringing meters was begun, a large number of them were put upon the market, and they were extensively advertised, prior to the filing of the application for reissue No. 10,806.

Nash took one form of the Galloway rotary engine,—that described in Reuleaux's Kinematics of Machinery, translated by Kennedy and published in London, Eng., in 1876, and made improvements upon it which were necessary and valuable to adapt it for practical use as a water meter. The Galloway engine was a steam engine. At that time it was well known that steam and water engines, whether rotary or reciprocating, could be used as meters to measure the flow of fluids passed through them, and various forms of both kinds had been used as meters. The original patent of Nash states that it is contemplated to use the apparatus as a motor or as a pump, and so does the reissue.

Galloway had patented another form of engine in England, by English patent No. 11,485, sealed December 14, 1846, and specification enrolled June 14, 1847. Tilden, the inventor of the defendant's water meter, took the form of this latter Galloway engine, and made such improvements upon it as were necessary to adapt it to practical use as a water meter. Both Nash and Tilden supplied the arrangements of ports and discharging spaces necessary for the special form of piston and cylinder chamber in the respective Galloway engines, adding also a registering device, to operate by attachment to the piston. In the Galloway engine described in the Kinematics there is a piston having projections and a cylinder having recesses, but the recesses are more in number than the projections on the piston. In the engine of Galloway's patent of 1846, the piston has the same number of projections that the cylinder has recesses. In the engine in the Kinematics, and in the plaintiff's apparatus, the piston has a side-rocking movement across the center of the cylinder, upon successive bearing points made by the contact of a projection on the piston with the recess in the cylinder, or conversely; and the piston rotates upon its own axis, so that each projection comes successively into each recess of the cylinder. But in the piston of Galloway's patent, and in the defendant's structure, there is no side-rocking nor any rotary motion, and each projection on the piston always operates in connection with one particular corresponding recess in the cylinder, and never leaves that recess.

The descriptions of the apparatus in the original and reissued patents of Nash are the same; but in reissue No. 10,806 there is a disclaimer in these words, which was not in the original specification: "I do not claim, broadly, a piston for water meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually changing lines across the center of said chamber, to effect its division at two or more points on its sides into receiving and discharging spaces, c, c, which communicate with the inlet and outlet, as a motor having a piston of substantially such construction and movement within a cylinder chamber having such construction is shown and described in the English patent of Elijah Galloway, December 14, 1846, (No. 11,485;) but what I do claim are said elements in combination with additional elements, as hereinafter specified, thereby limiting my claims to the novel features embraced in my meter."

In all of the eight claims of the original patent, except claim 1, a piston revolving about its center was an element in the combination claimed, and it is a feature in each one of claims 3, 4, 5, and 6 of the reissue. The theory upon which the disclaimer was inserted appears to have been that claim 1 of the original patent did not specify a piston revolving about its center, and therefore was sufficiently broad to include the arrangement in the Galloway patented engine of 1846. But it does not seem doubtful that such a piston was a necessary element of claim 1 of the original patent, and that it forms an element of every new claim of the reissue. The only piston described in the specification of the original patent, and therefore the only one which could have been referred to in claim 1 of the original patent, is one having the side-rocking and rotating movement which constitutes the compound motion described in the original specification, which motion is due to the fact that the piston has one or several less projections than the cylinder has recesses. The defendant's meter does not have such a piston, and therefore does not infringe any of the claims of the reissue.

The forms of the two Galloway engines are essentially different, and necessitate a different construction and arrangement of the co-operating devices to adapt them to efficient service as water meters. As said by the circuit court in its opinion: "The inventions of Nash and Tilden commence upon different lines, and result in a combination having a different mode of operation. The time and order of controlling the valves differ in each, and require a different arrangement of the valve ports, with reference to the valves which open and close them. In Nash's meter the ports for both entrance and discharge of water are in the ends or sides of the piston, while in Tilden's the ports are not in the piston, but in the ends or heads of the cylinder case, and are so located that the contact of the piston with

the cylinder divides each recess into one filling and one discharging passage. In the former the ends of the cylinder act as the valves; in the latter the piston itself acts as the valves. In Nash's meter the rotary and side-rocking or compound movement of the piston opens some and closes others of the ports in succession, in such a manner as to equalize the pressure of the water at right angles to the direction of the movements of the piston. In Tilden's meter it is an essential feature that there shall be not merely water pressure which moves the piston about the cylinder chamber, but additional side pressure, which, in Nash's meter, must be avoided, and it is only because it has a pressure of water not found in Nash's meter that it is operative at all."

In the Nash reissue it is required that the piston patented should have an "eccentric or side-rocking motion across the center of a cylinder chamber, to effect its division at two or more points into receiving and discharging spaces." But the defendant's piston has no such motion, and the cylinder chamber of its meter is not divided by the piston "at two or more points, into receiving and discharging spaces," in the sense of the Nash reissue.

In the Nash reissue it is required that "with this eccentric or side-rocking action the piston also revolves round its own center, * * * for, as the piston rocks from one bearing point to another directly across the center of the cylinder, it is at the same time revolved." But the defendant's piston has no motion of revolution about its own center.

*557 *In the Nash reissue it is required that, "in the rotation of the piston around its own center, one or more projecting bearing points of the piston will pass into corresponding recesses at one point of the cylinder, and in contact with and over one or more projecting bearing points of the cylinder at a different point, thereby always maintaining a direct contact of the piston and cylinder at two or more dividing points within the continually changing cylinder spaces." But in the defendant's meter the bearing points of the piston are always in their own special recesses in the case, and are never in contact with, and never pass over, any of the projecting bearing points of the cylinder; and there never is a direct contact of the piston and cylinder at two or more dividing points, within the meaning of the Nash reissue.

In the Nash reissue it is required that the valves should be "arranged so that the cylinder spaces on one side of the piston as it revolves have free inlet for the water through one set of the valve ports, while the spaces on the other side of the piston have free outlets for the water through the other ports of the valve." But in the defendant's meter the division between the inlet and outlet ports is not made by the piston, and all the displacement of the water is effected in the individual chambers of the cylinder, and no two chambers are ever connected while measuring water.

In the Nash reissue it is required that the valves should so open and close the ports in succession "as to keep the line of pressure of the water as nearly as possible at right angles to the direction of the eccentric or side-rocking and rotary movements of the piston, and thereby avoid any undue lateral pressure of the water upon the piston." But in the defendant's meter the motion of the piston is of an entirely different character. The "lateral pressure of the water upon the piston," which the Nash structure is designed to avoid, is an essential feature of the operation, and without it the piston of the defendant's meter would not be kept up against the side of the case, and no water could be measured.

In the Nash reissue it is required that, when a separate valve controlled by the piston is not employed, the valve is "formed" by inlet and outlet openings or ports in the ends of the piston, communicating by means of passages in or through the piston with the spaces of the cylinder." But in the defendant's meter no separate valve is employed, and there are no ports in the ends of the piston, and no passages in or through the piston, which communicate with the spaces of the cylinder; the single passage in the center of the defendant's piston is a portion of the discharge pipe; and it is required only in order to accommodate the water discharged at the bottom of the meter,—a double discharge, namely, at the top and bottom of the meter, being used for the purpose of balancing the piston.

In the Nash reissue it is required that the piston and cylinder should have "bearing or contacting surfaces * * * formed by alternate recesses, a, a', and projections, b, b', of such form or configuration as to allow of the rotation of the piston not only upon its own axis, but around and across the center of the cylinder, and the space within the cylinder must be of such form and sufficiently larger than the piston, H, to allow it to have this compound motion." But in the defendant's meter the projections and recesses are of such form as to prevent the rotation of the piston upon its own axis, and also to prevent its motion around and across the center of the cylinder; and the space within the cylinder is not of such form as, and not sufficiently larger than the piston, to allow the latter to have that compound motion.

In the Nash reissue it is stated that "the object of this compound motion is to form bearing points or lines of contact of the piston with the cylinder walls on opposite sides thereof at the same time, as shown in Figs. 3 and 12, whereby to divide the cylinder into receiving and discharging

spaces." But in the defendant's meter no bearing points, or lines of contact of the piston with the cylinder walls, on opposite sides thereof at the same time, are formed; and the receiving and discharging spaces are differently situated, and are divided in an entirely different way and on different lines.

In the Nash reissue it is required that, "of whatever form these alternate recesses and projections, they must be such that while they are in contact upon one side of the cylinder they must also at the same time have a contact at the opposite or a different side of said cylinder, and in this way divide the cylinder into spaces." But in the defendant's meter the projections and recesses are of such form that such required mode of dividing the cylinder into spaces by contacts on opposite or different sides of the cylinder is impossible.

In the Nash reissue it is stated that "in this contact it will be observed that upon one side of the cylinder and piston such contact takes place between a recess and projection, or intermediately between these points, while upon the opposite side such contact is made by corresponding projections, as shown in Figs. 3 and 12." But in the defendant's meter no such contact ever takes place, and there is no contract upon opposite sides of the cylinder; and, in each particular chamber, receiving and discharging spaces are formed by that projection of the piston which is in that chamber from the first and never leaves it.

In the Nash reissue it is stated that "the compound motion of the piston and the contacting dividing points are due to the fact that the piston has one or more less points of projection than the cylinder." But in the defendant's meter there are the same number of projections on the piston and on the cylinder, and consequently no compound motion of the piston is possible.

In the Nash reissue it is stated that the function of either form of valve described "is to regulate the flow of water in and out of the spaces of the cylinder in such manner as to produce the compound rotation and cross movement of the piston." But in the defendant's meter the water is admitted and discharged in such a way as to prevent any motion of the piston except a sliding movement, which is neither a compound rotation nor a cross movement, within the meaning of the Nash reissue.

In the Nash reissue it is required that the valve and piston should "co-operate to produce the results stated," viz. the compound motion of the piston and the proper control of the flow of the water in and out of the spaces of the cylinder. But in the defendant's meter the valves are adapted to the peculiar motion of the defendant's piston and the peculiar separation of discharging and receiving spaces, characteristic of that meter, and not at all to any such structure as is required by the Nash reissue.

In the Nash reissue it is required that to get the best results "the valve should open and close its inlet and outlet ports in succession, in such a manner as to keep the line of pressure as nearly as possible at right angles to the direction of the motion of the piston;" and the specification explains: "By the 'line of pressure' I mean a line connecting the points of division which separate the inlet from the outlet spaces, c, of the cylinder, as shown by the line, z, in Fig. 12; and by a 'line of motion' I mean a line which is tangent to the path of the axis of the piston at any point of such path, as shown by the arrow, y, in said figure." But such a requirement, interpreted by the definitions given, is meaningless when applied to the defendant's meter.

In the Nash reissue it is stated that "in the use of the meter the inlet may become the outlet, and vice versa." But in the defendant's meter the inlet must always be the inlet, and by no possibility can it be made the outlet; and, while the Nash meter may be run in either direction, the defendant's meter would be inoperative if the inlet became the outlet, and vice versa.

It is clear to us that there is no infringement, and that the decree of the circuit court must be affirmed.

(149 U. S. 1)

CHICAGO, M. & ST. P. RY. CO. v. HOYT et al.

(April 17, 1893.)

No. 180.

COVENANTS—CONSTRUCTION—BREACH—GUARANTY.

1. A railroad company leased to certain persons lots belonging to it, and the lessees covenanted to erect thereon an elevator of a specified capacity, and, to the extent of its capacity, to receive and store all grain delivered to it by the lessor. The lessor covenanted to build side tracks to such elevator, and to deliver to it all grain hauled by the lessor, so far as it could control the same. It was further covenanted that "the amount of grain received at said elevator shall be at least five millions of bushels, on an average, for each year during the term of this lease," failing which the lessor should pay the lessees one cent a bushel for the amount of the deficiency. *Held*, that this was not an undertaking to pay in case the elevator failed to store and handle at least 5,000,000 bushels per annum, and the lessor is only liable if the grain brought to the elevator fell short of that amount.

2. There is consequently no breach of the covenant when the railroad company tenders more than 5,000,000 bushels during the year, but the elevator is unable to receive it because the amount already delivered has been allowed by the shippers to remain in store, the railroad company having no control in this matter.

3. A party may, by absolute contract, bind himself to perform things which subsequently become impossibilities, or to pay damage for their nonperformance, and such construction is to be put upon an unqualified undertaking when the event which causes the impossibility might have been foreseen and guarded against, or when the impossibility arises from the act or default of the promisor. But when the event is of such a character that it cannot reasonably be supposed to have been in contem-

plation of the contracting parties, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens.

In error to the circuit court of the United States for the northern district of Illinois.

Action by Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Co., against the Chicago, Milwaukee & St. Paul Railway Company. There was judgment for plaintiffs, and defendant brings error. Reversed.

Edwin Walker and John W. Cary, for plaintiff in error. John N. Jewett, for defendants in error.

*Mr. Justice JACKSON delivered the opinion of the court.

This action was brought by defendants in error against the plaintiff in error to recover a designated sum of money alleged to be due under the terms of a covenant contained in a certain indenture of lease made and entered into between the parties. The cause was tried by the court below under a written stipulation of the parties, waiving a jury, and resulted in a judgment for the plaintiffs below for the sum of $33,783.83, to reverse which, for errors of law claimed to have been committed by the court in its construction of the covenant, and in the legal conclusions it reached from the facts specially found, this writ of error is prosecuted.

*On February 18, 1880, the Chicago, Milwaukee & St. Paul Railway Company, (hereafter called the "Railway Company,") being the owner thereof, leased and demised to the defendants in error lots 3, 4, and 5, of block K, of the original town of Chicago, for a term of 10 years from the 1st day of January, 1881, at an annual rental of $3,850, to be paid quarterly by the lessees, who were also to pay all taxes and assessments that might be levied upon the premises during the term. At the date of the lease the lessees were the owners of the adjoining lots 1 and 2 of the same block, upon which was located an elevator or warehouse, used for receiving, storing, and handling grain, and having a capacity of about 350,000 bushels. The lease was executed under seal of the respective parties thereto, and the material provisions thereof, so far as they relate to the present controversy, are as follows:

By the second article, Hoyt and his associates agreed to erect on said lots 3, 4, and 5 a grain elevator, "of a storage capacity of 700,000 bushels or more, during the year 1880." The article provided that the elevator should have all modern improvements, and should be constructed to the satisfaction of the railway company. No question is raised upon this article. The case admits that it was fully executed.

By the third article the railway company "agrees to lay all necessary tracks adjacent to said elevator, to connect its railway therewith for the purpose of delivering grain in cars thereto, and keep the same in repair during the time of this lease, and agrees to deliver on said tracks, in cars, at said elevator, to the parties of the second part, all the grain that may be brought by its railway, consigned to parties in the city of Chicago, so far as the party of the first part can legally control the same, for handling and storage in said elevator." The case involves no breach of this article.

By the fourth article it is provided as follows: "The said parties of the second part [Hoyt and his associates] agree to receive, handle, and store said grain, as delivered, in the usual manner of handling grain in the city of Chicago, to the extent and capacity of said elevator to be constructed, and in addition agree that they will use for the same purpose, so far as their other engagements will allow, the elevator now standing on lots 1 and 2 of said block, and the said party of the first part shall at all times be entitled to storage for its grain to the extent of at least 1,000,000 bushels. The parties of the second part, with the consent of the party of the first part, may receive grain for storage from other parties, and from river and canal craft; but, in case such grain is so received so as to reduce the capacity of the parties of the second part to accommodate the party of the first part to the extent of 1,000,000 bushels in said elevators, the said parties of the second part agree to furnish storage in other elevators to the party of the first part, to the extent that their capacity is so reduced, without expense to the said party of the first part for switching or otherwise." The case involves no violation of this article by either of the parties.

The 5th, 6th, and 7th articles, taking them in their order, relate (1) to the charges to be made for the storage and handling of grain, certain elevators accommodating the grain business of competing railways being referred to as a standard; (2) to the rebuilding of the elevator in case of its destruction by fire or other casualty, and that the "parties of the second part will save the said party of the first part free and harmless from all loss or damage by fire to said elevator or contents during the continuance of this lease;" and (3) to the weighing of the grain received into the elevator, and the appointment of weighers. In all these respects the case presents no question of controversy.

The last clause of the seventh article reads as follows: "It is further agreed that the parties of the second part will at all times keep a force at said elevators sufficient to transact all business that may be offered by said party of the first part, and that cars of grain will be received and unloaded, when the business of the party of the first part requires it, in the nighttime or on Sundays,

and that said business shall be dispatched with equal and as great facility in that respect as at any of the elevators in the city of Chicago, above mentioned, so as not to delay the cars of the party of the first part unreasonably or unnecessarily."

'It is upon the alleged breach of the eighth article of the contract that this suit is brought. That article reads as follows:

"In consideration of the agreement aforesaid the said party of the first part agrees that the total amount of grain received at said elevator shall be at least five million bushels, on an average, for each year during the term of this lease, and in case it shall fall short of that amount the said party of the first part agrees to pay to the said parties of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year; and, whenever it shall appear at the close of any year that the total grain received during so much of this lease as shall then have elapsed does not amount to an average of five million bushels for each year, the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency. But, in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average amount of five million bushels per annum, the amount so paid to the parties of the second part shall be refunded, or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of deficiency shall be refunded, should the total receipts for the entire term equal or exceed fifty million bushels in all, on an average of five million bushels for each year."

The remaining articles of the contract, including the supplement thereto, are comparatively unimportant.

In May, 1888, the defendants in error brought their action of covenant against the railway company in the superior court of Cook county, Ill., for the alleged breach of the contract and agreement embodied in said article 8 of the lease. The railway company, being a citizen of Wisconsin, removed the cause to the United States circuit court for the northern district of Illinois. The declaration contained two special counts, and the same breaches are assigned in each count. In the first count the contract is set out in haec verba; the second, according to its tenor and effect.

The first breach assigned was that the grain received for storage from the railway company during the year 1886 was less by 1,740,194 bushels than the 5,000,000 bushels covenanted to be received, and therefore the railway company became bound at the close of the year 1886 to pay the plaintiffs, (defendants in error,) on account of the deficiency, the sum of $17,401.94.

The second breach averred that the grain received for storage from the railway company during the year 1887 was less by 2,042,408 bushels than the 5,000,000 bushels covenanted to be received, and therefore the railway company became liable at the close of the year 1887 to pay to the plaintiffs, (defendants in error,) on account of the deficiency, the sum of $20,424.08.

The main breach specially set up and relied on is the third, which comprehends the other two, and is thus stated in the declaration:

"The said plaintiffs further aver that the total amount of grain received in the elevators mentioned in said indenture during the years 1886 and 1887 did not equal the ten million bushels, or five million bushels upon an average for each of said years, covenanted by the defendant in said indenture to be therein received during those years, but, on the contrary, the said plaintiffs aver that the total amount of grain received in said elevators during said two years, allowing to the defendants the full storage capacity in said elevators of one million bushels stipulated for in said indenture, was less than the ten million bushels promised to be therein received by the defendant, as aforesaid, during said years 1886 and 1887, by three million seven hundred and eighty-two thousand six hundred and two (3,782,602) bushels. And the plaintiffs aver that on account of said deficiency between the amount of grain promised by the defendant to be received in said elevators, and the amount actually received therein, during said years, the said defendant became and was liable to pay to the plaintiffs, according to the terms and provisions of said indenture of lease and agreement, and its further covenant in such case therein provided, the sum of one cent per bushel upon the total number of bushels constituting the deficiency of said years 1886 and 1887, whereby and by reason whereof the said defendant by virtue of its covenant aforesaid, became liable to pay to said plaintiffs thirty-seven thousand eight hundred and twenty-six dollars and two cents ($37,826.02) at the times and in the manner in said indenture provided."

On demurrer of the defendant to the declaration being overruled by the court, (39 Fed. Rep. 416,) so far as it related to the breaches thus charged, the defendant interposed a plea of general performance; and by stipulation of the parties it was agreed that "said cause shall stand for trial upon the single plea of general performance, first pleaded by said defendant, and the issue made thereon, with the right reserved to either party to introduce on the trial of said cause under said issue all evidence which could be properly introduced under any issue legitimately framed under special pleas applicable to the case, and that upon the filing of this stipulation all other pleas filed herein by the said defendant shall be considered as withdrawn."

The cause was thereupon submitted and

heard upon its merits by the court below, which made the following special findings of fact:

"First. It found the contract, as already recited, duly made and entered into between the parties.

"Second. That said elevator was constructed upon the lots named in said agreement, and was completed within the time and in accordance with the terms and conditions of said agreement, on or about the 24th day of December, A. D. 1880, with a working capacity of 750,000 bushels; that the storage or working capacity of the elevator known as the 'Fulton Elevator' was 350,000 bushels, both elevators affording storage and working capacity of about 1,100,000 bushels of grain, and that the cost of constructing said new elevator was about the sum of $200,000.

"Third. That the said Munger, Wheeler & Co., as assignees of Jesse Hoyt and his associates, built said new elevator, and have controlled and operated both elevators since December, 1880, and are now operating the same, and that said firm during said time also owned and controlled six other elevators, all located in the city of Chicago, upon other railroads entering into said city, and that at the present time said firm controls and operates, in all, eight grain elevators in said city, with an aggregate storage or working capacity of about 6,000,000 bushels of grain.

"Fourth. That in the year 1886 the plaintiffs received from the defendant, for store in the St. Paul or new elevator, 1,923,339 bushels of grain, and in the Fulton elevator, 903,482 bushels, and also that the plaintiffs received from the defendant, for storage, 432,985 bushels of grain in the Union elevator, located on the Chicago & Alton Railroad, in the city of Chicago, making a total for the year 1886 of grain received by the plaintiffs from the defendant of 3,259,806 bushels, all of which is credited to the defendant in its account for that year.

"That in the year 1887 the plaintiffs received from the defendant in the new or St. Paul elevator 2,300,292 bushels of grain, and in the Fulton elevator, 657,300 bushels of grain, making a total of 2,957,592 bushels of grain received by the plaintiffs from the defendant during the year 1887.

"That all the grain received and handled by the plaintiffs in the Fulton and St. Paul elevators during said years was received from the Chicago, Milwaukee & St. Paul Railway Company.

"Fifth. The court further finds that the plaintiffs admitted in open court that, during the years 1886 and 1887, grain was tendered by the defendant to the plaintiffs for storage, and that it could not be received, for the reason that the plaintiffs' warehouses were filled; that the grain so tendered amounted to 8,685,269 bushels, and that the plaintiffs never declined to receive shipments of grain from the defendant when such elevators had capacity to receive it within 1,000,000 bushels, and that when the plaintiffs refused to receive further grain for storage the defendant was notified that it occupied the entire capacity stipulated for in the contract at the time plaintiffs decined to receive the grain so tendered, to wit, 1,000,000 bushels.

"Sixth. That for the year 1886 the defendant paid for switching grain to other elevators, when the plaintiffs were unable, and therefore refused, to accept the same, the sum of $2,871, and in the year 1887 the sum of $9,962.35, and that the cost of train service for the defendant in delivering such grain to other elevators amounted to about the same sum.

"That the defendant also, during said year, contracted with parties having grain stored in said elevators to remove the same in order to furnish more room for the defendant; that for the removal of 100,000 bushels the defendant paid the owners thereof $15,000, and that after such removal the plaintiffs refused to receive from the defendant for storage more than 40,000 bushels in place of the grain that had been so removed, for the reason that that amount of additional grain exhausted the storage and hauling capacity of said two elevators; that it was to the interest of the defendant to deliver all the grain to the plaintiffs at said St. Paul and Fulton elevators during said years.

"That during the two years in controversy the entire storage capacity of said elevators was constantly occupied by grain received from the defendant's cars, and, although the plaintiffs refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that their elevators were full, and contained more than 1,000,000 bushels of grain received from the defendant.

"That at no time during the said years 1886 and 1887 did the plaintiffs refuse to receive grain from the defendant for storage in said elevators when there was any unoccupied storage space in the same, and that some of the grain so delivered and stored during said years remained in said elevators so long that the plaintiffs were not able to receive or handle for defendant during said years the amount of grain contemplated by the contract, or the full amount actually tendered by the defendant, and that but for this unusual condition the plaintiffs would have received and stored all the grain tendered by the defendant.

"Seventh. The court further finds that the plaintiffs' regular charges for storage of grain in said elevators during the years 1886 and 1887 were one and three quarters of a cent per bushel for the first ten days, and one and one-half of a cent per bushel for the subsequent ten days, and for every thirty days the storage charges were one cent and three quarters per bushel; that for 1,000,000

bushels stored in such elevators, and continued therein for one year, the regular storage charges for the same during the years 1886 and 1887 would be at the rate of $150,000 for each 1,000,000 bushels for the term of one year; that, if said elevators could be kept employed with first storage—that is, if 1,000,000 bushels could pass through said elevators each ten days—the charges for a year would amount to about $270,000.

"That the length of time that said grain remained in store was not regulated or controlled by either the plaintiffs or defendant, but by the shippers or owners of such grain.

"Eighth. That the plaintiffs have kept the accounts of all their elevators together, and therefore could not state the earnings of the elevators in question for the years 1886 and 1887.

"Ninth. There is no evidence of the amount of earnings of said St. Paul and Fulton elevators during the years 1886 and 1887, or of the income of the plaintiffs derived from the storage of grain or charges thereon in said elevators during said period of time, nor is there any evidence of any actual damages sustained by the plaintiffs by reason of their not handling in said elevators, during said years, the full amount of 10,000,000 bushels of grain, or by reason of the alleged breach of covenant by the defendant, other than the one cent per bushel for the years 1886 and 1887, as prescribed by article 8 of the contract."

As the result of these findings, the amount of the deficiencies for the years 1886 and 1887, with interest from the end of each year to September 25, 1889, was ascertained to be $42,806.13, from which was deducted the rental and interest thereon for the years 1886 and 1887, set up as a counter claim, amounting to the sum of $9,022.30, which left a balance due from the defendant to the plaintiffs of $33,783.83, for which judgment was rendered.

The defendant moved for judgment on various grounds, which were denied by the court, and which need not be specially noticed, as they are covered by the assignments of error.

In the view we take of the case, it is not necessary to consider several questions presented by the plaintiff in error, such as want of mutuality in the covenant in question, or the impossibility of the performance thereof, or that it was a wagering contract, and ultra vires on the part of the railway company. The material questions of the case are covered by the two assignments that the judgment is not sustained by the special findings of fact, and that the court erred in its construction of the contract between the parties. There is no bill of exceptions in the record, and the errors of law relied upon by the plaintiff in error must therefore be considered and determined upon the special findings of fact.

The action of the lower court in overruling the demurrer to the declaration proceeded in part, if not entirely, upon the ground that the undertaking entered into by the railway company in and by the eighth article of the lease amounted to a guaranty that the business of the elevators during each year of the term should amount to a certain sum. As we understand their position, counsel for the defendants in error do not, however, insist upon this construction of the covenant, but rely upon the interpretation given it by the circuit judge at the hearing on the merits, which was "that if, with a storage capacity of 1,000,000 bushels, the plaintiffs should not be able to receive and handle 5,000,000 bushels annually, and earn commissions on that basis, the defendant would pay to the plaintiffs one per cent. per bushel on the deficiency."

If the true meaning and intent of the covenant—read, as it should be, in connection with the other provisions of the contract, and in the light of the surrounding circumstances, the situation of the parties, and the objects they respectively had in view—were to guaranty to the lessees that they would actually receive, store, and handle at the designated elevators, on an average, each year of the lease, as much as 5,000,000 bushels of grain, and that if, in the course of the grain business, they could not, in fact, receive, store, and handle more than 1,000,000 bushels during the year, still the railway company would be liable to them for one cent on 4,000,000 bushels not so received and stored, although tendered and offered to them in the manner and at the place provided for in the contract, then there is no error in the judgment of the circuit court.

If, however, the language of the stipulation means, as counsel for plaintiff in error contend, that the railway company only agreed that the quantity of grain which it would deliver at the elevators or tracks connected therewith, in the usual way, in cars, for storage and handling, should amount, on an average, to at least 5,000,000 bushels per annum for a period of 10 years, and that in case the grain so delivered, or brought to the elevators for delivery, fell short of that quantity, it would pay one cent per bushel on the amount of such deficiency, then the judgment is erroneous, and should be reversed. We are of opinion that the latter construction is the proper one, and meets the real object and purpose which the parties had in view in entering into the contract.

To meet a natural and reasonable solicitude of the lessees that the full supply of grain should be brought to their elevators, the railway company agreed "to deliver on said tracks, in cars, at said elevators, to the parties of the second part, [the lessees,] all the grain that may be brought by its railway, consigned to parties in the city of Chicago, so far as the party of the first part [the

railway company] could legally control the same, for handling and storing in said elevator." If the railway company had failed to deliver at the elevators, for storage and handling, all grain, consigned or unconsigned, which it brought to Chicago, and could legally control, it might, perhaps, have been liable to the lessees for the damage thence resulting, and could not have set up, by way of excuse or defense, that the elevators were continuously filled with other grain previously received from the railway company. The fact that the lessees had furnished storage for a million bushels received from the railway company, and thereby exhausted the capacity of their elevators to take any more grain on storage so long as the million bushels remained on hand, would not have exempted the railway company from the obligation of delivering at the elevators all grain brought by it to the city, so far as it could control the same. Under this provision of the contract, if the quantity brought, and subject to its control, was four or five million bushels in addition to the million previously delivered and in store, the railway company would still be bound to tender such additional grain to the lessees, who, under the construction placed upon the eighth article of the lease by the court below, could not only decline to accept the same, but actually make their inability to receive and store the grain tendered the basis of a valid claim for one cent per bushel on the amount so tendered and declined. A result so unreasonable as this is hardly to be supposed to have been contemplated and intended by the parties. It is found as a fact that the length of time grain could or would remain in store was not, and could not, be legally, controlled by either the lessor or the lessees, but was subject to the exclusive control, in that regard, of the shippers and owners of the grain. The construction which was placed upon the contract, and which is necessary to support the judgment below, would place the railway company in the position of undertaking to guaranty that shippers and owners having grain on storage in the elevators would so deal with, or remove and dispose of, the same as to enable the lessees to store and handle more grain than the elevators had capacity for. It is not to be supposed that the railway company was undertaking to make a guaranty as to how grain owned and stored by others would be dealt with or controlled, in respect to its remaining or being removed from the elevators, and the language of the covenant does not require a construction which would place the railway company in that position.

The court below attached importance to the use of the word "received," as employed in the eighth article. The words, "total amount of grain received at said elevators," would, however, be pressed beyond their legitimate and proper meaning if construed to mean that the elevator should actually store and handle 5,000,000 bushels during each year, without regard to its capacity, or without reference to the ability of the lessees to accept and store that quantity. The language of the covenant is that the "total amount of grain received at said elevators shall be at least 5,000,000 bushels, on an average, for each year during the term of this lease, and in case it shall fall short of that amount the said party of the first part agrees to pay to the said party of the second part one cent per bushel on the amount of such deficiency."

The agreement or stipulation that the amount of grain "received at said elevator" should reach the designated quantity falls short of an undertaking or guaranty by the railway company that the elevator should in fact store and handle that quantity each year of the term. The amount of grain "received at" an elevator during a given period should not be construed as meaning that such amount would or should be actually taken into the same for storage and handling, unless there is something in the context clearly indicative of an intention to use the words in the latter sense. No such intent appears in the present case.

The manifest object and purpose of the covenant were to assure the lessees that there would be delivered at or brought to said elevators, by the railway company and others, a total amount of at least 5,000,000 bushels of grain per annum for storage and handling, and not that the railway company would guaranty that the lessees could or would actually receive, store, and handle that quantity at the elevators. When, therefore, the railway company and others offered at the elevators the stipulated quantity or amount of grain, it performed the condition of its guaranty; and the inability of the lessees to accept the grain so tendered, on account of the storage capacity of the elevators being fully occupied by third parties, whose action in respect to allowing the grain to remain or to be removed was beyond the control of either the lessor or the lessees, cannot operate to defeat such performance, or constitute any ground for thereafter holding the railway company liable on its guaranty.

There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance; and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But, where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will

not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens.

This principle is directly applicable here; for the covenant sued on cannot be construed to mean that the railway company contemplated by the terms of its agreement that it was to be held responsible for the course of business of the lessees, or that it was undertaking to guaranty that shippers and owners, having grain in store at the elevators, would remove the same with sufficient dispatch to enable the elevators to store and handle as much as 5,000,000 bushels annually. This would be a most unusual and unreasonable undertaking, wholly beyond the control and ability of the railway company to perform; and while the words, "receive at the elevators," might in and of themselves be broad enough to include such an undertaking, if the context clearly showed that such was the intention of the contracting parties, we are of opinion that they were not so understood and used by the parties in this case, and should not be so extended as to cover the contingency or possibility of such a course of dealing as would prevent the acceptance of grain if the agreed quantity was tendered. There is no allegation in the declaration that grain to the amount specified was not, during the years 1886 and 1887, received at or tendered in cars, on the tracks, at said elevators, for delivery, to the amount of, or in excess of, 5,000,000 bushels of grain. On the contrary, the court below finds, as a matter of fact, "that the defendant in 1886 and 1887 so delivered 6,210,398 bushels, which was received by the plaintiff into said elevator, and further finds as follows: Fifth. The court further finds that the plaintiffs admitted in open court that, during the years 1886 and 1887, grain was tendered by the defendant to the plaintiffs for storage, and that it could not be received for the reason that the plaintiffs' warehouses were filled; that the grain so tendered amounted to 8,685,269 bushels, and that the plaintiffs never declined to receive shipments of grain from the defendant when such elevators had the capacity to receive it, within a million bushels; and that when the plaintiffs refused to receive further grain for storage the defendant was notified that it occupied the entire capacity stipulated for it in the contract at the time plaintiffs declined to receive the grain so tendered, to wit, one million bushels."

It is urged in behalf of the defendants in error that this amount of 8,685,269 bushels so tendered by the railway company includes the 6,210,398 bushels which the court finds was actually received into the said elevators during said years. We do not so construe this finding. Its language relates clearly and distinctly to an amount of grain that was tendered by the railway company, and which could not be received by the lessees, for the reason that the warehouses were filled. It is thus shown that, in addition to what was actually received, there was tendered by the railway company, at the place and in the manner provided for in the contract, 8,685,269 bushels, which the elevators could not accept, and did not receive and store. The amount so tendered, with that actually received, exceeded the total amount which the railway company agreed that the lessees should have the opportunity to accept and store, and this we hold to be a full and complete compliance by the railway company with the terms and true meaning of its covenant. To hold otherwise would render the railway company liable for the inability of the lessees to accept the performance that was offered by it. It would require the clearest and most unqualified understanding on the part of the railway company to subject it to such a liability.

The plaintiff in error interposed a counterclaim for the rent due it for the years 1886 and 1887, which, as found by the court below, amounted to $9,022.30, which was deducted from the amount which the court below adjudged to be due the lessees. The conclusion of this court is that the judgment awarded the lessees is erroneous, and must be reversed, with costs, and that the cause should be remanded, with directions to the court below to enter judgment in favor of the plaintiff in error for the above amount of rent due to it, with interest thereon from October 1, 1889, the date of judgment below; and it is accordingly so ordered.

The CHIEF JUSTICE, having been of counsel, and Mr. Justice FIELD, not having heard the argument, took no part in the consideration or decision of this case.

(149 U. S. 164)

Ex parte TYLER.

(April 24, 1893.)

No 17, Original.

CIRCUIT COURT—RECEIVERS—TAXATION—CONTEMPT.

1. Where a state officer, who has seized under tax warrants property in the hands of a receiver of the United States circuit court, and who has disobeyed the order of the court that he release it forthwith, is committed for contempt, upon his application to the supreme court for the writ of habeas corpus the only question to be considered is whether the order of commitment was void for want of power to make it.

2. Where the property is within the jurisdiction of the circuit court, and has been taken into its custody by the appointment of a receiver, its jurisdiction to protect it from interference by such state officer is independent of the amount involved, the citizenship of the parties, or of the existence of any new ground of equitable jurisdiction.

3. The rule that property in the hands of a receiver is in custodia legis, and that inter-

ference with such possession without leave of the court is a contempt, is as applicable in the case of seizure thereof to enforce payment of taxes due the state as in any other case.

4. The act of March 3, 1887, § 1, (24 St. p. 552, c. 373,) permits a receiver to be sued without leave of the court that appointed him, but provides that "such suit shall be subject to the general equity jurisdiction of the court, so far as the same shall be necessary to the ends of justice." Section 2 provides that the receiver shall manage the property "according to the valid laws of the state in which such property shall be situated." *Held*, that neither section restricts the power of the circuit court to preserve property in the custody of the law from external attack.

5. Where the receiver alleges that the tax sought to be collected is illegal, and files his petition in the circuit court to have its legality determined, the power of the court to restrain any interference with the property for the purpose of collecting the tax pending such determination is in no wise affected by the fact that the statutes of the state expressly deny any mode of relief against taxes claimed to be illegal, save that of payment under protest, and action to recover back the amount so paid.

6. The proceeding for contempt against the state officer who has so seized the property under tax warrants is in no sense a suit against the state, and is not in contravention of the eleventh amendment to the federal constitution.

Statement by Mr. Chief Justice FULLER:

This is a petition for a writ of habeas corpus, filed by leave of court March 7, 1893, by M. V. Tyler, sheriff of the county of Aiken, S. C., representing that he is unjustly detained by G. I. Cunningham, United States marshal for the district of South Carolina, to which the marshal made return upon a rule laid upon him to do so. The facts appearing from the petition, return, and accompanying documents are as follows:

On December 5, 1889, in the case of Bound v. The South Carolina Railway Company, Daniel H. Chamberlain was appointed receiver of the railway company by an order of the circuit court of the United States for the district of South Carolina, with the usual powers of receivers in such cases, and all of the property of the company was placed under his care and management, and protected by injunction. On March 7, 1892, the receiver filed a bill in equity in that court against the treasurers and sheriffs, 18 in number, in the counties through which the railroad in his possession passed, alleging that the treasurers were about to issue tax executions, and the sheriffs about to levy and seize thereunder property of the railroad company for the taxes for the fiscal year beginning November 1, 1890. The bill alleged that the taxes for that fiscal year were unconstitutional and illegal in part, upon various grounds set forth therein in detail, and involving an alleged wrongful and illegal raising of the valuation by the state board of equalization; that the levy and sale of the road would cause irreparable injury, preventing the receiver from carrying on the business of the railroad as a common carrier; that there was no adequate remedy at law; that a multiplicity of suits would be necessary to protect his rights, if he sued at law; and that the levy would cast a cloud upon the property,—and prayed for an injunction against the issue and levy of the tax warrants in question. The bill further set forth that the receiver had tendered, without condition, the taxes admitted to be due, and that the same had been refused by the county treasurers, but pending the motion for preliminary injunction the defendants were permitted to waive this refusal, and receive the amounts tendered, which was accordingly done. On April 8, 1892, the court, after full hearing, issued the injunction prayed for, and, the defendants having answered, it was provided by order of court that the testimony should be taken in due course in time for final hearing at the November term, 1893.

For the fiscal year beginning November 1, 1891, the receiver made a return of the property for taxes as provided by law, similar to the return he had made the year previous, and, the state board of equalization having again proceeded in the matter of the assessment and valuation as before, the receiver again tendered the taxes calculated on the valuation as returned, and not upon the valuation as assessed. The amounts so tendered were received, but tax executions or warrants were issued by the county treasurers for the difference between the return and the assessment, and on February 4, 1893, levy was made by Tyler, sheriff of Aiken county, upon property in the hands of the receiver at Aiken. There were apparently two warrants,—one for $1,215.14 and the other for $466.40,—and the value of the property levied on was $9,500. That property consisted of 14 freight cars, 5 belonging to the South Carolina Railway, 1 to another South Carolina company, and 8 to various railroad companies of other states. All of the cars were marked with the initials of the corporations to which they belonged, and most of them with the names of the owners in full. Eight of the cars were loaded with merchandise belonging to shippers. The cars were chained to the track of the South Carolina Railway Company, alongside of the only freight depot of the company in Aiken, and effectively stopped traffic through that depot for a period of 12 days. On Monday, February 6, 1893, the receiver filed his petition in the circuit court of the United States, alleging the illegality of the taxes for which the warrants were issued, in substantially the same terms as in the bill of the year before, and setting forth that he had paid the taxes admitted to be due; that the court in the previous case had decided a tax in all respects similar to be illegal,—and after disclaiming any intention to delay or escape the payment of the taxes due, and alleging that he was only doing his duty as an officer of the court, prayed that the treasurer and sheriff be enjoined from interfering with the property in the receiver's charge, and be committed for contempt for levying upon

*167 property in the *custody of the court. The court issued a restraining order, and a rule to show cause, returnable at Charleston on February 20, 1893, as follows:

"Ordered, that an order do forthwith issue and be served upon said MacMitchell and M. V. Tyler, requiring them to show cause before me on the 20th day of February, 1893, at 10 o'clock A. M., at the United States courthouse, Charleston, S. C., why they should not be attached and punished as prayed for.

"(2) That the said MacMitchell and M. V. Tyler do likewise show cause before me, at the same time and place, why they should not be enjoined and restrained from interfering with any or all of the property of the said South Carolina Railway Company, or other property in the possession and control of the said D. H. Chamberlain as receiver and officer of this court, or from interfering in any manner whatsoever with the officers and agents of the said receiver, and also from levying upon, advertising, or selling or in any manner whatsoever attempting to dispose of, the said property.

"(3) That the said MacMitchell and M. V. Tyler do likewise, in due course, file an answer, if any, why such further relief as may be necessary should not be granted in the premises.

"(4) In the mean time it is ordered that the said MacMitchell and M. V. Tyler be, and they are hereby, restrained and enjoined from levying upon, seizing, advertising, or selling, or in any manner whatsoever endeavoring to interfere with or to dispose of, the said property in the possession of the said D. H. Chamberlain as receiver of this court, until the hearing of the rule, and the order of this court thereon.

"(5) That a copy of the petition and order herein be forthwith served upon the said MacMitchell and M. V. Tyler."

On February 8th a supplemental petition was filed by the receiver, reciting the filing of the original petition, the order thereon, and the service of copies of said petition and order, and stating that the sheriff refused to comply with a written demand, on February 7th, for the release of the property from his custody.

*168 Accompanying this supplemental petition were affidavits *stating the facts in detail, whereupon the order of February 6th was so modified as to require the respondents to show cause on February 11, 1893, instead of February 20th.

The respondents answered the petitions on February 12th, denying any unlawfulness in the assessment, and admitting that the property was in the possession of the court, but denied that such possession exempted the same from process of law for the collection of taxes by the state. They admitted the levy upon the cars, but denied any knowledge or information sufficient to form a belief that any of them belonged to corporations other than the South Carolina Railway, and denied that the levy seriously interfered with the receiver or the public in doing business over said road. They further denied that the facts stated in the original and supplemental petitions, if true, were sufficient to constitute a contempt of court, and insisted upon various matters, afterwards again set forth in the application for habeas corpus.

They asserted the legality and regularity of the warrants for the collection of the taxes, and that the levy was made in obedience thereto, and submitted that they were acting under the laws of South Carolina, as the officers and agents of the state, "and as such engaged in the performance of their duties in issuing the said execution, in making the said levies, and in retaining possession of the property so levied upon, under the valid, constitutional laws of the said state, and that, if said petitioners have any controversy with any one in regard thereto, it is a controversy with the state of South Carolina, which is no way a party to these proceedings, and that there can be no controversy with the respondents in this regard unless they were acting without the commission and warrant of the state of South Carolina, and were trespassers, which they deny;" and, finally, they disclaimed "any intention to treat this court or its orders with disrespect, and state that they have been actuated alone with a desire to discharge their official duties as officers of the state of South Carolina."

This return was accompanied by a large number of affidavits tending to show the legality of the tax complained of.

A hearing having been had, the circuit court delivered its *opinion, stating the facts *169 briefly, and holding that the interference by the court by injunction was justified on the ground of excessive levy, and on the ground of the taking of property other than the property of the alleged taxpayer, but, further, that while property in the hands of a receiver of any court, either state or national, was bound for the payment of taxes,—state, county, or municipal,—yet that a receiver is not bound to pay taxes in his judgment unlawful, unless by the order of the court whose officer he is, and that in the present proceeding it was not competent for the court to go into the question of whether the tax was or was not illegal. The circuit court thereupon entered severally the following orders:

"This cause came on to be heard on petition, rules to show cause, return thereto, and affidavits; and on hearing the same, and upon due consideration thereof, it is

"Ordered, adjudged, and decreed that an injunction do issue to M. V. Tyler, sheriff of Aiken county, his deputies and agents, enjoining and restraining them from further intermeddling, interfering with, keeping, and holding the personal property distrained up-

on by him, belonging to the petitioner, as receiver of the South Carolina Railway Company, or in his care and custody as receiver and common carrier, and that this injunction remain of force until the further order of this court.

"It is further ordered that the said property be restored to the custody of the receiver of this court, and that the marshal put him in possession thereof."

"M. V. Tyler, sheriff of Aiken county, having been served with two rules to show cause why he be not attached for contempt, for the matters set forth in copy of petition to each rule attached, and sufficient cause not having been shown, and it further appearing that he, notwithstanding, continues to hold and detain said property, we adopt the precedent set in In re Chiles, 22 Wall. 157, by the supreme court of the United States.

"It is ordered, adjudged, and decreed that he is in contempt of this court, and of its orders and process.

170 "It is further ordered that he do pay a fine of five hundred dollars, and that the clerk of this court shall enter judgment thereon, and issue execution therefor, and that he also stand committed to the custody of the marshal of this court until he has paid said fine, or purged himself of his contempt herein."

Among other averments in the petition for the writ of habeas corpus, it was alleged that by an act of the general assembly of South Carolina, approved March 19, 1874, (15 St. S. C. p. 789,) it is provided that, in all cases where it is claimed that taxes have been erroneously or illegally charged upon taxable property within the state, the person so claiming may, by petition, submit a full statement of the facts in the case, and the comptroller general may make such abatement thereof as in his judgment the same may demand, and that such relief so granted in cases for erroneous charges as aforesaid has not been sought by the receiver or the railroad company; that by the statutes of the state it is also provided that the collection of taxes shall not be stayed or prevented by any injunction, writ, or order issued by any court, or judge thereof, (Gen. St. S. C. § 171;) and that in all cases where taxes are charged against any person, which he may conceive to be unjust or illegal for any cause, he shall pay the taxes notwithstanding, under protest, and upon such payment being made the person so paying may, within a time limited, by action against the county treasurer, recover such taxes as may in such suit be adjudged to have been wrongfully or illegally collected. It was further averred that by the act of congress approved March 3, 1887, and amended by the act of August 13, 1888, the receiver appointed in this case was required to manage and operate the property situated in South Carolina according to the requirements of the valid laws of that state, in the same manner as if in possession of the owner thereof; and petitioner insisted that the action of the circuit court in appointing a receiver did not change the title or possession of the property, or its relation to the sovereign power of the state to tax it, and was subject in like manner as the property would have been subject had it remained in the hands of its owners. Petitioner also referred to an act of the legislature of South Carolina, approved December 24, 1892, (Acts S. C. 1892, p. 81,) which provided that the assessment of property for taxation should be deemed and held to be a step in the collection of taxes; that certain enumerated sections of the General Statutes, thereby declared to be in full force and effect, should be construed to mean as giving full and complete power to the county auditor, independent of any rights conferred on county boards of assessors or other officers, in the matter of securing a full and complete return of property for taxation in all cases, and that the action of the auditor under those sections should not be interfered with by any court of this state by mandamus, summary process, or any other proceeding, but that the taxpayer should have the right to pay his tax on such return under protest, as now provided by law. Petitioner therefore insisted that an adequate remedy at law was given the taxpayer for unjust and excessive taxation, and that it was not competent for a court of the United States to grant the injunction in this case, any more than it would have been for a court of the state; that the receiver's possession is that of the court, only for the parties litigant in the suit, and to the extent only of the power to subject the property to the rights of suitors, subject to the paramount right of the state to tax the property according to its own laws; that the railway company was a citizen of South Carolina, and hence that the receiver, as plaintiff in his petition, represented a citizen of South Carolina, and proceeded against the petitioner, Tyler, who was also a citizen of that state; that the amount involved was less than gives jurisdiction to the circuit courts of the United States; that on the grounds indicated the court had no jurisdiction, and its order was void; and that, therefore, the order of commitment and fine was void. In conclusion petitioner insisted:

"(1) That the injunction proceeding by the receiver is a suit against the state of South Carolina; that to enjoin the functionary is to forbid the function of the state to tax by its own laws, and fix and assess its amount by its own procedure; and that your petitioner, as the officer charged with this state function, is sued by the receiver, which is in fact a suit against the state, and contrary to the eleventh amendment of the constitution of the United States.

"(2) That under the laws of the United

States and of the state the remedy of the owner or taxpayer is ample by proceeding at law, and he can have none in equity, which is denied by the statute of the state, and on general principles of equity practice, and that the exigency which induced the appointment of a receiver does not in any respect change the legal aspect of the case, but makes the order of the court of the United States illegal, void, and without jurisdiction.

"(3) That to fine and imprison your petitioner for action, as a legal officer, under and according to the valid laws of South Carolina, is to deny the authority of the state itself, by making it impossible for the state to execute its laws by agents, except under penalties which the United States courts cannot impose as an obstruction to the functions of the state itself.

"Wherefore, your petitioner insists that he is held in custody against law, and contrary to the constitution of the United States, the supreme law of the land."

D. A. Townsend, Attorney General of South Carolina, J. Randolph Tucker, Saml. Lord, and Ira B. Jones, for petitioner. Jos. W. Barnwell, for respondent.

*180 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

Unless the order of commitment was utterly void for want of power, this application must be denied. The writ of habeas corpus is not to be used to perform the office of a writ of error or appeal; but when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the circuit court, which had no jurisdiction of the person or of the subject-matter, or authority to render the judgment complained of, then relief may be accorded. Ex parte Parks, 93 U. S. 18; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77; Neilsen, Petitioner, 131 U. S. 176, 9 Sup. Ct. Rep. 672. And even if the contention were well founded, which is not at all to be conceded, that under the fifth section of the judiciary act of March 3, 1891, *181 a writ of error might be brought to review such a judgment as that before us, and *that thereby our appellate jurisdiction was enlarged, we should still decline to consider the whole record for error, merely, but only to ascertain whether the judgment was absolutely void.

The property in question was in the custody of the circuit court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver's application the ordinary grounds of equity interposition were not required to be set forth. Whether inadequacy of remedy at law in respect of the disputed taxes, or the requisite jurisdictional amount, or diverse citizenship, were shown to exist, was not and could not be matter of inquiry. But it may be observed that diverse citizenship is not material in ancillary and dependent proceedings, where jurisdiction exists over the subject of the litigation, (Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Morgan's, etc., Co. v. Texas Cent. R. Co., 137 U. S. 171, 201, 11 Sup. Ct. Rep. 61;) that the objection of adequacy of legal remedy, as here presented, goes to the want of equity, and not to want of power, (Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. Rep. 486;) and that an apparent defect of jurisdiction for lack of a matter in controversy of sufficient pecuniary value can be availed of only by appeal or writ of error, (In re Sawyer, 124 U. S. 200, 221, 8 Sup. Ct. Rep. 482.) In the latter case the distinction between an absolute want of power, and its defective exercise; between cases where the subject-matter falls within a class over which equity has jurisdiction, and those where it does not,—is clearly pointed out, and the authorities cited.

No rule is better settled than that, when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court, and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor. Wiswall v. Sampson, 14 How. 52; Taylor v. Carryl, 20 How. 583; Davis v. Gray, 16 Wall. 203; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Barton *v. Barbour, 104 U. S. 126; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. Rep. 379.

Ordinarily the court will not allow its receiver to be sued touching the property in his charge, nor for any malfeasance of the parties or others, without its consent; and while the third section of the act of congress of March 3, 1887, (24 St. p. 552, c. 373,) now permits a receiver to be sued without leave, it also provides that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." Neither that, nor the second section, which provides that the receiver shall manage the property "according to the valid laws of the state in which such property shall be situated," restricts the power of the circuit courts to preserve property in the custody of the law from external attack.

In this case, instead of issuing an attachment against the petitioner at once for forcibly seizing the rolling stock of this railroad under the circumstances appearing upon the face of the record, the court adopted the course of serving him with a rule to show cause, and with an order restraining him, in the mean time, from interference with the property. The petitioner refused to release the property upon request of the receiver, and persisted in his attempt to hold

possession thereof by force in disregard of the order of the court.

The general doctrine that property in the possession of a receiver appointed by a court is in custodia legis, and that unauthorized interference with such possession is punishable as a contempt, is conceded, but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly, property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law; but this does not justify a physical invasion of such custody, and a wanton disregard of the orders of the court in respect of it. *183 The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other; and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

The levy of a tax warrant, like the levy of an ordinary fieri facias, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and, while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done, and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty,—an assumption carrying a contemp upon its face.

The acceptance of the rule has been general, and but few decisions were cited on the argument in illustration of its application.

The court of appeals of Maryland, in County Com'rs v. Clarke, 36 Md. 206, stated the question presented to be "whether, after a decree has been passed by a court of equity for the sale of real estate, and trustees have been appointed to make such sale, a collector of taxes has the power to seize and sell the same, or any part thereof, for taxes due." And the court thus proceeded: "The decree was passed the 9th of November, 1865. The taxes for which the land was sold were assessed for the years 1866 and 1867, and the collector's sale took place the 29th of September, 1870. The land in the mean time had been sold by the trustees, under the decree in the equity case, but exceptions having been filed to the sale, the question of its ratification was still pending; so that both at the time of the imposition of the taxes, and at the time of the collector's sale, the land in question was under the control and jurisdiction of a court of equity. Under these circumstances it was not admissible for a collector to step in, and by a summary distress and sale divest the court of its jurisdiction, and transfer the question of title to another tribunal. His plain and obvious duty was to apply to the court for the payment of the taxes due, and, as they had full power, the presumption is that they would have directed their payment through their agents, the trustees, in a manner that would have occasioned no unnecessary delay, while at the same time the rights of all interested would have been properly protected."

In Greeley v. Bank, 98 Mo. 458, 11 S. W. Rep. 980, payment of taxes upon intervention of the tax collector in a case wherein a receiver had been appointed was resisted upon the ground of lapse of time, and the court said: "The amount of the taxes was undisputed, and the receiver had in his hands funds sufficient to pay them, and we think the order should have been made. It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets,—a right which it could have enforced through its revenue officers, by the summary process of distress, but for the fact that the property and assets of its debtor had passed into the custody of its courts, whose duty it was, in the administration and distribution of those assets, to respect that paramount right, upon the untrammeled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it, and to make no order for the distribution of assets in custodia legis except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors; and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off, unless presented to the court for allowance within a given time." And see Central Trust Co. v. New York C. & N. R. Co., 110 N. Y. 250, 18 N. E. Rep. 92.

County of Yuba v. Adams, 7 Cal. 37, was also a case of intervention, and the view of the court was thus expressed: "The levy of the tax gave to the intervener a judgment and lien on the property assessed, having the force and effect of an execution, which might be enforced in the same manner as other executions. This lien was not divested by the subsequent proceedings taken by

Brumagim and others; but the fund, being in the custody of the law, was not liable to seizure, and the proper remedy was by direct application to the court having the fund in possession."

We do not understand any other or different rule to have obtained in the courts of South Carolina. Indeed, in Hand v. Railroad Co., 17 S. C. 219, the court, without objection, passed upon a claim for taxes by the state against the property of the railroad company in the hands of the court, and held that it could not be maintained.

If such be the ordinary rule in the state courts, it is quite apparent that it is the only one that can be properly applied where property is in the custody of the courts of the United States. Their officers are the agents of the United States, and, without an order of the court appointing them, they are in duty bound to hold the property, and refer those who would interfere with it to the court.

In Georgia v. Railroad Co., 3 Woods, 434, an application was made to the circuit court of the United States for the southern district of Georgia, on behalf of the state of Georgia, for leave to sell the depots, freight houses, passenger houses, and offices of the railroad company, by virtue of a writ of fieri facias which had been levied on the property to enforce the collection of taxes due the state, and the levy suspended by affidavit of illegality filed by the railroad company under a provision of the Code of Georgia to that effect. A receiver had been appointed by the circuit court after the levy, and had possession subject to the prior lien of the execution which was being contested. Mr. Justice Bradley, for reasons given, held that the levy was void, and denied the application for leave to proceed with the execution, while he declared that the court would take care that *186 the full right of the state should be preserved, so far as it should be brought judicially to the notice of the court.

In W. U. Tel. Co. v. Atlantic, etc., Co., 7 Biss. 367, Judge Drummond decided that proceedings in the state court on the part of one of the parties to condemn a right of way of the other, in the exercise of the power of eminent domain, was invalid, because the property was in the possession of the circuit court of the United States, through receivers, "and, that being so, no action could take place in the state court affecting it without the consent first obtained of this court."

In Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. Rep. 355, where the question arose as to the replevin by process from a state court of property held by a United States marshal, which this court held could not be permitted, Mr. Justice Matthews, delivering the opinion, said: "The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but, between state courts and those of the United States, it is something more. It is a principle of right, and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."

This principle is applicable here, for whether the sheriff were armed with a writ from a state court, or with a distress warrant from a county treasurer, this property was as much withdrawn from his reach as if it were beyond the territorial limits of the state.

The inevitable conclusion that this must be so, if constitutional principles are to be *187 respected in governmental administration, does not involve interruption in the payment of taxes, or the displacement or impairment of the lien therefor; but on the contrary it makes it the imperative duty of the court to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue. And, when controversy arises as to the legality of the tax claimed, there ought to be no serious difficulty in adjusting such controversy upon proper suggestion. The usual course pursued in such cases is by intervention pro interesse suo, as in the instance of sequestration. 2 Daniell, Ch. Pl. & Pr. (4th Ed.) 1057, 1744; Savannah v. Jesup, 106 U. S. 563, 564, 1 Sup. Ct. Rep. 512. The tax collector is a ministerial officer, (Erskine v. Hohnback, 14 Wall. 613; Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. Rep. 227;) and no reason is perceived why he should not bring his claim to the attention of the court, while, on the other hand, it is clearly the duty of the receiver to do so, if he contends that the taxes are illegal. If found valid, they must be paid; if invalid, the court will so declare, subject to the review of the appellate tribunals.

The courts of the United States have always recognized the importance of leaving the powers of the state in respect to taxation unimpaired. Where the questions involved arise under the state constitution and laws, the decisions of its highest tribunal are accepted as controlling. Where the constitution and laws of the United States are drawn in question the courts of the United States must determine the controversy for themselves.

Such was the aspect of this case. The re-

ceiver had denied the validity of a distinctive portion of the annual taxes, and under the direction of the court had proceeded by bill to test the question in reference to the levy for the previous fiscal year. Injunction had been granted, issues made up, and the case stood for final hearing. The alleged illegality existed in the levy for the current year. The receiver paid the undisputed taxes, and, upon the forcible intervention of the collectors to compel payment of the balance, brought *188 the controverted point again to the attention of the court in his application for the protection of the property. So far as the order before us is concerned, we are not called upon to review the grounds upon which the assertion of illegality is rested. It has been repeatedly and uniformly held by this court that in a proper case for equity interposition an injunction will lie to restrain the seizure of property in the collection of taxes imposed in contravention of the constitution of the United States. Osborn v. Bank, 9 Wheat. 738; Dodge v. Woolsey, 18 How. 331; Allen v. Railroad Co., 114 U. S. 311, 5 Sup. Ct. Rep. 925, 962; In re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. Rep. 646. Whether or not the particular case is one calling for that measure of relief, it is for the circuit court to determine in the first instance, and its action cannot be treated as a nullity.

It is said that any restraint upon or correction of unjust and illegal assessment and taxation by judicial interposition is inconsistent with the revenue laws of South Carolina, which only permit payment under protest, and recovery back at law; and our attention is called to statutory provisions forbidding the courts to interfere with the collection of taxes by any writ, process, or order, and to various decisions thereunder. In State v. County Treasurer, 4 S. C. 520, the subject was considered whether the legislature was precluded by the state constitution, prescribing the jurisdiction of the circuit courts, from taking away the remedy by prohibition commonly resorted to in the case of illegal taxation; and it was held that it was not, a vigorous dissenting opinion being delivered by Chief Justice Moses, who said: "The power to tax is the most extensive and unlimited of all the powers which a legislative body can exert. It is without restraint, except by constitutional limitations. To tie up the hand that can alone resist its unlawful encroachments would not only render uncertain the tenure by which the citizen holds his property, but would make it tributary to the unrestrained demands of the legislature."

In State v. Gaillard, 11 S. C. 309, application was made to the court for a writ of mandamus, directed to the county treasurer, commanding him to receive bills of the Bank of South Carolina for taxes, and the writ was refused. Mr. Justice McIver concurred on the ground that the constitutionality of the prohibitory act had been settled in the case of State v. County Treasurer, just cited.

In Chamblee v. Tribble, 23 S. C. 70, the action was brought to enjoin the county treasurer from collecting certain taxes for railroad purposes. The constitutionality of these provisions was again adjudged, Mr. Justice McIver concurring, as before, solely on the ground of stare decisis, while Mr. Justice McGowan dissented.

In Bank v. Cromer, 35 S. C. 213, 14 S. E. Rep. 493, the court granted a mandamus to correct an assessment, and held that the statute did not prohibit the courts from exercising proper control over officers charged with the listing and assessment of property for the purpose of taxation when proceeding contrary to law.

This was followed by the passage of the act of December 24, 1892, providing that the assessment of property for taxation should be deemed and held to be a step in the collection of taxes, and inhibiting interference by mandamus, summary process, or any other proceeding, with official action in respect of assessments.

Manifestly the object of this legislation was to confine the remedy of the taxpayer for illegal assessments and taxation to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, but all this is nothing to the purpose. The legislature of a state cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a state does not involve a question of power.

The reasonableness of the contention that it would have been wiser, in this instance, for the circuit court to have directed the receiver to pay these taxes, and bring suits at law, in nine different courts, against the county treasurers of as many counties, to recover them back, need not be passed upon.

The jurisdiction exercised by the circuit court had relation to the property in its custody, and the proceeding before us relates only to its exercise of power in the protection of that property from unauthorized seizure. *189

*The stress of the argument, however, on behalf of the petitioner, is placed upon the proposition that this proceeding is void because it is in fact a suit against a state, and forbidden by the eleventh amendment. But this begs the question under consideration. The petitioner was either in contempt, or he was not. This property was in the custody of the circuit court under possession taken in a cause confessedly within its jurisdiction, and if such possession could not be lawfully interfered with the petitioner was in contempt; and, apart from the question of the validity of such legislation, we know of no statute of South Carolina that attempts to empower its officers to seize property in the

possession of the judicial department of the state,—much less, in that of the United States.

The object of this petition was, we repeat, to protect the property; but even if it were regarded as a plenary bill in equity, properly brought for the purpose of testing the legality of the tax, we ought to add that, in our judgment, it would not be obnoxious to the objection of being a suit against the state. It is unnecessary to retravel the ground so often traversed by this court in exposition and application of the eleventh amendment. The subject was but recently considered in Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. Rep. 699, in which Mr. Justice Lamar, delivering the opinion of the court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, or, in a proper case, for an injunction to prevent such wrong and injury, or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial, such suit is not, within the meaning of the amendment, an action against the state.

And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of Osborn v. Bank, 9 Wheat. *738, that, "in all cases where *jurisdiction depends on the party, it is the party named in the record," and that "the eleventh amendment is limited to those suits in which a state is a party to the record," had been qualified to a certain degree in some of the subsequent decisions of this court, yet it was also rightly declared that the general doctrine there announced,—that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the constitution, and would do irreparable damage and injury to him,—has never been departed from.

The views expressed in U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. Rep. 240; New Hampshire v. Louisiana, 108 U. S. 76, 2 Sup. Ct. Rep. 176; In re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. Rep. 504; McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. Rep. 972; and numerous other cases,—render further discussion unnecessary.

The levies here were excessive, were made in large part on property other than that of the defendants in the warrants, and in such a way and on such property as to obstruct the operation of the railroad. No leave of court was sought, and it was known that the legality of the amount unpaid was disputed by the receiver, and that identical taxation had been previously held by the court to be illegal. The sheriff declined, upon request, to release the property from seizure, or to yield to the order of the court.

Such conduct was not to be tolerated, and the court was possessed of full power to vindicate its dignity, and to compel respect to its mandates. Its action to that end is not subject to review upon this application.

The petition for the writ of habeas corpus is denied.

Mr. Justice FIELD did not hear the argument, and took no part in the consideration of this and the following cases.

(149 U. S. 191)

Ex parte RISER. Ex parte TYLER. Ex parte GAINES.

(April 24, 1893.)

Nos. 16, 18, 19, Original.

Petitions for writs of habeas corpus. Denied.

D. A. Townsend, Attorney General of South Carolina, J. Randolph Tucker, Sam'l Lord, and Ira B. Jones, for petitioners. Henry Crawford and Hugh L. Bond, Jr., for respondents.

*192 *Mr. Chief Justice FULLER. The differences between the general facts in these cases and in that just considered are not controlling as to the result, and for the reasons given in the opinion in that case (13 Sup. Ct. Rep. 785) the applications for the writ of habeas corpus are severally denied.

(149 U. S. 70)

Ex parte FREDERICH.

(April 24, 1893.)

No. 1,305.

HABEAS CORPUS—FEDERAL COURTS — CONVICTION BY STATE COURT.

1. A prisoner was convicted in a state court of murder in the first degree, and sentenced to death. The state supreme court, however, considering the evidence insufficient to show murder in the first degree, reversed the judgment and remanded the case, with directions to allow the verdict to stand, and enter a new judgment thereon for murder in the second degree, which was done. Thereupon the prisoner applied to a federal court for a writ of habeas corpus on the ground that his confinement was without due process of law, and contrary to the provisions of the fourteenth amendment to the constitution of the United States. *Held*, that the federal court had a discretion either to grant the writ, or to require the prisoner to take a writ of error to the state supreme court, and, in case its judgment was against him, to have the same reviewed on writ of error from the supreme court of the United States, and that the court properly exercised its discretion in pursuing the latter course. 51 Fed. Rep. 747, affirmed.

2. Where one imprisoned under a sentence of a state court claims that such sentence violates his rights under the constitution or laws of the United States, it is the general rule, and better practice, in the absence of special circumstances, to require him to seek a review of the judgment by writ of error, instead of resorting to a writ of habeas corpus.

Appeal from the circuit court of the United States for the district of Washington. Affirmed.

S. F. Phillips and Fred. D. McKenney, for appellant. W. C. Jones, Attorney General of Washington, for respondent.

Mr Justice JACKSON delivered the opinion of the court.

This is an appeal from an order denying an application for a writ of habeas corpus addressed to the court below by *Albert Frederich, a prisoner confined in the penitentiary of the state of Washington, at Walla Walla, in that state. See 51 Fed. Rep. 747. *71

The case, as made by the petition and accompanying exhibits, is as follows: On the 17th of June, 1891, the prisoner was duly indicted by the grand jury of King county, Washington, for the murder of one Julius Scherbring, and upon said indictment he was subsequently arraigned, pleaded not guilty, was tried by a jury, and on the 26th of September, 1891, was found guilty of murder in the first degree. A motion for a new trial having been overruled, he was sentenced to be hung. From this judgment of death, and the order overruling his motion for a new trial, the accused appealed to the supreme court of the state, which reversed the judgment of the trial court, and remanded the case, with a direction to set aside and vacate the judgment imposing the sentence of death, but to let the verdict stand, and to enter a new judgment thereon for murder in the second degree, that being, in the opinion of the state supreme court, the proper degree of his crime, inasmuch as the evidence in the case did not show such deliberate and premeditated malice as would sustain a conviction of murder in the first degree. State v. Freidrich, 4 Wash. 204, 29 Pac. Rep. 1055, 30 Pac. Rep. 328, and 31 Pac. Rep. 332.

This judgment of the supreme court was rendered under and in pursuance of the following provision of Hill's Code of the state, (volume 2:)

"Sec. 1429. The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings."

Pursuant to this order of the supreme court, the prisoner, on the 16th of June, 1892, was again brought before the trial court, and adjudged to be guilty of murder in the second degree, and he was thereupon sentenced to imprisonment in the state penitentiary for the term of 20 years. This sentence having been carried into execution, and the prisoner incarcerated in the penitentiary, he thereupon, on the 9th of August, 1892, made this application for a writ of habeas corpus, claiming that he was deprived of his liberty without due process of law, in violation of the *provisions of the fourteenth amendment to the constitution of the United States. *72

The grounds upon which this application is based are that the supreme court of the state was without jurisdiction, and did not have any authority, under said section 1429 of the Code, or under any other law, to render the judgment it did; that all that court could do was either to affirm the judgment of the trial court outright, or to reverse it outright, and, under proper instructions, remand the cause for a new trial by a jury; that therefore its judgment was absolutely void, and the judgment of the trial court in carrying out the directions of the supreme court was, of necessity, void; and that the prisoner ought therefore to be discharged.

The court below practically agreed with the petitioner that the supreme court of the state had misinterpreted said section 1429 of the Code, and that what it had actually done, by its decision and judgment, was to modify the verdict of the jury, which, under legal and proper proceedings, it had no authority to do; that its judgment, and the subsequent judgment of the trial court carrying it into effect, were both void; and that, therefore, the petitioner's imprisonment was without due process of law, and in violation of the fourteenth amendment to the federal constitution. The circuit court further ruled, however, that the petitioner's proper remedy was not by writ of habeas corpus in the federal courts, in the first instance, but that he should first raise the question of his illegal imprisonment in the state courts, and, if it was finally decided against him by the state supreme court, he could then have it reviewed and corrected by the supreme court of the United States on a writ of error; and it accordingly denied the application. 51 Fed. Rep. 747.

*At common law the general rule undoubtedly was that where an erroneous judgment was entered by a trial court, or an erroneous sentence imposed, on a valid indictment, the appellate court, on error, could not itself render such a judgment as the trial court should have rendered, or remit the case to the trial court with directions for it to do so, but the only thing it could do was to reverse the judgment and discharge the defendant. This rule was recognized in England in the case of Rex v. Bourne, 7 Adol. & E. 58, where the court of king's bench reversed the judgment of the court of quarter sessions, and discharged the defendants, because the sentence imposed upon them by that court was of a lower grade than that which the law provided for the crime of which they had been convicted. *73

Some of the states in which the common law prevails, or is *adhered to, have adopted the same rule; but in most of the states it is expressly provided by statute that when there is an error in the sentence which calls for a reversal the appellate court is to render such judgment as the court below should have rendered, or to remand the record to the court below with direc-

tions for it to render the proper judgment, and this practice seems to prevail in the state of Washington. The whole subject is discussed in Whart. Crim. Pl. §§ 780, 927, where the authorities are collected and cited.

But whether this practice in the state of Washington is warranted, under a correct construction of said section 1429 of the Code, or whether, if it is, that section violates the fourteenth amendment to the federal constitution, in that it operates to deprive a defendant whose case is governed by it of his liberty without due process of law, we do not feel called upon to determine in this case, because we are of opinion that for other reasons the writ of habeas corpus was properly refused.

While the writ of habeas corpus is one of the remedies for the enforcement of the right to personal freedom, it will not issue as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense. Under the writ of habeas corpus this court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact, and pronounce them erroneous. The writ of habeas corpus is not a proceeding for the correction of errors. Ex parte Lange, 18 Wall. 163; Ex parte Siebold, 100 U. S. 371; Ex parte Curtis, 106 U. S. 371, 1 Sup. Ct. Rep. 381; Ex parte Carll, 106 U. S. 521, 1 Sup. Ct. Rep. 535; Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. Rep. 542; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734; In re Snow, 120 U. S. 274, 7 Sup. Ct. Rep. 556; In re Coy, 127 U. S. 731, 8 Sup. Ct. Rep. 1263; In re Wight, 134 U. S. 136, 10 Sup. Ct. Rep. 487; Stevens v. Fuller, 136 U. S. 468, 10 Sup. Ct. Rep. 911.

As was said by this court, speaking by Mr. Justice Harlan, in Ex parte Royall, 117 U. S. 241, 252, 253, 6 Sup. Ct. Rep. 734, 741, "where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of habeas corpus summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States."

The office of a writ of habeas corpus, and the cases in which it will generally be awarded, was clearly stated by Mr. Justice Bradley, speaking for the court in Ex parte Siebold, 100 U. S. 371, 375, as follows: "The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. This distinction between an erroneous judgment, and one that is illegal or void, is well illustrated by the two cases of Ex parte Lange, 18 Wall. 163, and Ex parte Parks, 93 U. S. 18. In the former case we held that the judgment was void, and released the prisoner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause, and we refused to interfere." The reason of this rule lies in the fact that a habeas corpus proceeding is a collateral attack, of a civil nature, to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should therefore be limited to cases in which the judgment or sentence attacked is clearly void, by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises.

It is said in Ex parte Royall, supra, that after a prisoner is convicted of a crime in the highest court of the state in which a conviction could be had, if such conviction was obtained in disregard or in violation of rights secured to him by the constitution and laws of the United States, two remedies are open to him for relief in the federal courts: He may either take his writ of error from this court, under section 709 of the Revised Statutes, and have his case re-examined in that way on the question of whether the state court has denied him any right, privilege, or immunity guarantied him by the constitution and laws of the United States, or he may apply for a writ of habeas corpus to be discharged from custody under such conviction, on the ground that the state court had no jurisdiction of either his person or the offense charged against him, or had for some reason lost or exceeded its jurisdiction, so as to render its judgment a nullity, in which latter proceeding the federal courts could not review the action or rulings of the state court, which could be reviewed by

this court upon a writ of error. But, as already stated, the circuit court has a discretion as to which of these remedies it will require the petitioner to adopt. This was expressly ruled in Ex parte Royall, supra, and has been repeatedly followed since that case. In the recent case of In re Wood, 140 U. S. 278, 290, 11 Sup. Ct. Rep. 738, after reaffirming the rule laid down in Ex parte Royall, the court added: "After the final disposition of the case by the highest court of the state, the circuit court, in its discretion, may put the party who has been denied a right, privilege, or immunity claimed under the constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of habeas corpus."

We adhere to the views expressed in that case. It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes, than to award him a writ of habeas corpus; for, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged.

In some instances, as in Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. Rep. 384, the proceeding by habeas corpus has been entertained, although a writ of error could be prosecuted; but the general rule, and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the constitution or laws of the United States to seek a review thereof by writ of error, instead of resorting to the writ of habeas corpus.

In the present case we agree with the court below that the petitioner had open to him the remedy by writ of error from this court for the correction of whatever injury may have been done to him by the action of the state courts, and that he should have been put to that remedy, rather than given the remedy by writ of habeas corpus. The circuit court had authority to exercise its discretion in the premises, and we do not see that there was any improper exercise of that discretion, under the facts and circumstances.

Without passing, therefore, upon the merits of the question as to the constitutionality of the provision of the Code under which the supreme court proceeded in disposing of the case when it was before it, or upon the question of the validity of the judgments rendered by the state courts in the case, we are of opinion, for the reasons stated, that the order of the circuit court refusing the application for the writ of habeas corpus was correct, and it is accordingly affirmed.

(149 U. S. 117)

DOBSON v. CUBLEY et al.

(April 24, 1893.)

No. 206.

PATENTS FOR INVENTIONS—INFRINGEMENT—BANJO.

Letters patent No. 203,604, issued May 14, 1876, to Charles E. Dobson, for an improvement in banjos, were for a device consisting of a dome-shaped metal ring interposed between the parchment and the wooden rim of the banjo, for the purpose of lessening the wear of the parchment, and improving the tone or resonance of the instrument. Letters patent No. 249,321, granted November 8, 1881, to Henry C. Dobson, were for a device consisting of a similarly situated metal ring, having two downwardly projecting flanges, the inner one of which projects down inside the ring, free from contact with other parts of the instrument, so as to be capable of unrestrained vibration, thereby giving a clear, bell-like tone to the instrument. *Held*, that neither patent is infringed by the Cubley banjo, made under letters patent No. 253,849, granted February 1, 1882, in which the shell of the instrument is made entirely of sheet metal; especially in view of the fact that expert evidence shows that the tone of the Cubley instrument is of a totally different quality from that of the Dobson instruments, and that it is suitable only to a different class of trade. 39 Fed. Rep. 276, affirmed.

Appeal from the circuit court of the United States for the southern district of New York.

This was a suit by Catharine L. Dobson against Edwin L. Cubley and George Van Zandt for infringement of a patent. The bill was dismissed by the circuit court. 39 Fed. Rep. 276. Complainant appeals. Affirmed.

A. S. Browne and A. Comstock, for appellant. Howard Henderson, for appellee.

Mr. Justice SHIRAS delivered the opinion of the court.

This case comes here on appeal from the circuit court of the United States for the southern district of New York, whose decree dismissed complainant's bill charging the defendants with infringing letters patent of the United States, No. 203,604, granted to Charles E. Dobson, May 14, 1876, and letters patent No. 249,321, granted to Henry C. Dobson, November 8, 1881, both being for improvements in banjos.

The bill discloses that the several letters patent so as aforesaid issued to Charles E. Dobson and to Henry C. Dobson, by certain assignments in writing, became vested in the complainant, Catharine L. Dobson, and avers an infringement by the defendants, E. I. Cubley and George Van Zandt, of her rights under said letters patent.

The defendants, by their answer, admit that letters patent were issued, as alleged in the bill, to Charles E. Dobson and Henry C. Dobson, but deny that said patentees were original inventors of the devices described therein, and allege that each of the combinations or devices claimed in said several letters patent was a mere aggregation of mechanical features well known in the art, and hence contend that the claims for said devices should be declared null and void.

The answer further sets up that the defendant Edwin I. Cubley was himself the original inventor of certain improvements in banjos and other musical instruments, for which letters patent No. 253,849 were, on the 21st of February, 1882, granted to him, under which the defendants were carrying on the manufacture and sale of banjos, and denies that such manufacture and sale were infringements of any supposed or alleged rights of complainant, as assignee of the several letters patent described in the said bill.

Replication was duly filed, testimony taken, and, after hearing, the decree dismissing the bill of complaint was rendered.

The banjo is described as a musical instrument of the guitar class, having a neck with or without frets, and a circular body covered in front with tightly-stretched parchment. It has from five to nine strings, of which the melody string, the highest in pitch, but placed outside of the lowest of the others, is played by the thumb of the performer. As in the guitar, the pitch of the strings is fixed by stopping them with the left hand, while the right hand produces the tone by plucking or striking. Cent. Dict. art. "Banjo."

*The banjo of the Charles E. Dobson patent contained a dome-shaped ring, composed of metal, interposed between the parchment and a wooden rim; and what is claimed as new is this dome-shaped ring, in combination with the wooden rim and parchment head. The advantages claimed are that the rounded shape of the ring causes less wear of the parchment head than the more angular corner or edge previously in use, and that such combination materially improves the tone or resonance.

The banjo of Henry C. Dobson has also a metal ring, but the ring is formed with two downwardly projecting flanges, interposed between the parchment head and a rim composed of wood and metal. The outer flange passes down outside of the ring, and the inner one projects down inside the ring, and is free from contact with other parts of the instrument, so as to be capable of unrestrained vibration, and it is claimed that the effect is to give a clear, bell-like, ringing tone to the instrument.

The ring is an element of both of the Dobson patents, and its peculiar form is essential in each invention in producing the bell-like notes which are characteristic of the instruments. These effects are varied in each by the dimensions and form of the ring, and in the Henry C. Dobson patent the flanges and the combination of wood and metal in the rim are distinctive features.

The Cubley banjo has no ring. The parchment rests directly on the rim, as was the case with the old form of banjo. The device claimed as new is in making the shell entirely of sheet metal, and the advantages claimed are—First, mechanical, in strengthening the shell by shaping it so that the strain of the parchment will come upon the metal in the line of its greatest resistance, and thus maintain the shape of a true circle; secondly, in beautifying the appearance of the shell by covering from view the internal attachments by which the straining device is fastened upon the outer side, and providing a continuous surface, unbroken, and with rounded corners, capable of being finely and easily polished; and, thirdly, to strengthen and render more melodious the tone of the instrument.

*Conceding that the Dobson devices involve a patentable novelty, we are of the opinion that the Cubley patent does not infringe either of these, as it has no ring upon which the parchment rests. In the Cubley banjo the parchment rests directly upon the rim, which consists of a metallic shell formed by turning over both edges of a piece of sheet metal and constituting a hollow rim or case, the effect of which is to impart a different musical quality to the instrument. This difference is doubtless accentuated by discarding altogether the wooden rim of the Dobson banjo. The devices are so dissimilar in their design and functions that we are of the opinion that the latter cannot be deemed an infringement of the former.

These differences in mechanical structure result in a noticeable difference in the tones of the instruments, so much so as to call for a different kind of trade.

Arthur C. Fraser, the complainant's expert, admits that in the Dobson patents the ring and rim are two distinct parts, while in the defendants' banjo they are actually integral. He claims that this feature of construction necessitates that the rim should be of metal, which, as compared with a wooden rim, gives the instrument what he calls "an inferior quality of tone." He says that "assuming that both banjos were made of the same grade of excellence, so far as workmanship and finish are concerned, it seems to me that the Dobson banjo would be considerably superior to the defendants' banjo in the fact, chiefly, that it is constructed with a wooden rim, whereas defendants' banjo has a metal rim. The rim of a banjo is essentially its sounding box, and it is well known that wood is more resonant, and is in every way a better material for a sounding box than metal, giving a

louder sound and a fuller, deeper, and richer quality than is given out by metal. A metal sounding box gives out a light, thin, wiry, or tinny sound as compared with the full, sonorous vibration resulting from a wooden sounding box." He furthur says: "A brass plate as thick as that in the ring in the Dobson banjo would give a much louder and clearer ringing tone than a similar plate made as thin as the flange of the ring in *121 the defendants' banjo. * * * The sound produced by the Dobson banjo is much louder, and the tone more full, clear, resonant, and brilliant than of defendants' banjo, which is comparatively weak, colorless, and sharp or tinny."

William Becker, an expert called by the defendants, testified that "I think the Dobson banjos are more adopted for large audiences, ballrooms, theaters, etc., while the Cubley banjo would better meet the trade for home amusement and parlor use." And again: "It is well known that wood-rim banjos covered with metal have a sharp, shrill tone, where a hollow-shell rim will give a metal tone."

George Van Zandt, a witness for the defendants, testified that "the tone of a banjo is a very essential feature in reference to its value as a musical instrument, but there are various kinds of tones, and for some uses one kind may be preferred to another, and, for other uses, vice versa. For a concert room a strong, loud tone is desirable, and for a smaller room a soft and mellow tone would be preferred. The tone of the Dobson banjo is a loud, strong one, especially in the high notes. The one of the Cubley banjo is softer and more enduring, especially in the lower notes. For accompaniment, and for use in the parlor by amateurs, probably the Cubley banjo would be preferred. By professional players, for brilliant effects, perhaps the Dobson banjo would be the best."

Without expatiating on this "strange difference twixt tweedle-dum and tweedle-dee," we think we see in the testimony of the respective witnesses on the merits of their favorite instruments a recognition of an obvious difference in the quality and characteristics of their tones. Differing, then, as we have seen they do, in their mechanical devices and in the material of the sounding boxes, and in the quality and character of their musical effects, we conclude that the Cubley banjo cannot be deemed an infringement of either of the Dobson banjos.

The contention that the Dobson banjos exhibit no patentable novelty has not been much pressed. At all events, we think that their additional devices are obvious improvements, and justify the granting of letters patent.

As the court below reached the same conclusion, (39 Fed. Rep. 276,) its decree is affirmed.

(149 U. S. 79)

CHANDLER v. CALUMET & HECLA MIN. CO.

(April 24, 1893.)

No. 202.

PUBLIC LANDS—SWAMP LANDS—ADJUDICATION BY LAND OFFICE—PAROL EVIDENCE—CONFLICTING PATENTS.

1. Under the swamp-land grant of September 28, 1850, (9 St. p. 519, c. 84,) a list of all swamp lands in the state of Michigan was made by the surveyor general, approved by the secretary of the interior, and transmitted to the state authorities, and a patent issued to the state therefor, as provided by the act of August 26, 1852. Congress in the mean time granted certain lands to the state to aid in the building of a canal, (10 St. p. 35, c. 92,) and the selection of such lands by the state was approved by the secretary of the interior, and his approval certified to the state authorities in accordance with the provision of the act. *Held*, that the exclusion of a certain piece of land from the selection and patent under the swamp-land act, and its inclusion in the selection made by the state under the canal-grant act, with the approval of such selection by the interior department and the certification thereof to the state authorities, operated to pass title to the state as completely as a formal patent could have done.

2. In 1855 the state issued a patent for a specific piece of land included in the canal-grant selection, but not in the swamp-land selection. In 1887 it issued a second patent for the same land as swamp land. *Held*, that in an action of ejectment by the second against the first patentee, parol evidence could not be introduced to show that the land was in fact swampy, within the meaning of the swamp-land act, for the action of the secretary of the interior in formally approving the selection by which this piece was excluded from the swamp lands and included in the canal lands was a conclusive adjudication of its character. 36 Fed. Rep. 665, affirmed. Railroad Co. v. Smith, 9 Wall. 95, and Wright v. Roseberry, 7 Sup. Ct. Rep. 985, 121 U. S. 488, distinguished. French v. Fyan, 93 U. S. 169, and Ehrhardt v. Hogaboom, 5 Sup. Ct. Rep. 1157, 115 U. S. 67, followed.

3. Even if the state had acquired title to the land in dispute under the swamp-land act, it could not, except by a suit in equity, impeach the title conveyed by its patent, which did not on its face purport to be limited to such lands as the state acquired by the canal grant. A subsequent patent for the same land would not entitle the patentee to maintain an action of ejectment against the prior patentee. 36 Fed. Rep. 665, affirmed.

In error to the circuit court of the United States for the western district of Michigan.

At law. Action of ejectment by Joseph H. Chandler against the Calumet & Hecla Mining Company. Verdict and judgment were given for defendant. 36 Fed. Rep. 665. Plaintiff brings error. Affirmed.

J. M. Wilson, Jas. K. Redington, and Frank E. Robson, for plaintiff in error. T. L. Chadbourne and Ashley Pond, for defendant in error.

Mr. Justice JACKSON delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff in error, a citizen of Illinois, against the defendant in error, a Michigan corporation, to recover a tract of 40 acres

of land in Houghton county, Mich., particularly described as the "Southeast quarter of the northwest quarter of section 23, township 56 north, range 33 west."

Both parties to the controversy derive their title from the state of Michigan; the plaintiff under a patent of the state, issued to him on November 3, 1887, and the defendant by various mesne conveyances, under a state patent issued to the St. Mary's Falls Ship Canal Company, a New York corporation, on May 25, 1855. The material and uncontroverted facts of the case on which the questions involved depend are the following: By the act of congress approved September 28, 1850, (9 St. p. 519,) known as the "Swamp-Land Act," there was granted to the state of Michigan the whole of the swamp and overflowed lands, made unfit thereby for cultivation within the state, and it was made the duty of the secretary of the interior to make lists and plats of such lands, and transmit them to the governor of the state, and cause patents therefor to issue conveying such lands in fee simple. After the passage of this act the commissioner of the general land office, by correspondence with the authorities of the state, suggested, through the surveyor general thereof, as a mode or method of selecting or segregating the swamp from the other public lands, that the field notes of the United States surveys of lands should be accepted by the state as the basis of identification of the swamp lands which were intended to be granted by congress. An act of the legislature of Michigan, passed June 28, 1851, accepted the grant, and adopted, as suggested by the secretary of the interior, or the commissioner of the general land office, the field notes of the United States surveys as a basis upon which the swamp lands should be identified and segregated. The surveyor general, on February 12, 1853, made lists of lands which he ascertained to be swamp, and within the provisions of the grant, from the field notes so agreed upon. Those lists were transmitted to the secretary of the interior, and by him approved January 11, 1854, and under date of February 24, 1854, a copy of said lists was certified by the commissioner of the general land office to the governor of the state, and thereafter, on March 3, 1856, a patent was issued to the state for the lands described in said lists. The lists of the lands so selected and approved to the state were lodged in the Michigan land office. The lands thus selected and patented to the state, while embracing some portion of township 56 north, range 33 west, did not include the land in controversy.

By an act of congress approved August 26, 1852, (10 St. p. 35,) there was granted to the state of Michigan for the purpose of building a ship canal around the falls of St. Mary's, "seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeable to the United States surveys, by an agent or agents to be appointed by the governor of said state, subject to the approval of the secretary of the interior, from any land within said state subject to private entry." The state accepted this grant by acts of its legislature approved, respectively, February 5 and February 12, 1853, and authorized commissioners of the state to enter into a contract for the building of such canal. In pursuance of this authority a contract was entered into between the state and certain designated parties for the construction of the ship canal, by the terms of which the parties undertaking its construction, or their assignees, were to receive from the state of Michigan 750,000 acres of land at $1.25 per acre, to be located under the provisions of the act of August 26, 1852. The terms of this contract need not be specially set forth, as no question arises thereon.

The parties undertaking the construction of the canal subsequently assigned and transferred all their rights and privileges in the contract to the St. Mary's Falls Ship-Canal Company. By the act of the legislature authorizing the contract for the construction of the canal, the state undertook the selection of the lands under said grant, and the contractors were to receive the lands so selected in payment for the work of building the canal. The fifth section of the act of the state legislature provided that "when, and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the state land office, whose duty it shall be to transmit to the commissioner of the general land office a true copy of said list, and to designate and mark upon the books and plats in his office the said lands as 'St. Mary's Canal Lands.'"

By section 6 it was provided that after the completion of the canal within the time specified, to the satisfaction of, and the acceptance thereof by, the commissioners, the governor, and engineer, and a certificate of that fact filed in the office of the state land office, it was made the duty of said commissioner "forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided for, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the secretary of state, and patents shall immediately be issued thereon, as in other cases."

The St. Mary's Falls Ship-Canal Company, as the assignee of the construction contract, completed the canal and became entitled to the consideration which the state was to pay therefor.

The agents appointed by the state to select and locate the lands granted for the purpose of building the canal made selections to the

amount required, the list of which was filed in the general land office of the state, and was certified to the secretary of the interior, who, under date of January 24, 1855, duly approved the same to the state of Michigan under the act of congress of August 26, 1852. The list of selected lands under this grant, and so approved by the department of the interior, included the demanded premises, and on May 25, 1855, the governor of the state, in pursuance of the foregoing legislation and contract on the subject, issued a patent to the St. Mary's Falls Ship-Canal Company for a large portion of these selected lands, including therein, by particular description, the premises in controversy, which by mesne conveyances passed to the defendant in error, which entered into possession of the same, and was in actual possession thereof at the commencement of the present suit. This conveyance was duly recorded, and after the expiration of five years from the date of the patent, during which they were exempt from taxation, the lands so patented to the canal company have been continually subject to taxes by the state.

It is shown from the foregoing statement of facts, and it is conceded, that the demanded premises had never been selected as a part of the swamp lands granted to the state, nor had the same ever been approved to the state as such, and that no list or plat of swamp lands in Michigan made by or by the authority of the secretary of the interior contained or described the tract in question as swamp land, although a portion of the land in the vicinity thereof, and in the same township, was included in the lists of such lands which were selected and approved by the secretary of the interior.

It thus appears that the plaintiff and the defendant have each a conveyance from the state of Michigan for the particular tract of land in controversy, and that the conveyance to the defendant in error was prior in time to the conveyance to the plaintiff in error. The latter, however, claims that the demanded premises were a part of the swamp and overflowed lands granted to the state by the act of congress of September 28, 1850, and as such were conveyed to him by the patent of the state issued on November 3, 1887, and that he thereby acquired a title to the same, superior to that which the defendant in error acquired under the prior patent to the canal company, through which the defendant in error derives its title. In support of this contention it is urged that the swamp-land act was, in effect, a grant in praesenti, so that the title of the state to such lands dated from the date of that act, and consequently the state did not and could not acquire title to the tract in question under the act of August 26, 1852.

On the other hand, the defendant in error insists that the act of the state and of the department of the interior in the selection of lands under the swamp-land act amounted to an adjudication or a determination on the part of the department of the interior that the parcel of land in question was not embraced within the provisions of the act of 1850, and that the same, having been affirmatively and particularly selected and certified to the state under the grant of August 26, 1852, was a direct adjudication that it came properly within the canal grant; that the legal effect and operation of the two selections, considered together, made with the consent and concurrence of the state, was to exclude, by implication, the particular premises here involved from the operation of the former grant, and to expressly include the same within the latter grant; and that this adjudication or determination of the department cannot be collaterally attacked or called in question in an action at law. The defendant in error further contends that, even conceding that the title of the state to the lands in question was derived under the act of 1850, it acquired the superior title thereto, under and by virtue of the conveyance made to the St. Mary's Falls Ship-Canal Company by the state's patent of May 25, 1855, which operated to pass to said company whatever title the state had to the premises in question, independently of the source from which it had derived its title.

On the trial of the case by the court and jury the plaintiff, to maintain the issues on his part, introduced his patent from the state, and offered oral evidence to prove that the tract conveyed thereby, and involved in the suit, with the exception of about seven acres thereof, was in fact swamp and overflowed land, being wet and unfit for cultivation, within the meaning of the swamp-land act of congress, and was so at the time of the approval of the act. To this evidence the defendant objected, and the court, reserving its ruling thereon until after the defendant had introduced its proof, sustained the objection, and refused to allow the evidence to go to the jury, to which ruling the plaintiff excepted.

After all the evidence in the case had been introduced, the plaintiff, by his counsel, requested the court to direct the jury to return a verdict in his favor. This the court refused to do, and instructed the jury to bring in a verdict for the defendant, which was accordingly done, and judgment was entered thereon, to which the plaintiff excepted; and to reverse this judgment the present writ of error is prosecuted.

The opinion of the court below is reported in 36 Fed. Rep. 665, and its action in rejecting the oral testimony and in directing a verdict for the defendant was rested upon two grounds: First, that after the secretary of the interior had discharged his duty and approved the list of swamp lands, made, in accordance with his suggestion, from field notes of government surveys with the consent of the state, which selection and identification did not include the parcel of land in

question, although embracing other lands in the same township, there was in effect a determination that the land in controversy was not covered by or embraced within the swamp-land grant; and, secondly, that the state, having accepted the parcel of land in question, under the grant of 1852, and having conveyed the same to the canal company, was estopped from thereafter asserting any title thereto.

The plaintiff has assigned for errors (1) that the trial court improperly excluded the oral evidence offered to show that the demanded premises were in fact swamp lands when the act of September 28, 1850, was passed; and (2) that the court should have directed a verdict for the plaintiff, instead of for the defendant.

In support of the first proposition, the plaintiff in error relies upon the case of Railroad Co. v. Smith, 9 Wall. 95, in which oral evidence was admitted to establish the fact that the parcel of land there in dispute was swamp and overflowed land at the date of the swamp-land act. But in that case there was no selection or identification of the land under either the swamp-land act or under the subsequent grant for railroad purposes. The selection and identification under each of said acts was left open and undetermined when the respective titles involved therein were acquired. It also further appeared in that case that the state neither made any selection of the lands granted for railroad purposes, nor conveyed to the railroad company any particular lands, but simply assigned or transferred generally the lands granted to the state by congress, which were at the time only "a float," requiring identification and selection to make the grant operative to pass title to any portion of the public domain.

The facts of the present case present the direct converse of the situation which existed in the case of Railroad Co. v. Smith. But, aside from this, the rule as to oral evidence, recognized in that case, was afterwards explained, and limited in its operation to cases in which there had been nonaction or refusal to act on the part of the secretary of the interior in selecting lands granted, as appears in the subsequent cases of French v. Fyan, 93 U. S. 169, 173, and Ehrhardt v. Hogaboom, 115 U. S. 67, 69, 5 Sup. Ct. Rep. 1157, where parol evidence was offered to show that patented lands were not of the character described.

In French v. Fyan the court, speaking by Mr. Justice Miller, said in reference to such evidence: "The case of Railroad Co. v. Smith, 9 Wall. 95, is relied on as justifying the offer of parol testimony in the one before us. In that case it was held that parol evidence was competent to prove that a particular piece of land was swamp land, within the meaning of the act of congress. But a careful examination will show that it was done with hesitation, and with some dissent in the court. The admission was placed expressly on the ground that the secretary of the interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act. The court said: 'The matter to be shown is one of observation and examination; and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became, because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.' There was no means, as this court has decided, to compel him to act; and if the party claiming under the state in that case could not be permitted to prove that the land which the state had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the state might be defeated by this neglect or refusal of the secretary to perform his duty. There is in this no conflict with what we decide in the present case, but, on the contrary, the strongest implication that if, in that case, the secretary had made any decision, the evidence would have been excluded."

In the case of French v. Fyan it was held that, while the swamp-land grant was a grant in praesenti, by which the title to such lands passed at once to the state in which they lay, it was made the duty of the secretary of the interior to identify them, make lists thereof, and cause a patent to be issued therefor; and that the patent so issued could not be impeached in an action at law by showing that the land which it conveyed was not in fact swamp and overflowed land, as the plaintiff in that case sought to do.

In the subsequent case of Ehrhardt v. Hogaboom, 115 U. S. 67, 69, 5 Sup. Ct. Rep. 1157, the plaintiff deraigned title through a patent of the United States for the demanded premises, bearing date June 10, 1875, which was given in evidence, while the defendant claimed that 20 acres thereof were swamp and overflowed lands which passed to the state of California under the act of congress of September 28, 1850, and offered parol evidence to establish this fact, but the evidence was rejected. It did not appear in that case that the demanded premises formed a part of any land selected by the state or claimed by her as swamp and overflowed land. In that case this court held, speaking through Mr. Justice Field, that "a patent of the United States, regular on its face, cannot, in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and overflowed, and therefore unfit for cultivation, and hence passed to the state under the grant of such land on her admission into the Union;" and, after citing and approving the decision made in French v. Fyan, above

cited, proceeded as follows: "In that case parol evidence to show that the land conveyed by a patent to Missouri under the act was not swamp and overflowed land was held to be inadmissible. On the same principle, parol testimony to show that the land covered by a patent of the United States to a settler under the pre-emption laws was such swamp and overflowed land must be held to be inadmissible to defeat the patent. It is the duty of the land department, of which the secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. As was said in the case cited of the patent to the state, it may be said in this case of the patent to the pre-emptioner it would be a departure from sound principle, and contrary to well-considered judgments of this court, to permit in such action the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony."

Nothing that was said or involved in Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. Rep. 985, where the subject of these grants was exhaustively considered by the court, is in conflict with the rulings announced in these cases. In Wright v. Roseberry patents for lands had been issued to the defendants, or their grantors, by the United States, under the pre-emption laws, upon claims initiated subsequently to the swamp-land grant to the state, and it was held that such patents were not conclusive at law as against the parties claiming under the latter grant, and that in an action for their possession evidence was admissible to determine whether or not the lands were in fact swamp and overflowed at the date of the swamp-land grant, and that, if proved to have been such, the rights of subsequent claimants, under other laws, would be subordinate thereto. In that case the lower court held that the title to the demanded premises never vested in the state for want of a certificate by the department of the interior that they were swamp and overflowed lands, and that the state could not make title to the plaintiff upon which he could maintain an action of ejectment against persons in possession under a patent of the United States. This principle was denied by this court in an elaborate opinion announced by Mr. Justice Field, fully reviewing all the decisions on the subject, who said (page 509, 121 U. S., and page 994, 7 Sup. Ct. Rep.) that "the result of these decisions is that the grant of 1850 is one in præsenti, passing title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted: but when that officer has neglected or failed to make the identification it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. An resort to such mode of identification would also seem to be permissible, where the secretary declares his inability to certify the lands to the state for any cause other than a consideration of their character."

Under the principle announced in that case, and under the foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the secretary of the interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which passed to the state by the swamp-land grant, and that the selection by the state of the demanded premises under the canal grant of 1852, with the approval of the secretary of the interior, and the certification of the department to the state that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. The exclusion of the land in dispute from the swamp lands selected and patented to the state, and its inclusion in the selection of the state as land coming within the grant of 1852, with the approval of such selection by the interior department, and the certification thereof to the state, operated to pass the title thereto as completely as could have been done by formal patent, (Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. Rep. 1141;) and, being followed by the state's conveyance to the canal company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony in an action at law. Under the facts of this case we are of opinion that the plaintiff in error could not properly establish by oral evidence that the land in dispute was in fact swamp land for the purpose of contradicting and invalidating the department's certification thereof to the state, and the latter's patent to the canal company.

But, assuming that this parol testimony offered by the plaintiff in error was competent, and that it would have established that the land in controversy was swamp land that passed to the state by the act of 1850, what, then, would be the rights of the parties to this suit, under their respective patents from the state? Can it be maintained that, because the state acquired title thereto under the act of 1850, its patent therefor to the canal company made in 1855 would be overreached and superseded by its subsequent patent to the plaintiff in 1887? We are at a loss to understand upon what principle this can be asserted, for, even conceding that the state, in patenting the demanded premises to the canal company,

acted under mistake or misapprehension as to the character of the land so conveyed, still, so long as that patent remains uncanceled and unrevoked by the state, it must be held that its legal effect was and is to pass whatever title the state had to the tract in question, however that title may have been originally acquired by the state.

In the cases relied upon by the plaintiff in error there had been no particular lands conveyed by the state under grants subsequent to the act of 1850, and there was no presumption of law or fact that its patent was intended to convey lands which accrued to it under the swamp-land grant. But in the case under consideration, even assuming that the state's title was acquired under the latter grant, it had a title for any and all purposes to which it might choose to apply or devote the property, and when it applied it to the purpose of constructing the canal, and actually conveyed it to the canal company, it was not in a position thereafter, so long as that conveyance remained in force, to transfer the same land to another purchaser.

It is well settled that the state could have impeached the title thus conveyed to the canal company only by a bill in chancery to cancel or annul it, either for fraud on the part of the grantee, or mistake or misconstruction of the law on the part of its officers in issuing the patent, and until so canceled or annulled it could not issue to another party any valid patent for the same land. U. S. v. Hughes, 11 How. 552; Hughes v. U. S., 4 Wall. 232; Moore v. Robbins, 96 U. S. 530. This is also the view taken of the question in State v. Flint & P. M. R. Co., 89 Mich. 481, 494, 51 N. W. Rep. 103. In that case the prior patent of the state was held to estop it from subsequently asserting title to the parcel of land conveyed, while its patent for the same land was outstanding. But whether there is any technical estoppel, in the ordinary sense, or not, it cannot be maintained that the state can issue two patents, at different dates to different parties, for the same land, so as to convey by the second patent a title superior to that acquired under the first patent. Neither can the second patentee, under such circumstances, in an action at law, be heard to impeach the prior patent for any fraud committed by the grantee against the state, or any mistake committed by its officers acting within the scope of their authority, and having jurisdiction to act and to execute the conveyance sought to be impeached.

The patent to the canal company is not shown to be void, because the state acquired title to the parcel in question, if it did so acquire it, under the swamp-land grant, rather than under the act of 1852. Neither the state nor its subsequent patentee is in a position to cancel or annul the title which it had authority to make, and which it had previously conveyed to the canal company. The patent to the canal company did not on its face, or by its terms, purport to convey only such lands and such title as the state was entitled to under the grant of 1852. On the contrary, it conveyed by accurate description the particular tract or parcel of land in controversy. It is therefore wholly immaterial under which of the two congressional grants the state acquired its title to said lands.

The canal grant of 1852 did not by its terms make the state a trustee, in any proper sense of the word, in reference to the lands granted by that act; but if it did, the state, as a trustee, made the selection of the lands covered by that grant, and in that selection included the particular parcel in question, and thereafter conveyed it to the canal company; and, having full authority to so appropriate it, even if the title had previously accrued to it under the swamp-land act of 1850, its conveyance of the same to the canal company for a full and adequate consideration cannot, upon any well-settled principle, be held void either as to the state or any subsequent grantee from the state. So that, independently of any question arising upon the action of the court in excluding the parol evidence to show that the premises in controversy were, in fact, swamp land, it is clear that, under the facts in this case, the defendant has shown a superior title to such premises, and that the court below was correct in directing a verdict for it.

Our conclusion, therefore, upon the whole case is that the judgment below should be affirmed.

Mr. Justice FIELD did not hear the argument in this case, or take any part in its decision.

Mr. Justice BROWN, being interested in the result, did not sit in this case, and took no part in its decision.

(149 U. S. 122)

CITY OF CAIRO v. ZANE.

(April 24, 1893.)

No. 210.

RAILROAD AID BONDS—VALIDITY—SUBSCRIPTIONS TO STOCK—DONATIONS—BONA FIDE PURCHASERS.

1. A city was duly authorized, by a vote of its inhabitants, to subscribe $100,000 for stock in a railroad company, and to issue its bonds to an equal amount in payment thereof. Thereafter the city council passed a resolution binding the city to sell to the company all this stock for $5,000, to be paid by a return of its bonds to that amount. The bonds were accordingly issued, and by direction of the council placed in escrow, to be delivered to the company when certain conditions were performed by it, the depositary being authorized and directed, after receipt of the stock, to sell the same to the railroad company for $5,000 of the city bonds. There was nothing to show that the railroad company agreed to purchase the stock on the terms stated, or on any terms, but, after the stock and bonds were duly exchanged, the stock was sold in the manner proposed.

Held, that this transaction did not convert the "subscription," which was authorized by the statute, into an unauthorized donation of $95,000, and, if any wrong was done by the council in thus disposing of the stock, it did not vitiate the bonds in the hands of a bona fide purchaser.

2. When the law of a state provides for the registry of municipal bonds and a certificate thereof, such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone such bonds can be registered.

3. The Illinois general railroad law of 1849 (Laws 1849, 2d Sess. p. 33) authorized cities to subscribe for railroad stock, and pay therefor with bonds. The charter of the Cairo & Vincennes Railroad Company authorized cities along its lines to subscribe for stock, and pay therefor in bonds of $500 each, which bonds might be made payable in New York. *Held*, that there was nothing to prevent a city from exercising all the powers conferred by both acts, and hence, in payment for stock of the Cairo & Vincennes Company, it might issue bonds for $1,000 each, payable in New York city.

4. It is the settled law of Illinois that coupons attached to municipal bonds draw interest after maturity.

In error to the circuit court of the United States for the Southern district of Illinois. Affirmed.

Statement by Mr. Justice BREWER:

*123 *On August 3, 1883, defendant in error commenced suit in the circuit court of the United States for the southern district of Illinois, on certain coupons attached to bonds issued by the city of Cairo, plaintiff in error. After answer had been filed, a trial was had, which resulted in a judgment in favor of plaintiff for $8,556.36. This judgment was entered on February 27, 1888, and to reverse such judgment the city sued out a writ of error from this court.

The facts as developed in the case are these: On May 28, 1867, a resolution passed the city council of the city of Cairo, ordering a special election "for the purpose of voting upon the question of the city issuing $100,000 in twenty-year bonds, drawing eight per cent. interest, as a subscription to the capital stock of the Cairo and Vincennes Railroad." An election was duly had, at which 695 votes were cast in favor of the subscription and 1 vote against. At a meeting of the council on July 1st the vote was canvassed, and a motion carried "that it be declared the wish of the people that the said sum of $100,000 be so subscribed." On November 5, 1867, the journal of the proceedings of the city council contains this record:

"A proposition was received from the Cairo and Vincennes Railroad Company, proposing to purchase from the city of Cairo the $100,000 capital stock of said company subscribed by said city, accompanied by the following contract for consideration, viz.:

*124 " 'This contract, made and entered into by and between the city of Cairo, Illinois, party of the first part, and the Cairo and Vincennes Railroad Company, party of the second part, witnesseth:

" 'That whereas, heretofore, to wit, on the first day of July, 1867, by a vote of the electors of the city of Cairo, Illinois, at an election held in said city, the mayor and city council of Cairo were authorized to make a subscription of one hundred thousand dollars to the capital stock of the Cairo and Vincennes Railroad Company, and to pay for said stock in bonds of the city of Cairo of the denomination of five hundred dollars, with the bonds to run for twenty years, and to bear interest at the rate of eight per centum, payable half yearly, on the first days of January and July of each year, in the city of New York, said city of Cairo being required by the laws of this state to issue installments of said bonds from time to time, as assessments may be made upon said stock by said railroad company;

" 'And whereas, the said railroad company proposes to guaranty that work on said road shall be commenced at Cairo within six months from the date of this contract, and that the construction of the roadbed, and laying the track from Cairo northward, shall be pushed with reasonable dispatch, and also to release the city of Cairo from the obligation to issue any part of said bonds until said railroad shall be built from Cairo to the boundary line between Alexander and Pulaski counties, and also to purchase of the city of Cairo the stock to be issued to said city upon the delivering of the city bonds aforesaid: It is therefore hereby stipulated and agreed, by and between the parties aforesaid, as follows:

" 'Article 1. The party of the second part agrees that work on said road shall be commenced at Cairo within six months of the date of this contract, and that the construction of the roadbed and laying of the track from Cairo northward shall be pushed with reasonable dispatch.

" 'Art. 2. The party of the second part agrees that, instead of the city of Cairo issuing bonds in payment for stock upon assessments made from time to time by said railroad company, the city of Cairo shall issue fifty thousand dollars of bonds, and deliver the same to said company in payment for stock, when the track of said road shall have been laid to the boundary line between the counties of Alexander and Pulaski, and cars shall have run thereon; and the said city shall issue fifty thousand dollars of bonds, as aforesaid, and deliver the same to said company in payment for stock, when the track of said company shall have been laid, and cars shall have run thereon, from the city of Cairo, through Pulaski county, to the boundary line between that county and Johnson county, Illinois.

" 'Art. 3. The party of the first part hereby agrees to issue the fifty thousand dollars of bonds of the city of Cairo in payment for fifty thousand dollars of stock of said Cairo and Vincennes Railroad Company, and deliver said bonds to said company whenever

the railroad track of said company shall be laid from Cairo to the boundary line between Alexander and Pulaski counties, and cars shall have run thereon; and also to issue fifty thousand dollars of said bonds in payment for stock as aforesaid, and deliver the same to said company whenever the railroad track of said company shall have been laid from the city of Cairo to the boundary line between Pulaski and Johnson counties, and cars shall have run thereon.

"'Art. 4. And whereas, the early construction of said road is of vast importance to the city of Cairo, therefore, in consideration of the stipulations made by the party of the second part in articles first and second of this contract, and in consideration of the sum of five thousand dollars to be paid by the said party of the second part as hereinafter stated, the party of the first part hereby agrees to sell and transfer to said party of the second part the one hundred thousand dollars stock of said railroad company, to be issued to the city of Cairo, Illinois, in payment for one hundred thousand city bonds, at and for the sum of five thousand dollars, as follows: When fifty thousand dollars of the stock of said company shall be issued to the city of Cairo, the party of the first part agrees to transfer and assign the same to
126 the party of the second part on payment of twenty-five hundred dollars in Cairo city bonds and, when the fifty thousand dollars of the stock of said company shall be issued as aforesaid, the party of the first part agrees to transfer and assign the same to the party of the second part on payment of twenty-five hundred dollars in Cairo city bonds.'

"Alderman Baker then offered the following resolution, viz.:

"'Resolved, that the contract between the city of Cairo and the Cairo and Vincennes Railroad Company this evening laid before the city council by the president of said company be, and the same is hereby, approved, ratified, and confirmed by the city council of the city of Cairo, and that the proper city officers be, and are hereby, authorized, empowered, and instructed to sign, seal, and execute said contract for and in behalf of the city.'

"Alderman Vincent moved that said resolutions be adopted, which motion was carried by the following vote, viz.:

"Ayes: Baker, Halliday, Hamilton, Lansden, Redman, Rittenhouse, Vincent, and Webb.

"Nays: None."

On July 22, 1871, this ordinance was passed:

"An ordinance to authorize the subscription of $100,000 to the Cairo and Vincennes Railroad Company, and for other purposes.

"Whereas, by an agreement entered into between the Cairo and Vincennes Railroad Company and the city of Cairo, and approved by the city council November 25, 1867, it is provided that the stock, amounting to $100,000, to be issued by the Cairo and Vincennes Railroad Company to the city for the subscription of that amount, should be sold by the city to the said company upon certain conditions as expressed in said contract; and whereas, it is understood that said company are willing to extend the time for the issue of said bonds and the commencement of the payment of interest on the same: Therefore,

"Be it ordained by the city council of the city of Cairo:

"Section 1. That the mayor of the city be, *127 and is hereby,* authorized and instructed to subscribe on behalf of the city of Cairo to the capital stock of the Cairo and Vincennes Railroad Company in the sum of one hundred thousand dollars, said subscription to be payable in bonds of the city, as hereinafter provided for; that the mayor, city clerk, and city comptroller be, and they are hereby, authorized and instructed to have prepared, and to sign and seal, bonds of the city to the amount of one hundred thousand dollars, to be issued to said railroad company, said bonds to be in such sums as the said company may desire, to bear interest at the rate of 8 per cent. per annum, and to be payable twenty years after the date thereof, with coupons attached for the payment of the interest semiannually on the same; that the mayor is hereby authorized and instructed to take charge of said bonds when prepared and signed, sealed, and ready for delivery, and is authorized and instructed to deliver the same to some responsible banking, loan, or trust company, trustee or trustees, located or residing in the city of New York, or elsewhere, as may be agreed upon by him and said railroad company, said bonds to be held by said banking, loan, or trust company, trustee or trustees, in escrow, and to deliver up to the said Cairo and Vincennes Railroad Company when the said Cairo and Vincennes railroad has been constructed —that is to say, has been put in good, ordinary running order—from the city of Cairo, Illinois, to the city of Vincennes, Indiana, and the cars shall have run thereon, and not before, provided work on said road shall be resumed by or before October 1st next, and said road shall be finished by or before the first day of August, 1873, and provided, also, that the interest accruing on said bonds previous to their delivery to said railroad company shall not inure to the benefit of said railroad company, but the coupons for all accrued interest shall be detached from said bonds previous to their delivery to said railroad company, and be returned to said city of Cairo, so that interest shall not be paid or accrued to said railroad company before the time when said company shall be entitled to receive said bonds according to the condition herein expressed.

"Sec. 2. It shall be, and it is hereby, made *128 the duty of the* banking, loan, or trust com-*

pany or trustees which shall be chosen or selected to hold such bonds, as hereinbefore provided, to deliver up the said bonds to said railroad company upon the said company's issuing to said city and delivering to said trustee one hundred thousand ($100,000) dollars of paid-up stock in said railroad company, which said stock the said trustee is hereby authorized and directed to sell to said railroad company for five thousand dollars ($5,000) of Cairo city bonds, so as thereby to carry out the provisions of the agreement entered into November 25, 1867, by and between said city and railroad company.

"Approved July 22, 1871.

"John M. Lansden, Mayor.

"Attest: M. J. Howley, Clerk."

On January 6, 1873, these proceedings were had:

"The finance committee also reported that they had received from A. B. Safford, trustee, five bonds numbered from 96 to 100, inclusive, for $1,000 each, issued in favor of Cairo and Vincennes Railroad Company, and also 100 coupons detached from said bonds before being transferred to said railroad company. The committee reported that they had destroyed said bonds by burning, and asked that their action be approved.

"Alderman Safford moved that said report be received, and the action of the committee sanctioned. Carried.

"A communication was read from A. B. Safford, trustee, stating that he had, on the 4th day of December, delivered to the Cairo and Vincennes Railroad Company one hundred thousand dollars in bonds of the city of Cairo, from which he previously detached all the January, 1873, coupons, (subject to the order of the city;) that in return he received from said railroad company (a certificate) for one hundred thousand dollars paid-up stock of said company; and in accordance with the provisions of ordinance 119, approved July 22, 1871, he had transferred said stock to said railroad company, and received from said company therefor five thousand dollars in said bonds. Said trustee further stated in his communication that as he had detached all the January 1, 1873, coupons, the company is entitled to sixteen days' interest, amounting to $337.82.

"Accompanying said communication was a copy of a receipt of Councilman Wood, chairman of the finance committee, for said five thousand dollars in bonds and for said detached coupons, a copy of a receipt of the Cairo and Vincennes Railroad Company, by Edward F. Winslow, attorney in fact, for said one hundred thousand dollars in bonds, and also a copy of a sworn certificate of E. F. Winslow, of the firm of Winslow & Wilson, and Charles O. Wood, to the effect that on the 13th day of December, 1872, a through train passed over the Cairo and Vincennes railroad from the city of Vincennes to the end of the track at Cairo."

On December 14, 1872, the mayor of the city furnished to the auditor of the state of Illinois the following certificate of registration:

"Certificate of Registration.

"State of Illinois, County of Alexander.

"City of Cairo, December 14th, 1872.

"To the Auditor of Public Accounts of the State of Illinois—Sir: I hereby certify that the following described bonds are entitled to registration in your office under the provisions of the act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869, the bonds being numbered from No. 1 to No. 95, inclusive, for $1,000 each, dated July 1st, 1872, and payable July 1st, 1892, being in all 95 bonds, and amounting to $95,000, and bearing interest at the rate of eight per cent. per annum, payable semiannually on the first days of January and July. These bonds are issued by the city of Cairo, in the county of Alexander and state of Illinois, to the Cairo and Vincennes Railroad Company, under and by authority of the provisions of 'An act to incorporate the Cairo and Vincennes Railroad Company,' approved March 6th, A. D. 1867, and the general act of the legislature of this state for subscriptions of stock, etc., in railroad companies, approved November 6th, 1849, and by a vote of the people of said city of Cairo at an election held on the first day of July, A. D. 1867; and I, as the mayor of said city of Cairo, do hereby certify that all the preliminary conditions in the act 'in force April 16th, 1869,' required to be done to authorize the registration of these bonds and to entitle them to the benefits of said act last referred to, have been fully complied with, to the best of my knowledge and belief.

"John M. Lansden,

"Mayor of the City of Cairo, Illinois.

"Subscribed and sworn to by the said John M. Lansden, mayor, etc., before me this 14th day of December, A. D. 1872.

"[Seal.] H. H. Candee, Notary Public."

The bonds were, with the indorsements, in the following form:

"Bonds of City of Cairo.

"United States of America.

"(Number —.) ($1,000.)

"Bond of the City of Cairo, State of Illinois, Issued in Payment of Stock in the Cairo and Vincennes Railroad Company.

"Know all men by these presents, that the city of Cairo, in the county of Alexander and state of Illinois, acknowledges itself indebted and firmly bound to the Cairo and Vincennes Railroad Company in the sum of one thousand dollars, which sum the said city of Cairo promises to pay to the said Cairo and Vincennes Railroad Company, or bearer, at the $1,000 National Bank of Commerce in the city of New York, on the first day of July, 1892, together

with interest thereon from the first day of July, 1872, at the rate of eight per cent. per annum, which interest shall be payable semi-annually on the first days of January and July in each year, on the presentation and delivery at said National Bank of Commerce, New York, of the coupons of interest hereto attached.

"This bond is issued in pursuance of an ordinance passed by the city council of said city of Cairo, and authorized by a vote of the citizens of said city, and in accordance with the laws of the state of Illinois.

"In testimony whereof the said city of Cairo has executed this bond by the mayor, city clerk, and city comptroller thereof signing their names under the ordinance authorizing the same, and affixing the seal of said city, at said city of Cairo, on the 1st day of July, A. D. 1872.

"J. M. Lansden, Mayor.
"E. A. Burnett, City Comptroller.
"M. J. Howley, City Clerk.
"[City of Cairo Seal.]"

Indorsement on above bond:

"Auditor's Office, Illinois.

"I, Charles E. Lippincott, auditor of public accounts of the state of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns.' in force April 16, 1869.

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

"[Seal.] C. E. Lippincott, Auditor P. A."

The coupons attached were in the ordinary form of such instruments, being simply an acknowledgment of so much due at a given date, for interest on the bond.

The statutes and constitutional provisions bearing upon the question are the following: First. The act incorporating the Cairo & Vincennes Railroad Company, passed March 6, 1867, (2 Priv. Laws Ill. 1867, p. 558,) the tenth section of which authorized towns, cities, or counties, through or near which the railroad should pass, to subscribe for and take stock in the company, and issue bonds in payment for such stock of $500 each, and required, as a condition of such subscription, a majority of the legal votes cast at an election held upon the question. Second. The general railroad law of November 6, 1849, (Laws Ill. 1849, 2d Sess. p. 33,) authorizing cities and counties to subscribe for stock in railroad companies, and to pay for such stock in bonds. Third. An act passed February 9, 1869, amending the act incorporating the Cairo & Vincennes Railroad Company, (3 Priv. Laws, Ill. 1869, p. 259,) the third section of which is as follows:

"Sec. 3. Be it further enacted, that all contracts made by towns, cities, and counties, into, through, or near which the Cairo and Vincennes railroad shall run, whereby, as an inducement for the construction of said railroad, such towns, cities, and counties agreed, upon the completion of certain portions of said railroad, to sell to the said company, at a nominal price, the stock of said company which such towns, cities, or counties, by a vote of their electors, had theretofore subscribed and agreed to issue bonds in payment thereof, thereby in effect agreeing to make a donation to said company of certain amounts of the bonds of such towns, cities, or counties, as an inducement for the construction of said railroad, are hereby declared to be valid and binding upon such towns, cities, and counties, and shall be carried into effect, in good faith, by the same; and all orders and notices of election, and elections and returns of such elections, in respect to such subscriptions of stock to said company, in any such towns, cities, and counties, are hereby declared to be valid and binding upon such towns, cities, and counties."

Fourth. An act approved April 16, 1869, to fund and provide for paying the railroad debts of counties, townships, cities, and towns. Pub. Laws, Ill. 1869, p. 316. That act authorized the registering of bonds by the state auditor. Section 7 forbade the registry, unless the debt was authorized by a majority of the legal votes cast at an election duly held, and until the railroad aided had been completed, and cars run thereon, and all conditions prescribed in the subscription had been fully complied with. It then continued as follows: "And the presiding judge of the county court, or the supervisor of the township, or the chief executive officer of the city or town, that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, into, or through such county, township, city, or town, as may have been agreed upon, and the running of the cars thereon, shall certify under cath that all the preliminary conditions in this act required to be done to authorize the registration of such bonds, and to entitle them to the benefits of this act, have been complied with, and shall transmit the same to the state auditor, with a statement of the date, amount, number, maturity, and rate of interest of such bonds, and to what company and under what law issued, and thereupon the said bonds shall be subject to registration by the state auditor as is hereinbefore provided." Fifth. These sections of the constitution of 1870:

"No county, city or town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: provided, however, that the adoption of this article shall not be con-

strued as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." 1 Starr & C. St. 167.

Article 9, Section 12.

"No county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation from issuing their bonds *in compliance with any vote of the people which may have been had prior to the adoption of this constitution, in pursuance of any law providing therefor." 1 Starr & C. St. 153.

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Schedule.

"That no inconvenience may arise from the alterations and amendments made in the constitution of this state, and to carry the same into complete effect, it is hereby ordained and declared:

"Section 1. That all laws in force at the adoption of this constitution, not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts of this state, individuals, or bodies corporate, shall continue to be as valid as if this constitution had not been adopted." 1 Starr & C. St. 168.

W. B. Gilbert, for plaintiff in error.
Geo. A. Sanders, for defendant in error.

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*Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

It is insisted that these bonds were void because issued after the restrictive provisions of the constitution of 1870 had come into effect, and that they were in fact a mere donation, and the only authority given by the people prior to the constitution of 1870 was to issue bonds in payment of a subscription. This contention cannot be sustained. There was a vote authorizing a subscription. The bonds were issued by the city, and received by the company in payment of a subscription, and stock for an equal amount was issued by the company to the city. It is true the stock thus received was immediately thereafter sold to the company for $5,000 of the city bonds, a portion of the bonds thus issued, and that this sale was in pursuance of an agreement made by the city long prior to the execution of the bonds; and it is urged that the form of the transaction must be ignored; that the resultant fact is that the company has $95,000 of the city bonds, and the city nothing; and that thus substantially there was a donation of $95,000 of bonds. But the result does not determine the true nature of the transaction. The same result would have followed if the city had given away the stock to a third party. The fact is that the city issued its $100,000 of bonds, and received its $100,000 of stock; and the wrong, if any there were, on the part of the council, was not in carrying out the subscription as directed by the vote of the people, but in wrongfully disposing of the stock received. But surely a wrong in that matter does not affect the question of the validity of the bonds, nor can it be presented as a defense against one who has purchased in good faith the bonds thus issued. In the case of Commissioners v. Beal, 113 U. S. 227, 5 Sup. Ct. Rep. 433, it appeared that after bonds had been voted by the county, at an election held on September 13, 1869, the county board, on November 5th, passed an order directing a subscription in accordance with the terms of the vote, and also "that the stock above subscribed for by this board in behalf of Anderson county is hereby sold and transferred, for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, to James F. Joy, president of said railroad company, and the chairman of this board is authorized to sign a transfer of said stock to said James F. Joy, and to assign the certificate for said stock issued to Anderson county by said railroad company, and to authorize in such assignment the necessary transfer of said stock on the books of said company;" and it was averred that this transfer thus ordered was for the benefit of the railroad company. In reference to this, Mr. Justice Blatchford, speaking for the court, observed, (page 240, 113 U. S., and page 439, 5 Sup. Ct. Rep.:) "When the bonds were delivered to the company the transaction was complete, and the bonds, as they afterwards passed to bona fide holders, passed free from any impairment by reason of any dealing by the board with the stock subscribed for to which the county became entitled by the issuing and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a bona fide holder of the bonds or coupons." And in Maxcy v. Williamson Co., 72 Ill. 207, it appeared, as here, that after an election authorizing a subscription of $100,000 to the stock of a railroad company, the county court entered into an agreement to sell the

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$100,000 of stock to the railroad company for $5,000, a transaction, it will be perceived, precisely like the one before us. The validity of the bonds thus issued in payment of this subscription was thereafter challenged in a suit by taxpayers to restrain the collection of taxes levied to pay the interest thereon. Their validity was sustained, and, in respect to this transfer of the stock, the court (on page 212) says: "We fail to perceive how the sale of the certificate of stock to the company for $5,000 can in any manner affect the rights of the holders of the bonds of the county. It surely is not intended to be insisted that because the county has, by any means, lost the consideration it received for the bonds, innocent holders, who had nothing whatever to do with the sale of the certificate, must lose their bonds."

It is said that a different rule has since been established in Illinois, and the cases of Choisser v. People, 140 Ill. 21, 29 N. E. Rep. 546, and of Post v. Pulaski Co., decided by the circuit court of appeals for the seventh circuit, 9 U. S. App. 1, 1 C. C. A. 405, 49 Fed. Rep. 628, are cited. But, even if this were so, it was not established until long after the plaintiff had purchased these bonds, and he would doubtless be entitled to claim the benefit of the rule existing when he made his purchase; and the facts as they appear in these two cases are substantially unlike those in the case before us. Thus, in Choisser v. People, the vote to subscribe $100,000 of stock was on October 5, 1867, and on November 28th following an agreement was entered into between the company and the county court, acting on behalf of the county, that $100,000 in stock should be issued, but that the stock should be returned back to the company for the sum of $5,000, payable on the redelivery to the city of that amount of county bonds. When the bonds came to be issued, the record made by the county court recited that the $100,000 of the capital stock should be sold back to the company for $5,000 of county bonds, "thereby making a payment of $95,000 of Saline county bonds to said company as a donation;" and no stock was in fact issued by the company or received by the county, and only $95,000 of bonds were issued by the county or delivered to the company. In short, the parties to the transaction treated it as though it was a donation of $95,000 of bonds, and it was this transaction which was condemned as unauthorized by a vote prior to the constitution. Yet, even in that case, the court was careful to limit its decision to a case in which only the rights of the railroad company, the party receiving this $95,000 of bonds, were concerned, for it says: "The only presumption arising from these facts is that said bonds are still in the hands of the railroad company, and no question, therefore, is presented as to how far the alleged invalidity of said bonds would be affected by those conclusive presumptions which the law raises for the protection of bona fide holders of commercial paper. * * * Nothing is before us except the mere question of the legality of these bonds, as between the county and the railroad company, the original parties thereto." And the case in the circuit court of appeals is simply a counterpart of the case in the supreme court.

*But the case before us is entirely different. The parties did not treat it as a donation. The city issued the full amount of $100,000 in bonds, and the company issued a certificate for $100,000 of stock, and, until the receipt of this certificate, no sale had been made of it. All that the record shows was an agreement on the part of the city to sell at a named price. Nowhere is it shown that the company agreed absolutely to purchase. It was, until after the receipt of the stock, an unaccepted offer on the part of the city. No contract was signed by the company. All we have are the recitals of the record of the city. Of course, such recitals do not bind the company. Thus, on November 5, 1867, it is said that a proposition was received from the company to purchase the stock. What that proposition was is not disclosed. It is stated that it is accompanied by a contract, tendered to the city for consideration, which contract also recites that the company proposes to purchase. That contract nowhere binds the company to purchase, but does bind the city to sell on payment of $5,000 in Cairo city bonds. So, in the proceedings of July 21, 1871, while there is a recital of the making of an agreement for the sale of the stock, yet such recital did not bind the company; and, if the contract referred to was that copied into the record of November, 1867, it contained nothing binding the company; and the second section of the ordinance then passed (the first section having provided for placing the bonds in escrow) made it the duty of the trustee holding these bonds in escrow to deliver them to the company upon its issuing to the city, and delivering to him, $100,000 of its paid-up stock, and then authorized and directed him to sell such stock to the company for $5,000 of Cairo city bonds. But nowhere in this or any other of the ordinances or agreements in evidence is there any promise on the part of the company to take $95,000 in city bonds, and release the city from all obligations growing out of the subscription. On the contrary, so far as is disclosed, when the trustee delivered the $100,000 in bonds, and received the $100,000 in stock, there was nothing casting any obligation on the company to repurchase its stock, or to return to the city any portion of the bonds. The city had offered to sell, but it had not agreed to buy. It could have

stopped with the receipt of the $100,000 of bonds, and left the city to do what it pleased with the stock.

There is therefore not presented the case of an ignoring of the fact or terms of a subscription. Everything authorized by the vote of the people was done, and fully done, and whatever wrong may have been committed by the city council in its proffer of sale and subsequent sale of the stock could not vitiate the bonds after they had passed into the hands of a bona fide holder.

But, further: The bonds on their face show that they were issued in payment of stock in the railroad company, and recite that they were issued in pursuance of an ordinance of the city council, and authorized by a vote of the citizens, and in accordance with the laws of the state; and they were duly registered by the auditor of the state, and his certificate of registry was indorsed on the back. It is true that the recitals do not show when the ordinance was passed, or the election held, and do not refer, by title or otherwise, to the particular statute granting the authority, and the bonds were dated and issued after the constitution of 1870 had come into force. It is also true that the certificate of registry is not conclusive that the bonds were issued in full compliance with the terms and conditions of a subscription. German Sav. Bank v. Franklin Co., 128 U. S. 526, 540, 9 Sup. Ct. Rep. 159.

But surely these recitals and this certificate have significance. It is unnecessary to affirm that the certificates are so "clear and unambiguous" (School Dist. v. Stone, 106 U. S. 183, 187, 1 Sup. Ct. Rep. 84) as to estop the city from showing that the bonds were issued in violation or without authority of law, or that they, in conjunction with the certificate, foreclose all possible defenses. But when the law of the state provides for registry of municipal bonds, and a certificate thereof, such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered. If the plaintiff in this case, not *142 resting upon the mere terms of the certificate, had examined the records of the auditor's office, he would have found there the certificate, under oath, of the mayor of the city, of the election, its date, and facts necessary to warrant the issue of the bonds, such officer being the one named in the statute as the one to furnish to the auditor the evidence necessary to justify the registry. Can it be that a purchaser, with this evidence before him, is not protected by the statement upon the face of the bonds that they were issued in payment of a subscription? Is it his duty to examine all the proceedings, to see whether that which was a subscription in the first instance was called a subscription all the way through, and was named as a subscription in the bonds, had not been transformed by some action of the city council into a donation? It will be borne in mind that it is not a matter of law, but of fact, in respect to which an estoppel is urged against the city by virtue of the recitals and the fact of registry. But it is unnecessary to pursue this line of thought further. We are of opinion that the bonds were properly held valid in the hands of a bona fide holder.

It is finally objected that the court erred in allowing interest on the coupons. They were made payable in New York, and, as such, drew interest according to the laws of New York. Pana v. Bowler, 107 U. S. 529, 546, 2 Sup. Ct. Rep. 704; Walnut v. Wade, 103 U. S. 683, 696. Counsel, not questioning the fact that such have been the frequent rulings, insists that in this case, as found by the court, the bonds were issued under the law of 1849; that that does not authorize specifically the issue of bonds payable outside of the state; that in People v. Tazewell Co., 22 Ill. 147, it was decided that "counties and municipal corporations, unless specially authorized by legislative enactment, have no power to make their indebtedness payable at any other place than at their treasury,"—a decision reaffirmed in Johnson v. County of Stark, 24 Ill. 75, 91, and adhered to in Sherlock v. Winnetka, 68 Ill. 530.

We do not understand the findings of the court in the manner claimed. The finding is simply that the bonds are of the denomination of $1,000 each, as authorized under and by the law of 1849, and not of the denomination of $500 each, as required by the charter of the railroad company. But there is nothing in the nature of things preventing the city from exercising all the powers conferred by two or more acts, where the acts do not involve in and of themselves substantial contradictions. It is not a vital matter whether the bonds should be of $500 or $1,000 each; and, as the charter of the railroad company expressly authorized the issue of bonds payable in the city of New York, we see no reason why such stipulation could not be incorporated into a bond of the denomination of $1,000, and the certificate of the mayor to the auditor is that the bonds were issued under the authority of both acts. Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. Rep. 267. Indeed, counsel refers to the law of 1857, (Pub. Laws Ill., 1857, p. 38,) which provides that, "where any contract or loan shall be made in this state, * * * it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other state or territory of the United States." If that statute is applicable, then of course it is immaterial whether the bonds were issued under the general railroad law, or the act incorporating the railroad company. But it is unnecessary to consider this question at length. The settled rule in Illinois is that coupons draw interest after maturity. Harper v. Ely, 70 Ill. 581, 586; Humphreys v. Morton, 100 Ill. 592;

Drury v. Wolfe, 134 Ill. 294, 297, 25 N. E. Rep. 626; Mortgage Co. v. Sperry, 138 U. S. 313, 340, 11 Sup. Ct. Rep. 321.

These are the only matters that we deem essential to consider. We see no error in the conclusions reached, and the judgment is therefore affirmed.

Mr. Justice GRAY did not hear the argument, and takes no part in the decision of this case.

(149 U. S. 411)

PATRICK v. BOWMAN.[1]

(April 24, 1893.)

No. 157.

EQUITY—SALE BETWEEN PARTNERS—CONCEALMENT—RESCISSION.

1. One of two partners in a mining venture declined to purchase the other's interest for a specified consideration proposed by the latter, but he subsequently wrote that he thought he could find a party who would take it; and again, asking if the other would sell on the same terms, and saying that he had found such a party, although in fact he had made no definite agreement to that effect with any one. In the subsequent correspondence and dealings, both parties treated the offer as if made by the partner for his own benefit. *Held*, that he held himself out as the agent of an unknown principal without authority to do so, and that he was bound by his offer to purchase. The Chief Justice and Mr. Justice Brewer, dissenting. 36 Fed. Rep. 138, reversed.

2. Letters containing an offer to purchase an interest in a mining venture were sent by one partner in that enterprise addressed to the other at St. Louis, although the writer knew that the other's address would be Bayfield, Wis., where the letters were in fact received, and an acceptance immediately telegraphed by the recipient. The first partner wrote, withdrawing his offer, before it had been received, but the second partner testified that he had never received the letter of withdrawal. In a subsequent correspondence both parties treated the contract as complete, except as to detail. *Held*, that the attempted withdrawal was invalid, and the contract complete, and could be treated as such by the purchaser. The Chief Justice and Mr. Justice Brewer, dissenting. 36 Fed Rep. 138, reversed. Tayloe v. Insurance Co., 9 How. 390, followed.

3. The managing partner of a mining venture made a complete contract to purchase the interest of an absent partner for a consideration suggested by the latter, and thereafter discovered a rich vein on the claim. He thereupon secured a deed from the absent partner, in accordance with the contract, without informing him of this discovery. *Held*, that the absent partner could not maintain a bill in equity to set aside the deed. The Chief Justice and Mr. Justice Brewer, dissenting. 36 Fed. Rep. 138, reversed. Brooks v. Martin, 2 Wall. 70, distinguished.

Appeal from the circuit court of the United States for the eastern district of Missouri.

Reversed.

Statement by Mr. Justice BROWN:

This was a bill in equity originally filed by Bowman in the circuit court of St. Louis, and subsequently removed to the circuit court of the United States, against William F. Patrick and James M. Patrick, to rescind a sale made October 19, 1882, by Bowman to William F. Patrick, his then partner, of a five forty-eighths interest in the Col. Sellers and Accident mines, at Leadville, Colo., and for an account of profits received by Patrick from that interest. The theory of the bill was that Patrick had concealed from the plaintiff the discovery of ore in one of these mines in the summer of 1882, and thereby induced him to part with his interest at much less than its value.

The facts of the case were substantially as follows: In February, 1882, Bowman, then a resident of St. Louis, Mo., and temporarily in Leadville on legal business, as attorney of William F. Patrick, was introduced by one William H. Wilson, a mining promoter, to one Stebbins, who, with others, owned two adjacent mining claims in Leadville, known as the "Col. Sellers" and "Accident" claims, upon which no shaft had then been sunk to mineral, and it was then unknown whether the property had any value. The owners were looking for some one who would sink a shaft for a share in the property. Bowman, at Stebbins' request, visited the property, was pleased with it and its surroundings, and soon afterwards asked Patrick to join him in sinking the shaft. The result was that on February 17, 1882, an agreement was entered into between Stebbins and the other owners of the mine upon one part, and Bowman and Patrick upon the other, by which the latter undertook, in consideration of an undivided one-half of the property, a deed of which was deposited in escrow, to sink a shaft on the property to limestone in place or bed rock, if pay mineral should not be sooner found, and to obtain patents from the United States to said property, and further agreed to commence work in sinking the shaft within 30 days from the date of the contract. It seems the mineral in that district lies in nearly horizontal bodies, at the contact between porphyry and limestone; the porphyry being the overlying rock, and of varying thickness. The shaft was to be sunk through the surface earth and gravel, known as "wash," and the porphyry. The indications are generally apparent in the shaft, if there be an ore body below, and it be near; the porphyry becoming iron stained, and sometimes small seams or stringers of mineral are found in the porphyry leading to the mineral body below.

Bowman and Patrick were, between themselves, to be equal partners in the venture, each paying half of the expenses. Patrick, living at Leadville, was to superintend the sinking of the shaft, and keep Bowman advised of all that should happen in the partnership venture. In March, 1892, and for some time afterwards, Patrick was indebted to Bowman for money advanced by him on account of certain legal business then in his charge. Bowman returned to St. Louis, and did not meet Patrick again until June 19th, when they had a settlement, at which Bowman exhibited a willingness to sell out his interest to Patrick. A correspondence,

[1] For dissenting opinion, see 13 Sup. Ct. Rep. 866.

both by letter and telegram, began soon after that date, which is fully set forth in the opinion of the court, and which resulted in a deed by Bowman of his entire interest in the property.

Upon the hearing in the circuit court upon pleadings and proofs, a decree was entered setting aside the sale, and adjudging that William F. Patrick refund the sum of $57,099.69, the amount of profits received by him on Bowman's interest to March 19, 1889, the date of the final decree. 36 Fed. Rep. 138. From that decree, Patrick appealed to this court.

C. C. Parsons, for appellant. E. McGinnis, for appellee.

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*Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case turns upon the question whether the correspondence between these parties subsequent to the execution of the contract of February 17, 1882, and the conduct of Bowman in that connection, indicated a completed understanding between them, prior to the discovery of ore in paying quantities, that Patrick was to purchase Bowman's interest.

The theory of the plaintiff in this connection is that Patrick, being present on the spot, and having the sole charge and management of the sinking of the shaft, was bound to keep the plaintiff advised of the progress of the work, and the prospects of the mine, pending the negotiations for the purchase of his interest, and that, having failed to apprise him of the discovery of a large body of ore on the 31st of August, the sale subsequently made was fraudulently procured, and should be annulled. The defendants do not dispute the legal principle laid down by this court in Brooks v. Martin, 2 Wall. 70,—that where one partner is present, in sole charge of the business, while the other is at a distance, in order to sustain a sale of the absent partner's interest, it must be made to appear that the price paid approximates a fair consideration for the thing purchased, and that all the information in the possession of the purchaser necessary to enable the seller to form a sound judgment of the value of what he sells should be communicated by the buyer to him. Defendants, however, claim that the parties had reached an understanding as to terms and conditions of the sale before the discovery of the ore, and that William F. Patrick was under no obligation to apprise plaintiff of this fact; that, even if the plaintiff had a right to rescind the sale, he did not act with sufficient promptness; and that his failure for four years to institute these proceedings should debar him from a recovery.

The nature of the defense in this case requires a statement somewhat in detail of the succession of events following the contract of February 17, 1882, and of the correspondence between the parties. Bowman seems to have left Leadville the day following the execution of the contract with the understanding that Patrick should remain there, and superintend the opening of the shaft, —in short, that he should be the resident partner of the enterprise. He and Bowman were each to contribute one half, and to have an equal interest in the venture. On March 25th, Bowman sold to James M. Patrick, brother of the defendant, William F., one third of his half interest, in consideration of Patrick paying one third of Bowman's share of the cost of sinking the shaft; Bowman agreeing to make all necessary advances for the first year, and Patrick agreeing to repay him the sums so advanced. Bowman did not return to Denver until early in May, having in the mean time received several letters from William F. Patrick, giving a general idea of the progress of the work, and of certain litigation connected with the property.

At this time Wilson claimed that he had introduced Bowman to Stebbins, and had been instrumental in procuring for Bowman the contract for an interest in the property, and that, in fairness, Bowman should let him have a share in this contract. Bowman assented to this, and assigned to Wilson a one fourth interest. At this visit, too, a settlement seems to have been had, in which it was agreed that Bowman would owe Patrick $288.70 if Wilson paid his assessment, and $465 if he did not; and, as Patrick says, "the understanding between Mr. Bowman and myself was that I was to draw for either $465 or $288.70." Wilson's time to pay would expire May 18th. On May 13th, Patrick drew on Bowman for $465. This draft was presented for payment on May 15th, when Bowman telegraphed to Patrick: "Must know Wilson's conclusion. Rebates not satisfactory. Answer at once,"—and on the same day wrote to Patrick as follows: "Wilson made a claim * * * for an interest in the Col. Sellers and Accident. I yielded to his request. * * * He named the interest, and promised his share of the money. You were to collect of him, or forfeit his claim for nonpayment. Your brother's interest I agreed to carry, and am willing to; but now you draw on me without collecting of Wilson, or securing his relinquishment. This much I expected you to do. I have telegraphed you, but can get no answer. I leave in an hour for Chicago."

The parties did not meet again until June 19th, when Patrick went to St. Louis to talk over the Col. Sellers matters, and at this interview they had a settlement of their accounts up to May 8th, in which a balance of $288.69 was found due from Bowman, for which he gave his note to Patrick, who had it discounted at once for its face. Of this $288.69, the sum of $245.75 was for James Patrick's share of the expenses, which Bow-

man was to advance for him, and for which amount James soon afterwards gave his note to Bowman.

In the mean time and on May 11th, Wilson had assigned his interest to John Livezey. These assignments to James Patrick and Wilson left Bowman the owner of ten forty-eighths of the contract, or five forty-eighths of the entire property, which was the interest he subsequently conveyed to William F. Patrick. Up to the time of this interview of June 19th, nothing, apparently, had been said with reference to a sale. But at the time of this settlement it seems that Bowman, who appeared despondent, suggested to Patrick that he thought he only ought to do a little work every 10 days as specified in the contract, to prevent its becoming forfeited, and that that would keep it alive. Patrick says: "He made me a proposition at that time, as I remember, after I secured this note, if I would surrender the note he would surrender all his right, title, and interest under that contract to me; and I told him at the time that I had about all that I could carry, and I didn't think I could afford to take it, but thought I knew a man out west who I thought would take it, and that on my return I would speak to him in regard to it."

At this interview, Bowman told him that he was going to leave in a few days for Bayfield, Wis., and gave him that as his post office address during the summer. Patrick started back for Leadville that evening, and on arriving at Denver wrote Bowman at St. Louis, under date of June 22d, as follows: "In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands, and let me go right ahead with the work, which I would very much like to do. If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately and I will try and make the arrangement." *417

On June 27th he wrote another letter in the following terms: "I would also like to have an answer with regard to the proposition I made you about the Col. Sellers,—to return you your note, and forfeit your share in the contract. There is a party here who will take it." On the following day, June 28th, he wrote still another letter, to this effect: "Please let me know what we are to do in this new complication, and also about the Col. Sellers, as I am anxious to continue work on that property, and see what is there." These letters were all addressed to St. Louis, and were forwarded to Bayfield, Wis., and, as Bowman was then in the woods, he did not receive either of them until the 13th of July, when he received the one of June 22d, and at once telegraphed to Patrick: "Yours of June 22 received yesterday. Proposition accepted. Send note." To this Patrick replied, under date of July 15th, by telegraph: "Acceptance too late. Proposition was dependent upon immediate acceptance in St. Louis. See my letter of fifth." Bowman must have gone to St. Paul on this or the following day, since on July 16th he wrote Patrick the following letter: "When I came out of the woods I found your letter of June 22d waiting my answer, and I telegraphed you on the same day, accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on your surrendering my note; and, on a perusal of your subsequent letters received here at St. Paul to-day, I learn that is your wish. I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way, and will not. If you wish any papers signed, send, and I will sign them. My address is Bayfield, Wis."

Before Bowman received Patrick's letters, and telegraphed his reply, Patrick claims that he wrote the following letter to Bowman on July 5th, addressed, not to St. Louis or to Bayfield, but to St. Paul:

*"Leadville, July 5, 1882. Mr. Frank J. Bowman, Merchants' Hotel, St. Paul, Minn.—Dear Sir: I send you a statement of all amounts paid on the Col. Sellers contract since our settlement, from which you will see that the am't due from you thereon is $952.32, for which am't I will draw on you to-morrow. I wish to notify you and hereby do so, that if the draft is not paid that I will apply to Stebbins and Robinson and their partners for a new contract in my own name. I have consulted an attorney here, and am satisfied that we are obliged to continue the work in order to comply with our contract, and that your plan of doing a little work every ten days would not be acting according to its letter or spirit, and would cause a forfeiture of the contract, and loss of the am't we have spent in sinking the first 100 feet. The same attorney also tells me that under our contract, if you do not pay your proportion when called upon, you forfeit your rights under said contract. I want to deal fairly with you, and will tell you that in my opinion the shaft, which is now 165 feet deep, is looking very promising, and I think we are not very far from the contact. My reasons for thinking so are that the porphyry is now heavily iron stained. Hope you will pay the draft, and that we may continue the work together, but if you do not I will have to protect myself, and will do so, by taking a new contract, as I have said. I withdraw my offer to return your note of $288.70, dated June 19th, 1882, in case you assign your interest in the contract to me. Yours, truly, W. F. Patrick." *418

On the following day, Patrick drew upon Bowman for $952.32, which included the amount of James Patrick's share of the expenses, and also part of certain expenses for repairing the shaft. The draft was mailed

to the bank in St. Paul, and was returned to Patrick because Bowman was not at St. Paul. We see no reason to doubt that this draft was drawn in good faith, with the expectation that it would be presented to Bowman, though, as Patrick says, he did not think it would be paid, because of his conversation with Bowman at St. Louis on June 19th, when he expressed himself as dissatisfied with the way the work was going on. The letter of July 5th seems never to have been received.

On August 2d, defendant wrote Bowman as follows, evidently in reply to Bowman's letter of the 16th of July: "Yours of the 16th ult. received. In accordance with your request therein, I send the within paper for your signature. I sold the note in St. Louis before getting your reply, so will have to wait until it matures, which will be September 19th." Inclosed in this letter was a memorandum of agreement, signed by William F. Patrick, reciting the contract of February 17, 1882; the performance of considerable work in developing the lode; the unwillingness of Bowman to continue such work, or to pay the costs; the execution of the note of June 19, 1882,—and providing that, if Patrick should pay the note when it became due, Bowman would release to him all his right, title, and interest to the contract with the owners of the property, and would execute and deliver to Patrick a good and sufficient deed of conveyance of the same; Patrick agreeing to release Bowman from any liability under the contract.

In reply to this, and on August 28th, Bowman wrote to Patrick from his camp on Brule river, Wis., as follows: "I send you the contract you desire, and trust that this will settle our matters pleasantly and amicably. I have inserted a clause concerning your brother's interest, but he may not care to retain it. My address will be St. Paul until September 10th. Then I shall return to St. Louis, and business. P. S. Mails are slow here."

With this letter was a contract signed by Bowman, which was a substantial copy of the one signed by Patrick, but containing a reservation for the use of Patrick's brother. This contract, however, made it obligatory upon Patrick to pay the note, and gave him no option in that particular, as was given in the contract inclosed in his letter to Bowman.

Having signed this contract, Bowman inclosed it in his letter of August 28th, and mailed it the same day to Patrick at Leadville, where it arrived after Patrick had left. It was forwarded to him at Knoxville, Tenn., where he received it on September 7th. He made no reply, however, and there was no further correspondence between the parties.

On October 19, 1882, Bowman having returned to St. Louis, James Patrick went to Bowman's office, and said he had called, by request of his brother, to get him to execute a deed to his brother for his interest in the Col. Sellers. The Patricks testify that they were both present in Bowman's office; that they talked over the matter of Bowman's relations to James, with regard to an interest in the contract; and that W. F. Patrick then agreed to take a conveyance of Bowman's entire interest, to assume Bowman's liability, and to advance James' share of the expenses. This matter being settled, Bowman acknowledged and delivered a deed of his interest in the property. There is a dispute between Bowman and the Patricks as to whether the former made any inquiry of them as to whether any mineral had been discovered in the Col. Sellers shaft. It is clear they never mentioned the matter to him, and there is no doubt Patrick failed to inform Bowman of the discovery of a large body of ore that had been made in the last days of August. If at that time there was a completed understanding between them that Patrick was to buy out Bowman's interest, and release him from his liability upon the note, there was no obligation to make such disclosure. If, upon the other hand, no such understanding had been reached, it was then incumbent upon Patrick to inform Bowman of the progress of the work before taking from him the deed of October 19th.

We think this question must be answered by referring to the correspondence between these parties, between June 19th and August 13th, upon which day the first indication of mineral was discovered in the shaft, and the policy of suppressing all information was inaugurated.

The letter of June 22d must be read in connection with the conversation at St. Louis on June 19th, in which Bowman offered Patrick all his interest in the enterprise if Patrick would return the note Bowman had just given him. Patrick replied that he had already as much as he could carry, but upon his return to the west he would speak to a man who he thought might take the offer. Accordingly, in his letter of June 22d, he does not offer to buy Bowman's interest himself, but says: "I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands. * * * If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately, and I will try and make the arrangement." Now, while it is true this is not, upon its face, a proposition to buy Bowman's interest himself, but a mere promise to try and make an arrangement with another party, and a call upon Bowman to let him know whether such a proposition would be accepted if made, in reality we think it should be considered as a proposition made by Patrick himself, for the following reasons:

The man he had in mind was Col. Bissell, of Leadville, whom he had not yet seen, and

who he had no good reason to believe would take the property. It was a mere conjecture on his part. Before he wrote his next letter, he went on to Leadville, saw Col. Bissell, and "spoke to him in regard to it, and he declined to take it, and declined to take the interest and pay that note; and, as I told Bowman, I was carrying all I could." Notwithstanding this, in his letter of June 27th he says: "I would also like to have an answer in regard to the proposition I made you about the Col. Sellers,—to return you your note, and forfeit your share in the contract. There is a party here who will take it." And again, on the 28th: "Please let me know what we are to do * * * about the Col. Sellers, as I am anxious to continue work on that property, and see what is there." Now, it does not clearly appear whether he had seen Col. Bissell, or not, when he wrote these two letters, but in either case the letters were untrue, though they may have been written in good faith, and with the expectation that Col. Bissell would eventually take the interest; but there was no party there who had given him any assurance that he would. Patrick was thereby placed in the position of holding himself out, not only as the agent of an unknown principal, but of one whom he had no authority to represent. In such case his contract, *428 though, of course, not *binding upon any one else, is binding upon the agent; at least, if the credit be given to such agent. Welch v. Goodwin, 123 Mass. 71; Worthington v. Cowles, 112 Mass. 30; Cobb v. Knapp, 71 N. Y. 349; Blakely v. Bennecke, 59 Mo. 193; Eichbaum v. Irons, 6 Watts & S. 67; Meech v. Smith, 7 Wend. 315; Winsor v. Griggs, 5 Cush. 210; Mechem, Ag. §§ 542, 550, 557.

In this case there is abundant evidence that the proposition contained in the three letters of June 22d, 27th, and 28th was treated by both parties as the proposition of Patrick himself. In his attempted retraction of July 5th, Patrick says: "I withdraw my offer to return your note for $288.70, dated June 19, 1882, in case you assign your interest in the contract to me." And, in his letter of July 16th, Bowman says: "When I came out of the woods, I found your letter of June 22d waiting my answer, and I telegraphed you on the same day accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on your surrendering my note." Of this letter, Patrick says: "I decided to accept the proposition contained in the letter, and instead of applying to the owners for a new contract * * * I decided to accept the proposition which was contained in Bowman's letter of July 16. I had a contract prepared, such as he indicated he would sign in that letter, * * * and I sent that contract to him by mail after signing it myself." In his letter of August 2d, which was written before the discovery of ore, Patrick inclosed a contract for Bowman to sign, in which his own name is mentioned as grantee, and Bowman, in his letter of August 28th, also inclosed a draft of his own, in which, also, Patrick is named as grantee. So, too, in his letter of September 2d, Patrick says: "I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, $288.70, and you relinquish all rights under the agreement." The matter was finally consummated on October 19th by a deed direct from Bowman to Patrick of his interest in the mine. Indeed, there is not a word of testimony, except as gathered from the three letters written in June, that the proposition was other than *that of Patrick himself. *423 For these reasons we think the offer should be considered as one made by Patrick to Bowman to take Bowman's interest in the mine, and release him from his liability upon the note.

The letter of June 22d, which was addressed to Bowman at St. Louis, was forwarded to Bayfield, Wis., and reached him in the woods at a distance from a telegraph office. He proceeded at once to Ashland, Wis., the nearest telegraph station, and on July 13th telegraphed Patrick as follows: "Yours of June 22d received yesterday. Proposition accepted. Send note." To this Patrick replied by telegraph, sent both to St. Louis and Ashland, as follows: "Acceptance too late. Proposition was dependent upon immediate acceptance in St. Louis. See my letter of the 5th." In view of the fact that Patrick was informed when in St. Louis, June 19th, that Bowman was about starting for the woods for the summer, and that his letters of June 22d, 27th, and 28th were sent to St. Louis, when he must have known that Bowman had gone, we do not think the acceptance was too late, although it might have been otherwise had the circumstances been such that a prompt reply must have been expected. After having sent this telegram, and before receiving the reply, Bowman left Ashland, and went to St. Paul, where he received the letters of June 27th and 28th, and answered them by his letter of July 16th, renewing his acceptance of the proposition he had already made by telegram. The tone of this letter certainly indicates that he had not received Patrick's telegram of July 15th when he wrote it. Indeed, it is improbable that he should have done so, as one copy of that telegram was sent to St. Louis, and another to Ashland, after Bowman had left there.

These letters and telegrams, taken together, indicate a complete understanding between these parties that Bowman should sell out his interest in the mine to Patrick on condition that the latter released him from liability upon the note. It is true the letter of June 22d contained no definite proposition, but a mere offer by Patrick to see if he could find a purchaser, and hence Bowman's telegram of July 13th, *424 might not *be construed as binding Patrick to * anything; yet the letter of June 27th did

contain, or at least recognize, a proposition as coming from Patrick himself; and Bowman's answer thereto of July 16th, construed in connection with his telegram, was a distinct acceptance of such proposition. Nor is this understanding affected by Patrick's attempted revocation of the offer in his letter of July 5th. Bowman denies that he ever received this letter, and, as there is no direct evidence that he did, his denial must be accepted as conclusive. Under such circumstances the revocation is of no avail to release either party from the obligations of his contract. The authorities are abundant to the proposition that when an offer is made and accepted by the posting of a letter of acceptance, before notice of withdrawal is received, the contract is not impaired by the fact that a revocation had been mailed before the letter of acceptance. Thus, in the case of Tayloe v. Insurance Co., 9 How. 390, in which the point decided was that a contract by correspondence was completed when the party to whom the promise was made placed a letter in the post office, accepting the terms, Mr. Justice Nelson, in delivering the opinion of the court, said, (page 400:) "We are of opinion that an offer, under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed a valid undertaking on the part of the company, that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail, accepting them, and that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted." This case was cited and followed in Byrne v. Van Tienhoven, 5 C. P. Div. 344, and Stevenson v. McLean, 5 Q. B. Div. 346. Other cases to the same effect are Adams v. Lindsell, 1 Barn. & Ald. 681; Dunlop v. Higgins, 1 H. L. Cas. 381; Harris' Case, L. R. 7 Ch. App. 587; The Palo Alto, 2 Ware, 344; Wheat v. Cross, 31 Md. 99.

There is, indeed, in a case of this kind, some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was *425 not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act.

It is quite evident that Bowman himself regarded this as a settlement of his rights under his contract with Patrick, leaving only the details to be arranged between them. His conduct from this time indicates a clear intention on his part to abandon any further interest in the property. It is evident that he intended to make no further claim upon Patrick, and it is equally clear that Patrick could have sustained no further action against him for the expenses of sinking the shaft. Indeed, the testimony leaves it doubtful whether Bowman ever contributed anything more than a nominal amount of money to the enterprise. At the interview in St. Louis on June 19th there seems to have been a settlement had by him up to May 8th, in which Patrick claimed of him $552.93, three eighths of the expenses up to May 8th, which was reduced to $288.69, by a credit of some $264.24 claimed by Bowman against Patrick, for which amount, less $288.69, he gave his note. He seems neither to have paid nor settled for any portion of the money expended by Patrick since May 8th, ($603.75,) nor to have given any assurances that the additional liabilities to be incurred would be met by him. He said that he was "hard up;" could not settle the expenses incurred since May 8th; asked Patrick to wait for him, as a matter of accommodation; and suggested that only a little work should be done every 10 days on the shaft,—just enough to save a forfeiture of their contract. He not only made no provision for the payment of his note of June 19th, or of the further expenses which he must have known would be required, but apparently took no further interest in the sinking of the shaft, and manifested in his letter of July 16th a willingness to sign any papers Patrick might send him, and subsequently did sign a release of his interest to Patrick. There is much dispute between the parties as to whether Bowman made any inquiries with regard to the progress of the work on October 19th; but it is scarcely presumable that he would have signed the deed at that time without instituting very careful inquiries with regard to the work, unless he had treated the matter as abandoned, since, from the time that had elapsed, he must have known that it was either a success or a failure. In a subsequent conversation with Wilson he said that his reason for selling out to Patrick was that he was not able to carry the assessments. He made substantially the same statement to James Patrick, and added that, even if he had had money enough, the constant fear of litigation and "jumpers" would have caused him to sell out, and wished him to express his congratulations to his brother upon the success of the enterprise.

In short, he gave no further attention to the matter for four years, when, from some letters between members of the defendant's family, which fell into his hands, he was apprised of the fact that a large body of ore had been discovered about the 31st of August, the knowledge of which Patrick had concealed from him. Conceding that, if the negotiations had then been open, it would have been Patrick's duty to inform his partner of all that had taken place, he was under no obligation to do so if the contract were complete. He might well be reluctant to give him information which would only lead to disputes and litigation.

In the view we have taken of this case, it becomes unnecessary to consider the conduct of Patrick after August 13th, in suppressing the information with regard to the discovery of the ore, or the question of laches which the defendant urges with so much earnestness.

The decree of the court below will therefore be reversed, and the case remanded, with instructions to dismiss the bill.

Mr. Justice FIELD did not sit in this case, and took no part in its decision.

The CHIEF JUSTICE and Mr. Justice BREWER dissented. See 13 Sup. Ct. Rep. 866.

(149 U. S. 144)

THE SERVIA.

THE NOORDLAND.

NICHELS v. THE SERVIA et al.

(April 24, 1893.)

No. 207.

COLLISION—STEAMSHIPS—BACKING OUT OF SLIP—RULES.

1. While the steamer S., having left her slip, was coming slowly down the Hudson river, from 800 to 1,000 feet off the New York side, the steamer N. was backing out of her slip at Jersey City, some distance below, preparatory to straightening down the river to go to sea,—maneuvers customary with both vessels when they lay in their berths, bows in. When the N. reached mid-river, where it was customary and proper for her to go ahead, she signaled that she would go ahead under a starboard helm; but she allowed two minutes to elapse before she put her engines ahead at half speed, and two more before they turned at full speed, and she consequently continued her sternway, which had been at the rate of five or six knots, when the engines were stopped, until it appeared to the S. that there was danger of a collision. The S. was then about 1,000 feet away, and, as she could not run in closer to the New York shore, she reversed her engines, and ported her helm. The N. continued to make sternway, and the two vessels came together, the starboard bow of the S. striking the starboard quarter of the N., and both vessels were injured. *Held*, that each steamer was bound to conform to her customary course and maneuvers under similar circumstances, and to take notice of those of the other, and observe her movements, and each had the right to presume that the other would do so. Affirming 30 Fed. Rep. 502.

2. At the time the N. was discovered, and from then until the collision occurred, the S. was from 1,200 to 1,400 feet beyond the middle of the river, towards which the N. was backing. *Held*, that the S. was justified in assuming that she might safely proceed on the course she had taken without being obstructed by the N., and it was not until she should have discovered that the N. was backing so near her path as to probably impede her movements that she was under any obligation to apprehend danger, and to take any additional measures to avoid collision. Affirming 30 Fed. Rep. 502.

3. Inasmuch as the S. was properly manned and equipped, exercised proper vigilance, and stopped and reversed as soon as it became apparent that the sternway of the N. was continuing so as to make collision probable, the S. was not guilty of fault or negligence contributing to the collision. Affirming 30 Fed. Rep. 502.

4. The collision was due solely to the fault of the N., as there was no occasion for her backing beyond the middle of the river, when it was customary for her to turn, and as she did not observe the movements of the S. with due attention. Affirming 30 Fed. Rep. 502.

5. The N. cannot be deemed to have been on a definite course, so as to give her the right of way under rule 19, requiring that when vessels are on crossing courses the one which has the other on her starboard must keep out of the way; but the case is rather one of "special circumstances," under rule 24, which requires each vessel to watch, and be guided by, the movements of the other. Affirming 30 Fed. Rep. 502.

Appeal from the circuit court of the United States for the southern district of New York. Affirmed.

Henry G. Ward and John E. Parsons, for appellant. Frank D. Sturges and E. L. Owen, for appellee.

*142 *Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in admiralty, in rem, brought in February, 1886, in the district court of the United States for the southern district of New York, by Harlich Nichels, master of the Belgian steamship Noordland, of Antwerp, against the British steamship Servia, to recover damages resulting from a collision which took place January 30, 1886, between those two vessels, in the harbor of New York, in the Hudson river, between New York and Jersey City. Both were damaged, and a cross libel was filed by the Servia against the Noordland. The Noordland was backing out, stern foremost, from her berth in a slip in Jersey City, and the Servia had backed out from her slip in the city of New York, and was heading down the Hudson river above the Noordland. Both vessels were going to sea, and had lain in their slips, bow in. The libel of the master of the Noordland charges fault in the Servia in that (1) she was not stopped when the Noordland could be easily seen from her; (2) she kept on until she was brought into dangerous proximity to the Noordland; (3) instead of then keeping out of the way of the Noordland, she threw her head to starboard, and thus struck the Noordland on the starboard quarter.

The answer of the Servia charges negligence and fault on the part of the Noordland, in that (1) she did not have competent and vigilant lookouts, properly stationed, and faithfully attending to their duties; (2) her officers and crew were inattentive; (3) she continued under sternway, thus bringing her down to and upon the Servia, which was as close in to the New York shore as it was prudent for her to go; (4) she did not stop her sternway, or start her engines ahead, until immediately before the collision, when it was too late to avoid it; (5) after she had stopped her engines, she wrongfully and improperly started them astern again, thus crowding down to and upon the Servia's rightful course, notwithstanding she had plenty of room between her and New Jersey

*146 to have gone ahead, which she was bound to have done, and so have avoided the Servia.

The case was heard by Judge Brown in the district court, and a decree was entered by that court dismissing the libel of the Noordland, with costs. The opinion of Judge Brown is reported in 30 Fed. Rep. 502. He held that the Servia did all that the law required of her, and was without fault, and that the collision occurred through the unjustifiable delay of the Noordland in starting her engines ahead. The master of the Noordland appealed to the circuit court, and that court, held by Judge Wallace, in March, 1889, affirmed the decree of the district court, and dismissed the libel of the Noordland, with costs of both courts. The libelant has appealed to this court.

The circuit court made the following findings of fact:

"(1) At about 2:45 P. M., January 30, 1886, a collision took place between the steamships Servia and Noordland, in the Hudson river, at a point 800 to 1,000 feet off the New York side, about opposite Cortlandt street. The river at that place is about 4,400 feet wide between the lines of the piers.

"(2) Both steamships had just left their respective slips, intending to put to sea; the slip of the Servia being above Houston street, New York city, and the slip of the Noordland being at Jersey City, about opposite the place of collision. It was customary and necessary for the steamers to back out of their respective slips to about the middle of the river, for the purpose of straightening on the courses down the river, and it was frequently the practice of the Noordland to back still nearer to the New York side. Both vessels knew the practice customary with the other when starting for sea. The Servia started from her slip at about 2:15; and the Noordland, from hers, about 2:30.

"(3) The Servia had got turned about and straightened on her course down the river, and was proceeding within a distance of 800 or 1,000 feet from the New York shore, and nearer to the New York shore than was customary, and as near as she prudently could, having reference to her own size, and the proximity of other vessels, while the Noordland was backing over towards the New York shore, assisted by a tug at her port quarter, preparatory to straightening on her course.

*147 "(4) When the Noordland reached about mid-river, she stopped her engines, and signaled the Servia that she intended to starboard her helm and go ahead. The Servia did not hear the signal, but observed the movements of the Noordland, and assumed that she would go ahead in time to leave the Servia an unobstructed course. The Servia proceeded without any material change of course, headed about south by west one half west, under slow speed, until she got near enough to observe that the Noordland was continuing to make sternway at considerable speed, and might bring herself in the path of the Servia, whereupon the Servia stopped her engines, being then about 1,000 feet away from the Noordland, and one minute after, upon observing that the Noordland still continued to make sternway at a speed which indicated danger of collision, put her engines at full speed astern, and ported her helm.

"(5) When the Noordland reached mid-river, and stopped her engines, she had been backing at a speed of five or six knots an hour and, after stopping her engines, and giving the signal to indicate that she would go ahead, she did not go ahead, but waited two minutes longer before putting her engines at half speed ahead, and two minutes more, and when it was too late to avoid collision, before putting her engines at full speed ahead, and in the mean time she had continued to encroach upon the Servia's course, and was making sternway at the time the vessels collided.

"(6) When the vessels came together the bow of the Servia canted a little to starboard, while her engines were reversed, and her starboard bow came into contact with the starboard quarter of the Noordland at the extreme stern. Both vessels were injured, and the Servia sustained damages in the sum found by the commissioner of the district court.

"(7) Both steamships were properly officered, manned, and equipped. Those in charge of the Servia exercised proper vigilance in observing the Noordland, but those in charge of the Noordland were inattentive in observing the Servia, and in observing the speed at which their own vessel was nearing the New York shore after she had reached mid-river, and were negligent in permitting her to back so near to the New York side.

"(8) There were no vessels or obstructions in the river at the time to complicate the movements of the Noordland, and it was entirely unnecessary for her to back much, if any, beyond the middle of the river in order to straighten upon her course; but she nevertheless did back at a speed gradually decreasing from five to six knots an hour until she came within 1,000 feet, or nearer, of the New York side, and struck the Servia."

There is a bill of exceptions, which, after setting forth the findings of fact by the court, states as follows:

"Whereupon the libelant offered to the said court the following additional findings of fact:

"'First. The course of the Servia was ahead down stream on the New York side from Houston street; and of the Noordland, astern across stream from Jersey City, about opposite the place of collision.'

"Which the said court refused, except as already found, and the libelant duly excepted to such refusal.

"'Second. The vessels were on crossing courses, the Servia having the Noordland on her starboard hand.'

"Which said court refused, except as al-

ready found, and the libelant duly excepted to such refusal.

"'Third. Just before the collision, but too late to overcome her headway, or prevent the vessels coming together, the Servia reversed full speed astern, causing her bow (her propeller being right-handed, and her helm being aport) to cant over to starboard, towards the Noordland.'

"Which said court refused to find, and the libelant duly excepted to such refusal.

"'Fourth. The Servia struck the Noordland at the port side of her fantail, at the extreme stern, doing considerable damage.'

"Which the said court refused, except as already found, and the libelant duly excepted to such refusal.

"'Fifth. If the Servia had reversed her engines a minute sooner, as she might perfectly well have done, there would have been no collision.'

"Which the said court refused to find, and the libelant duly excepted to such refusal.

"'Sixth. If the Servia had continued her course without stopping, she would have gone clear.'

"Which said court refused to find, and the libelant duly excepted to such refusal.

"'Seventh. The master of the Servia proceeded upon the opinion that his vessel had right of way; that the Noordland was required to keep out of her way. This led to the Servia coming into dangerous proximity to the Noordland. Instead of then keeping on, according to this view of her captain, the Servia, by reversing and canting her head towards the Noordland, brought about the collision.'

"As to the seventh request, the court found that the master of the Servia supposed and claimed that his vessel had the right of way. In other respects this finding was refused, and the libelant duly excepted to such refusal.

"'Eighth. To the southward and westward of the course of the Noordland, as she backed towards New York, were flats and shoals, to avoid which, when she straightened on her course, made it desirable for her to reach across as far as was safe towards the New York side of the river.'

"Which said court refused to find, and the libelant duly excepted to such refusal.

"'Ninth. The opinion and observation of the master of the Servia were that it is usual for steamers going to sea from the Jersey side of the river to back over to from eight hundred to a thousand feet of the New York piers,—just to clear them. This is usual where vessels are not in the way at the end of the New York piers, and suitable.'

"Which said court refused to find, and the libelant duly excepted to such refusal.

"'Tenth. The Noordland, as she was going astern, did not have the same command of her movements as was the case with the Servia.'

"Which the said court did find.

"And thereupon the said court found the following conclusions of law:

"'(1) Each steamship was bound to conform to her own customary course and maneuvers under similar circumstances, and take notice of the customary course and maneuvers, and observe the movements, of the other, and each had the right to assume that the other would do so.'

"To which conclusion the libelant duly excepted, as being against the evidence and against the law.

"'(2) The Servia was justified in assuming that she could safely proceed at moderate speed upon the course she had taken after she had straightened down the river, without being obstructed by the Noordland, and it was not until such time as she ought to have discovered that the Noordland was backing so near her path as to probably impede her movements that she was under any obligation to apprehend danger, and take additional measures to avoid collision.'

"To which conclusion the libelant duly excepted, as being against the evidence and against the law.

"'(3) The Servia was not guilty of fault or negligence contributing to the collision.'

"To which conclusion the libelant duly excepted, as being against the evidence and against the law.

"'(4) The Noordland was in fault for backing nearer to the New York side than was necessary or was prudent, in view of the course and movements of the Servia, for not taking timely measures to stop her sternway after she had reached mid-river, and for failing to observe the movements of the Servia with due attention.'

"To which conclusion the libelant duly excepted, as being against the evidence and against the law.

"'(5) The decree of the district court is right, and should be affirmed with costs, and it is accordingly so ordered.'

"To which conclusion the libelant excepted, as being against the evidence and against the law.

"And the libelant thereupon offered to and requested the court to find the following additional conclusions of law:

"'First. The Noordland had the right of way, and the Servia was at fault for not keeping out of her way.

"'Second. The Servia should have stopped before she came into dangerous proximity to the Noordland.

"'Third. The Noordland was not compelled to go ahead before she had run out her sternway, nor was she required to stop her engine nearer the Jersey side of the river.

"'Fourth. The Servia had no right to require or expect the Noordland to run out her sternway at a greater distance from the ends of the New York piers than she did.

"'Fifth. The Servia, having elected to go on, was at fault for reversing full speed

astern, and putting her helm aport, when so near the Noordland that before her headway was stopped her bow would be carried into that vessel.

" 'Sixth. The decree of the district court should be reversed, and a decree should be entered holding the Servia in fault for the collision, with costs to the appellants of the district and circuit courts, and a reference to ascertain the damages of the Noordland.'

"And the court declined to find any further conclusions of law than already found, to which refusal of the court to find the said six additional conclusions of law, and each of them, the libelant duly excepted, as being against the evidence and against the law."

It is stated in the bill of exceptions that it contains all the evidence material to any of the exceptions.

It is alleged by the appellant as error (1) that the circuit court should have made the eighth and ninth findings of fact requested on behalf of the Noordland; (2) that it should have made so much of the seventh finding of fact requested on behalf of the Noordland as found that the master of the Servia proceeded upon the opinion that his vessel had the right of way; (3) that the circuit court erroneously found the first, second, third, and fourth conclusions of law made by it; (4) that it erroneously refused to find, as requested for the Noordland, that she had the right of way, and that the Servia was at fault for not keeping out of the way; (5) that it erroneously refused to find, as requested for the Noordland, that the Servia should have stopped before she came into dangerous proximity to the Noordland; (6) that it erroneously refused to find, as requested for the Noordland, that she was not compelled to go ahead before she had run out her sternway, nor was she required to stop her engines nearer the New Jersey side of the river; (7) that it erroneously refused to find, as requested for the Noordland, that the Servia had no right to require or expect the Noordland to run out her sternway at a greater distance from the ends of the New York piers than she did; (8) that it erroneously decided that the Noordland was in fault; and (9) that it erroneously decided that the Servia was free from blame.

It is contended here on behalf of the Noordland (1) that the vessels were on crossing courses, and that the Servia, having the Noordland on her starboard side, was required by rule 19 of the steering and sailing rules set forth in section 4233 of the Revised Statutes of the United States, and by article 16 of the act of March 3, 1885, c. 354, (23 St. pp. 438, 441,) to keep out of the way of the Noordland; (2) that the collision occurred because the Servia claimed the right of way, and acted accordingly, and that the circuit court not only refused to find that the Noordland was entitled to the right of way, but approved the action of the master of the Servia in appropriating the right of way to that vessel; (3) that, if the Noordland was entitled to the right of way, it was error for the circuit court to refuse to find that the Servia should have stopped before she came into dangerous proximity to the Noordland; (4) that there were no special circumstances to deprive the Noordland of her right of way, nor was she unreasonable in insisting upon her right; (5) that the Servia could not be excused for her failure to keep out of the way of the Noordland on the ground that she had the right to assume that the Noordland would not obstruct her course, or would yield to the Servia the right of way to which the Noordland was entitled; (6) that the assumption upon which the Servia is supposed to have acted is pure assumption, those in charge of the navigation of the Servia not having acted upon such an assumption; (7) that it was error in the circuit court not to find the eighth and ninth additional findings of fact proposed on behalf of the Noordland; (8) that the collision was due solely to the fact that those in charge of the Servia erroneously supposed that they had the right of way; (9) that the undisputed facts show that the Servia was guilty of inattention; (10) that if the Noordland was at fault for allowing an interval to elapse between stopping her engines and going ahead, then the Servia was also at fault for allowing an interval to elapse between stopping her engines and going astern; and (11) that the decree of the circuit court should be reversed, and a decree made in favor of the Noordland for her damages, with costs.

But we are of opinion that the decree of the circuit court was correct, and must be affirmed.

The first conclusion of law of the circuit court, that "each steamship was bound to conform to her own customary course and maneuvers under similar circumstances, and take notice of the customary course and maneuvers, and observe the movements, of the other, and each had the right to assume that the other would do so," was correct. The known usage as to the movements of each vessel preparatory to getting upon her course to sea was established as a custom, and each vessel was justified in assuming that the other would perform her duty in that respect. Williamson v. Barrett, 13 How. 101, 110; The Vanderbilt, 6 Wall. 225; The Free State, 91 U. S. 200; The John L. Hasbrouck, 93 U. S. 405, 408; The Esk and The Niord, L. R. 3 P. C. 436. It was the duty of each vessel to observe the movements of the other.

The circuit court was correct, also, in finding, as a conclusion of law, that "the Servia was justified in assuming that she could safely proceed at moderate speed upon the course she had taken after she had straightened down the river, without being obstructed by the Noordland, and it was not until such time as she ought to have discovered that the Noordland was backing so

near her path as to probably impede her movements that she was under any obligation to apprehend danger, and take additional measures to avoid collision." The court had found as facts that the Servia was proceeding under slow headway down the river, *154 at a distance of from 800 to 1,000 feet from the New York shore, and heading about S. by *W. ½ W., thus having from 1,200 to 1,400 feet between her starboard side and the middle of the river, (the river being about 4,400 feet wide,) towards which the Noordland was backing. The Servia was therefore heading well under the Noordland's stern, the latter having abundance of the width of the river for her maneuver, and knew the usage of the Noordland to back to about the middle of the river, and saw that the engines of the Noordland were stopped when she had reached about the middle of the river, indicating that the Noordland intended to follow her usage. The Servia, therefore, had a right to assume that the Noordland would head down the river, and proceed to sea. It became the duty of the Servia only to proceed carefully on her course, keeping watch of the Noordland. No danger was apparent. The Servia's course was well clear of the Noordland, and of the course which the Servia had the right to believe the Noordland would promptly take. Mars. Mar. Coll. (Ed. 1880,) 233; The Ulster, 1 Marit. Law Cas. 234; The Scotia, 14 Wall. 170; The Free State, 91 U. S. 200; The Rhondda, L. R. 8 App. Cas. 549; The Jesmond and The Earl of Elgin, L. R. 4 P. C. 1.

The Servia stopped her engines when she had got near enough to see that the Noordland continued to make sternway, and when about 1,000 feet away from her, and immediately afterwards the Servia put her engines at full speed astern, and ported her helm. It then appeared to the Servia that the Noordland, in violation of the usage, and of her duty, was proposing to maintain her sternway so as to bring her across the path of the Servia, and that there was danger of collision. Then it became the duty of the Servia to take measures to avert a collision, which she did, as above stated.

The circuit court held that the Servia was not guilty of fault or negligence contributing to the collision. This is a proper conclusion from the findings of fact that she was *155 properly officered, manned, and equipped; that those in charge of her exercised proper vigilance in observing the Noordland; *that the Servia was well over towards the New York shore, leaving ample room for the movements of the Noordland; that the Servia was under slow speed; that she stopped her engines as soon as she saw that the Noordland was under sternway, although her engines had been stopped; and that the Servia put her engines at full speed astern as soon as she saw that such sternway of the Noordland was continuing so as to indicate danger of collision. The Servia, therefore, complied with all the requirements of the law.

The circuit court held, also, that the Noordland was in fault for backing nearer to the New York side of the river than was necessary or was prudent in view of the course and movements of the Servia; for not taking timely measures to stop her sternway after she had reached mid-river; and for failing to observe the movements of the Servia with due attention. This was a proper conclusion of law from the findings of fact, that it was the custom of the Noordland to back to mid-river in her maneuver of turning; that there were no vessels or obstructions in the river at the time to complicate her movements; that it was entirely unnecessary for her to back much, if any, beyond the middle of the river, in order to straighten upon her course; that when she reached mid-river she stopped her engines, and signaled that she intended to starboard her helm and go ahead; that she then waited two minutes longer before putting her engines at half speed ahead, and waited two minutes more before putting her engines at full speed ahead; that her speed astern, prior to the stopping of her engines, had been five or six knots an hour; that the two vessels struck when the Servia was 1,000 feet, or less, from the New York shore, and was making sternway; and that those in charge of the Noordland were inattentive in observing the Servia, and in observing the speed at which the Noordland was nearing the New York shore after she had reached mid-river, and were negligent in permitting the Noordland to back so near to the New York side.

This negligence on the part of the Noordland in observing the Servia, and in observing how the Noordland was encroaching on the course of the Servia, is a sufficient explanation of the collision which ensued. *156 The Genesee Chief, 12 How. 443, 463; The *Pennsylvania, 19 Wall. 125, 136; The *Sunnyside, 91 U. S. 208, 214; The Illinois, 103 U. S. 298, 299; The Nevada, 106 U. S. 154, 159, 1 Sup. Ct. Rep. 234.

The Noordland was in fault for not starting her engines ahead at once after stopping in mid-river. There was no necessity for her to back further across the river. It is found as a fact that after stopping her engines, and signaling that she would go ahead, she did not go ahead, but waited two minutes longer before putting her engines at half speed ahead, and two minutes more, and until after she had continued to encroach upon the Servia's course, before putting her engines at full speed ahead. That negligence was assigned by the district court as the cause of the collision, and the circuit court finds that the Noordland was in fault for not taking timely measures to stop her sternway after she had reached mid-river.

The exceptions on the part of the Noord-

land to the refusal of the circuit court to find the proposed conclusions of law are untenable, because those conclusions of law were based on the findings of fact proposed on the part of the Noordland, which the circuit court correctly refused to adopt. The court substantially found as requested by the first and second additional findings of fact proposed on the part of the Noordland. The Noordland was at no time before the collision on a definite course, as contemplated by the statute and rules of navigation, and on the facts found she cannot claim that she had the right of way, as against the Servia. The statutory steering and sailing rules before referred to have little application to a vessel backing out of a slip before taking her course, but the case is rather one of "special circumstances," under rule or article 24, requiring each vessel to watch, and be guided by, the movements of the other. A finding that the Servia had the Noordland on the starboard side, and that, therefore, the Noordland had the right of way, and the Servia was in fault for not keeping out of the way, would be immaterial, in view of the other facts affirmatively found. The Noordland was bound to conform to her usage in the river. She knew
*157 that usage, and the Servia also knew it. Only the inexcusable delay of the Noordland in observing her own *practice, which she indicated she intended to follow, brought about the collision.

The Servia maintained her position close to the New York shore. She proceeded slowly. She observed the Noordland closely. She stopped her engines when at a safe distance to enable the Noordland to check her own sternway, and she reversed her engines when the sternway of the Noordland indicated risk of collision. She was thwarted in her maneuvers by the faults committed by the Noordland. It was not incumbent upon the Servia to take any other precautions than she did, and she did nothing to bring on the risk of collision.

The other exceptions taken on the part of the Noordland are either immaterial, or have been sufficiently remarked upon.

Decree affirmed.

(149 U. S. 157)

NORTHERN PAC. R. CO. v. WHALEN et al.

(April 24, 1893.)

No. 156.

NUISANCE—INJUNCTION—CORPORATIONS — INTOXICATING LIQUORS.

1. Independently of statutory provisions, the only ground upon which a court of equity will enjoin the maintenance of a nuisance in a private suit by a corporation is special injury to the property of such corporation, and no corporation has such property in its workmen or in their services that it can, under the ordinary jurisdiction of the court of chancery, maintain a suit as for nuisance against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work. 17 Pac. Rep. 890, affirmed.

2. Under Code Wash. T. §§ 605, 606, defining a nuisance to be whatever is injurious to health, or indecent or offensive to the senses, or an obstacle to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property, and under sections 1235, 1242, providing that an action for damages may be brought and an injunction or abatement obtained "by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance," the only ground on which a corporation can obtain either damages or an injunction is injury to its property, since it cannot be said to have life or health or senses.

3. Code Wash. T. § 1247, relating to the abatement of nuisances which affect the public morals or the public peace, affords no countenance for a private action unless by the owner of property, the use or enjoyment of which is specially affected by the existence of such a nuisance in the immediate neighborhood of such property.

4. Code Wash. T. § 2059, providing that an employer or other person shall have a right of action against the seller of intoxicating liquor, or against the owner of the place where it is sold, to recover damages suffered by reason of sales to particular persons, creates a new liability unknown to common law, is to be strictly construed, and does not authorize an injunction to prevent the use of the building for future sales.

Appeal from the supreme court of the territory of Washington. Affirmed.

Statement by Mr. Justice GRAY:

This was an action, in the nature of a bill in equity to restrain a nuisance, commenced December 17, 1887, in a court of Kittitass county in the territory of Washington, by the Northern Pacific Railroad Company against the three county commissioners of that county, 21 persons constituting 10 partnerships, and 28 other persons, by a complaint alleging as follows:

*158 "That the plaintiff was a corporation created by an act of congress of July 2, 1864, to construct a railroad from Lake Superior to Puget Sound, and was constructing its railroad and a tunnel through and over the Cascade Mountains and at the village of Tunnel City, and had there 4,000 employes engaged in constructing its road, and such construction made it necessary to use high explosives, such as dynamite, and machinery run by electricity, steam, and compressed air, which required sober, skilled labor.

That the defendants, except the county commissioners, at and near Tunnel City, and along the line of the railroad so being constructed by the plaintiff, "for several months last past, have been running retail drinking and lager-beer saloons, and selling spirituous, malt, and fermented liquors to the said employes of said plaintiff; and that the said sales of said liquors to said employes have frequently and continuously caused drunkenness of said employes; and that the said drunkenness incapacitated the said employes so that they were not able to perform the labor assigned to them and the labor they were expected to do and for which they

were employed; and that the said drunkenness increased the risk and danger incident to the necessary use of said explosives and machinery, and increased the danger to the employes employed in constructing the road as aforesaid, and to the officers and agents of said plaintiff, and has caused and is causing many of said employes to quit their said employment on account thereof."

That "during the four months last past the said railroad company has employed and transported in and upon said work at and near Tunnel City, in Kittitass county, about eight thousand men, at an average expense of ten dollars for each man; that about four thousand of said men so employed, for the reasons aforesaid, quit and left the work of said plaintiff;" and that the plaintiff, by reason of such sales of liquors to its employes, had been prevented from obtaining and retaining enough employes to complete its road as far as Tacoma during the present year, and would be obliged to continue the work during the coming winter, at an increased expense of more than $100,000.

*That "said saloons have been so conducted, and drunkenness and gambling permitted and carried on to such an extent, that they, the said saloons, have been for months and are now public nuisances, and also a private nuisance in so far as the said plaintiff is concerned; that the superintendents, officers, and families thereof are seriously discommoded, discomfited, injured, and annoyed by said nuisance; and that said lives of the officers, agents, and employes have been endangered, and the said property of the said plaintiff has been diminished and injured in value, in consequence of said sales of liquors and drunkenness caused thereby; and that the said plaintiff, by said saloons, and the sale of intoxicating liquors therein to said employes, and said drunkenness and said gambling, has sustained great and irreparable injury."

That "said saloons and the said beer halls have been and are now running, and selling at retail said intoxicating liquors as aforesaid, to employes of the plaintiff and others, without a license, and without any right or authority so to do."

That "said saloons during the past have, and will in the future, unless enjoined, continuously and constantly continue to sell said intoxicating liquors to said employes, and constantly and continually permit said drunkenness and maintain said gambling houses and said public and said private nuisances, to the great injury, danger, discomfiture, and annoyance of the said plaintiff and the said plaintiff's employes and the said property of plaintiff."

That the saloons aforesaid were on unsurveyed lands, owned one half by the plaintiff and the other half by the United States, and were run and maintained under licenses issued by the county commissioners without right or authority; that the other defendants intended to apply, and were now fraudulently applying, to the county commissioners for licenses to sell intoxicating liquors at retail, without filing the consent of the owners of the lands, as required by law; that the county commissioners, knowing this, intended to grant such licenses; and that "the granting of said licenses will greatly complicate said matters, and injure and damage said plaintiff, and will deprive plaintiff to a great extent, if not absolutely, of any remedy against said defendants, and cause the plaintiff great and irreparable damage."

That the defendants were insolvent and unable to respond in damages; that the plaintiff had no adequate remedy at law; and that the granting of an injunction would avoid a great multiplicity of suits.

Wherefore the plaintiff prayed for an injunction to restrain the county commissioners from granting to the other defendants licenses to retail spirituous, malt, and fermented liquors, and to restrain the other defendants from selling such liquors at retail, and from running and maintaining the saloons and nuisances aforesaid, and for general relief.

The defendants demurred to the complaint, as not stating facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered for the defendant. The plaintiff appealed to the supreme court of the territory, which affirmed the judgment. 3 Wash. T. 452, 17 Pac. Rep. 890. The plaintiff thereupon, on March 7, 1889, appealed to this court.

James McNaught, A. H. Garland, and Heber J. May, for appellant.

*Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The Northern Pacific Railroad Company asks for an injunction against the county commissioners and the other defendants, because the latter, under pretended licenses from the former, keep and maintain gambling and drinking saloons at the village of Tunnel City, and along the line of the plaintiff's railroad, and there sell intoxicating liquors at retail to the plaintiff's employes, and thereby make them drunk and unfit to work under their several contracts with the plaintiff, and thus increase the danger to its agents and employes from the use of the machinery and explosives required in constructing its railroad, cause many of the employes to quit its employment, delay and increase the expense of constructing its railroad, seriously annoy its agents and their families, and consequently diminish the value of the plaintiff's property.

It is not alleged that the defendants have conspired or intend to injure the plaintiff's property or business, or to prevent the plaintiff's workmen from performing their

contracts of service. Nor is it alleged that any one of the saloons kept by the several defendants is a disorderly house, which, by reason of noises in or about it, or otherwise, is a nuisance to property in the neighborhood. The whole complaint is based upon the theory that by the general principles of equity jurisprudence, and by the provisions of the Code of Washington Territory, the saloons kept by the defendants severally are, by reason of the sales of intoxicating liquors therein to the plaintiff's workmen, and their consequent drunkenness and incapacity to work, public nuisances, and cause special damage to the plaintiff, to prevent the repetition and continuance of which it is entitled to an injunction.

But the usual, and at the suit of a corporation the only, ground on which, independently of express statute, a court of equity will grant an injunction in a private action for a nuisance is special injury to the plaintiff's property. 3 Bl. Comm. 216; Robinson v. Kilvert, 41 Ch. Div. 88; Georgetown v. Alexandria Canal Co., 12 Pet. 91, 99. No employer has such a property in his workmen or in their services that he can, under the ordinary jurisdiction of a court of chancery, maintain a suit, as for a nuisance, against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work.

Nor is there anything in the provisions of the Code of the territory, cited in behalf of the plaintiff, which enlarges the equitable jurisdiction in this respect.

By that Code, a nuisance, other than the obstruction of a highway, or of navigable or running waters, is defined to be "whatever is injurious to health, or indecent or offensive to the senses, or an obstacle to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property;" and again, "unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures, or endangers the comfort, repose, health, or safety of others, offends decency, or in any way renders other persons insecure in life or in the use of property;" "the remedies against a public nuisance are indictment or civil action or abatement;" and an action for damages may be brought, and an injunction or abatement obtained, "by any person whose property is injuriously affected, or whose personal enjoyment is lessened, by the nuisance." Sections 605, 606, 1235, 1242. As a corporation cannot be said to have life or health or senses, the only ground on which it can obtain either damages or an injunction, under these provisions, is injury to its property.

The Code further provides, in section 1247, that all houses of ill fame; "all public houses or places of resort where gambling is carried on or permitted; all houses or places within any city, town, or village, or upon any public road or highway, where drinking, gambling, fighting, or breaches of the peace are carried on or permitted;" and all opium dens,—are nuisances, and may be abated, and the owners or keepers thereof punished. This section is aimed at nuisances which affect the public morals or the public peace, and affords no countenance for a private action, unless by an owner of property, the use or enjoyment of which is specially affected by the existence of such a nuisance in its immediate neighborhood. U. S. v. Columbus, 5 Cranch, C. C. 304; Meyer v. State, 41 N. J. Law, 6; Hamilton v. Whitridge, 11 Md. 128; Inchbald v. Robinson, L. R. 4 Ch. App. 388.

The Code of Washington Territory contains no enactment, such as exists in some states, declaring all houses or tenements kept for the unlawful sale of intoxicating liquors to be common nuisances, and conferring jurisdiction in equity to restrain them by injunction, at the suit of the district attorney or of a private citizen.

The plaintiff relies on section 2059, which provides that "any husband, wife, child, parent, guardian, employe[r?], or other person, who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person," as well as against the owner of the building or premises in which the liquors are sold, if he has leased it with knowledge that such liquors are to be there sold, or has knowingly permitted their sale therein. But this section, creating a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms; and as the only remedy which it gives is an action against the seller of the liquor, or against the owner of the place where it is sold, to recover damages suffered by reason of sales to particular persons, it cannot be construed as authorizing an injunction to prevent the use of the building for future sales.

The complaint in this case has no foundation, in common law or statute, in principle or precedent. Judgment affirmed.

(149 U. S. 95)

THOMAS et al. v. WESTERN CAR CO.

(April 24, 1893.)

No. 190.

RECEIVERS—RAILROAD MORTGAGES—FORECLOSURE—PRIORITIES—OPERATING EXPENSES—INTEREST.

1. In proceedings to foreclose a railroad mortgage it is error to decree priority over the mortgage debt to a claim for rental of cars, accruing during the six months preceding the appointment of a receiver in the foreclosure proceedings; especially where the car company had expressly reserved the right to terminate

the lease upon the railroad's failure to pay promptly the interest on its bonds and other liabilities, and the officers of the car company were also officers of the railroad company, and were hence chargeable with notice of the financial condition of the latter. 36 Fed. Rep. 808, reversed.

2. It is within the discretion of the court, however, to decree such priority to a claim for rental accruing during the receivership until the surrender of the cars. 36 Fed. Rep. 808, affirmed.

3. Certain cars were, by agreement between the receiver and the car company, stored on the side tracks of the railroad pending a replevin suit wherein title to them was involved, the receiver being granted the right to use them for local traffic. Thereafter the receiver made, on the contract by which other cars were leased to him, an indorsement showing an agreement to hold the replevied cars on the same terms, and pay the same rental therefor. He testified that this new agreement was never consummated, but that it was understood that it was not to take effect until the replevin suit was determined, and he had applied to the court for leave to make such a contract. Upon this point there was a conflict in the evidence, but it was shown that he used the cars before either of these events occurred. *Held*, that the claim for rent of these cars was properly allowed in priority to that of the mortgages. 36 Fed. Rep. 808, affirmed.

4. The car company is also entitled to allowances of the amount expended by it in putting the cars in good running order after they were surrendered to it, the receiver having contracted to do so, and failed to do it; but it cannot claim the cost of practically rebuilding such cars, especially where they were shown not to have been in good running order when delivered to the receiver. 36 Fed. Rep. 808, modified.

5. The car company is not entitled to interest on such allowances during the period that they were in litigation, as the mortgagees are not to be subjected to a penalty for resisting claims which the court finally reduces or disallows.

Appeal from the circuit court of the United States for the northern district of Illinois.

This case arose on the intervening petition of the Western Car Company in the suit of Veeder G. Thomas and others against the Peoria & Rock Island Railway Company for the foreclosure of a mortgage. The petition was granted in part, and denied in part, (36 Fed. Rep. 808,) and the complainants appeal. Affirmed in part, and reversed in part.

Statement by Mr. Justice SHIRAS:

This is an appeal from the decree of the circuit court of the United States for the northern district of Illinois, in a proceeding to foreclose a mortgage executed by the Peoria & Rock Island Railway Company to secure its first mortgage bonds to the amount of $1,500,000.

The original bill was filed in October, 1874, by Veeder G. Thomas, Daniel R. Thomas, and Thomas B. Simpson, citizens of the state of New Jersey, as holders of certain mortgage bonds, and on behalf of all of the holders of such bonds. Among others, it made the trustee in the mortgage given to secure the bonds, and William R. Hamilton, Benjamin E. Smith, and William Dennison, defendants, and, beside setting forth the default in the covenants of the mortgage, charged, among other things, that these mortgage bonds were issued, as it was represented, for the purpose of constructing and equipping the said railroad, and that they were placed upon the market for general sale by the firm of Turner Bros., bankers, of the city of New York, who assumed and represented themselves to be the financial agents for the railway company, and, as such agents, represented by pamphlets, statements, and otherwise that the road of the said railway company was a completed road, built by subscriptions to its capital stock; that the capital stock, amounting to $2,000,000, had all been paid in; that the said road was open, and being operated successfully; and, finally, that the said bonds were offered for sale by the said company for the purpose of placing upon the road the equipment necessary for the business offered, and to construct cars, engines, depots, and machine houses, such as were required by the business of the company.

The bill charges that the complainants purchased, and became the holders of, their bonds in reliance upon these representations, and that the entire issue of bonds were sold by Turner Bros. under like representations; that these representations were in fact false and fraudulent; and that the officers of the railway company and the defendants Smith, Dennison, and Hamilton directed and authorized them to be made, knowing them to be false. It is charged that in June, 1870, while Hamilton was president of the railway company, a contract was made with Smith and his associates for the construction of the railroad, and that Dennison was one of the associates of Smith in this contract; that, by the terms of the contract, Smith and his associates agreed to iron, depot, and moderately equip with rolling stock the railway, and the railway company was to deliver to him, for himself and associates, $1,250,000 of the capital stock of the company, and the entire $1,500,000 of the first mortgage bonds; that the $1,250,000 of the capital stock was, immediately upon the making of the contract, issued and delivered to Smith for himself and his associates, being a large majority of all of the capital stock of the company, and that Smith and Dennison and their associates thereby obtained absolute control of the management of the railway company, and caused such officers and directors to be elected as were friendly to their schemes and in their control; that the road was insufficiently constructed and insufficiently equipped on the part of Smith and his associates; that, desiring to sell the bonds, and having control of the management of the company, Smith and his associates fraudulently caused the bonds to be offered for sale through Turner Bros. as the financial agents of the railway company, and as for its benefit, upon the said representations, and that in fact the bonds were not put upon the market and sold for

the benefit of the railway company, and it was not intended or expected to use the proceeds thereof for the purpose of placing the necessary equipment upon the road, as was represented, but, on the contrary, the entire proceeds of the bonds were received by and divided among Smith and his associates; and that the railway company has never had any other or greater equipment of rolling stock than that furnished by Smith under his construction contract before the sale of the bonds.

The bill charges, further, that in 1871, owning and controlling the capital stock of the railway company, Smith and his associates caused Smith, Dennison, and Hamilton, and others in their interest, to be elected directors, Hamilton to be elected president, and Smith to be elected vice president, of the railway company, and that as such they continued to control the affairs of the railway company down to the time of the filing of the bill.

Among other charges of fraud in the bill it is charged that Smith, Dennison, and others of the directors of the railway company had caused the railway company to hire cars from the Western Car Company at an exorbitant rate, and that these contracts for the use of cars were made and continued by reason of the control of Smith and his associates over the affairs of the railway company.

The bill sought a foreclosure of the mortgage, and prayed for the appointment of a receiver.

On the 23d of January, 1875, an order was entered appointing John R. Hilliard receiver of the Peoria & Rock Island Railway Company and its property, and on the 1st of February, 1875, Hilliard, as receiver, went into possession and into the operation of the said railway. Hilliard remained in control and operated the railroad until after its sale, in 1877, and until possession was delivered by him, under the order of court, to the purchasers, who had become organized as the Rock Island & Peoria Railroad Company, and who have ever since operated this railroad.

A decree of foreclosure was rendered on the 11th day of January, 1877. It directed a sale to be made by the master in chancery of the franchises and property of the railway company. It contained directions as to the application of the proceeds of the sale, ordering, among other things, that, after payment of specific sums provided for, the balance should be paid to the clerk of the court, who should apply the same, under the direction of the court, first, to the payment of all remaining claims of intervening creditors, as they should be allowed by the court, and next to the payment of the bonds and coupons secured by the mortgage which should be outstanding and unpaid. It authorized the master to receive from the purchaser or purchasers, after payment of the sum of $100,000 of the amount of his bid, for the balance of the sum bid, in lieu of cash, outstanding and unpaid bonds and coupons at such percentage as the court should direct on the approval of the sale; and it authorized the purchaser or purchasers of the property and franchises of the railway company to reorganize under and by virtue of the provisions of the charter of the said railway company, and to be invested with all the rights, franchises, privileges, and powers of the said railway company.

On September 17, 1877, an order was entered approving the master's report of sale, and ordering that the sale made to Ransom R. Cable for $550,000 be confirmed. The purchaser, Cable, was directed by this order to deposit all such bonds and coupons as he should desire to pay in on account of the purchase with the clerk of the court. The court also ordered that all petitioners for allowance of intervening claims complete their proofs of such claims by the 1st of October, 1877.

On the 14th of December, 1877, an order was entered by the court approving the report of the master, showing the execution of a deed by him of the property under the foreclosure decree to the Rock Island & Peoria Railway Company, in pursuance of an order entered on the 11th of December, 1877, and approving the deed, a copy of which is set forth in the order. This order also approved penal bonds in the sum of $100,000 each, payable to the clerk of the court, for the use of whosoever should become interested, one of such bonds being expressly conditioned for the payment to the Western Car Company of any amount which should be found due to it, reciting the intervention of that company, and the claims asserted by it against the proceeds of the sale of the property of the railway company.

The original intervening petition of the Western Car Company in this cause was filed on the 11th of December, 1876. It asserted that at the time of the appointment of the receiver the railway company was indebted to the car company in the sum of $35,106.49, and interest thereon, for car rentals under contracts made between the railway company and the car company. It also claimed the sum of $1,500 under the terms of these car contracts for the value of two box cars destroyed by the railway company, and not replaced. It claimed that the furnishing of cars to the railway company under these contracts was in the nature of supplies furnished to it, by means whereof the company had been enabled to transact its business, and prayed that the receiver might be ordered to pay his indebtedness to the petitioner out of any moneys in his hands, or income received from the business of the railway company.

To this original petition were attached statements of account, as exhibits, showing the amount claimed by the car company

against the railway company prior to the appointment of the receiver, and also copies of two contracts between the car company and the railway company,—one bearing date March 5, 1872, for the leasing of 70 box cars and 20 stock cars; the other bearing date October 1, 1873, for the leasing of 150 box cars.

To this original petition, answers were filed by both the complainants in the original cause and the receiver. The answer of the complainants in the original cause charged that these contracts were fraudulent and void, for the reason that, at the time when they were made, Benjamin E. Smith was the owner of a large amount of the stock of the car company, and its president, and in control of its operations, and Hamilton was the owner of a considerable portion of its stock, and the remainder of its stock was owned and controlled by the associates of Smith and Hamilton; that at the same time Smith was the vice president of the railway company, and the owner and holder of a great portion of its stock, and controlling its operations through the officers and agents whom he named and appointed, and Hamilton was the president of the railway company; and that Smith, Hamilton, and their associates owned and controlled the majority of its capital stock, and with their associates combined to defraud the owners and holders of the first mortgage bonds, and made these contracts for leasing cars for that purpose. The answer further charges that the rental reserved by these contracts was exorbitant, and that the fair rental for the cars in question did not exceed the sum of $10 per month per car, whereas the contracts reserved a rental of $20 per month per car; and that the car company received from the railway company moneys to the amount of more than $76,000.

The answer of the receiver stated that the books of the railway company showed credits to the car company for rental of cars to the amount of $115,686.70, and payments made to the car company prior to his appointment, amounting to $76,031.70, and that since his appointment he had paid over to the car company, under the order of court, $6,237.01. It alleged that the two cars were destroyed in the possession of the railway company more than six months prior to his appointment, and charged that the rental reserved by the contracts were extortionate, and that the cars were not worth to the railway company, and could not be made worth, more than from $7 to $10 per month per car. The receiver also stated that he had not as receiver used these cars under the said contracts, or in any wise adopted, recognized, or confirmed the contracts.

Both answers,—that of the complainants to the original bill and of the receiver,—denied that the rental of the cars was in the nature of supplies, or that the car company should have precedence or priority awarded to it over the bondholders.

On March 14, 1877, the car company filed its amended petition. In this it represented that, when Hilliard was appointed receiver, the railway company was in possession of 240 cars belonging to the car company under the two contracts; that on June 11, 1875, the former contracts were modified and changed by another contract made between it and the receiver, by which it rented to the receiver 138 of these cars, and that an additional clause was appended to that contract renting to the receiver 56 other cars. The amended petition set out verbatim this contract with the receiver and the additional clause appended to it, and charged that the receiver continued in possession and use of the 138 cars and the 56 cars, and claimed that there was due from the receiver to the car company for the rental of these cars $15,281.34, with interest.

It also claimed that the rental due for the use of its cars by the receiver was in the nature of a current operating expense, and a lien on the road and its property superior to that of the mortgage, and prayed that, in case the fund in the hands of the receiver should not be sufficient to pay these claims, the payment thereof might be enforced as a first lien on the road and property of the railway company, and paid out of the proceeds of any sale thereof.

To this amended petition were attached statements of rentals charged to be due to the car company from the receiver.

On May 26, 1877, an order was entered, directing the amendment to the petition of the car company, filed March 14, 1877, to be stricken out as an amendment to the petition theretofore filed, and ordering that it stand as a petition against the receiver, and giving the car company leave to file a supplemental petition.

This supplemental petition was filed May 26, 1877. It averred, as supplementary matter, that the receiver had notified the car company that he would not keep the 138 cars in service after May 1st, and that he had returned 88 of said cars, and proposed returning the remaining 50; that the receiver had neglected to keep the cars in repair, as provided in the contract, and had returned them in bad order and out of repair; and that the car company had been obliged to put them in the shops for repairs, and had thereby sustained large damages.

That as to the 56 cars, and to the rental due on them, the receiver had notified the car company that he did not, and would not, recognize any liability to it for the use or rental of the 56 cars.

On the 27th of June, 1877, the receiver filed his answer to the amended petition of the car company, in which he stated that when he took possession, as receiver, of the property of the railway company, only 135 of the 138 cars came into his possession. That during the months of February and March, 1875, he used the 135 cars, and paid

the car company $12 per month per car. That about April, 1875, he obtained leave from the court to rent these cars at a rate not to exceed $10 per month per car, and executed the agreement dated June 11, 1875, a copy of which is set out in the amended petition of the car company.

That in April, 1877, he became satisfied that the cars so rented could not be used to advantage at the rental of $10 per month, and notified the car company that he should return them on May 1, 1877, and that he did return them, from time to time, as collected.

That when he received these cars into his possession as receiver they were in poor condition and out of repair, and he was obliged to, and did, make large and extensive repairs on them, and that he kept them *105 and returned them in better *repair than when he received them, and that they were in good repair for use on said road.

As to the 56 cars, the receiver stated that he did not receive these cars from the car company, and did not agree with the car company to pay it any rental for them, and never executed and delivered to the car company the alleged writing in reference to the same; that Mr. Ingersoll, who was his attorney and the attorney of the car company, brought a replevin suit in the United States circuit court for the northern district of Illinois against the Chicago & Northwestern Railway Company, and under the replevin writ in that suit caused the 56 cars to be seized, he and one Whiting giving the bond necessary for the obtaining of the writ, and, in order that the bondsmen might have security to indemnify themselves upon their bond, they kept these cars in their possession, and obtained leave from the receiver to store them on the side tracks held by him as receiver; that it was afterwards agreed between Ingersoll and the receiver that, when the receiver should have occasion to use more cars than he then had as receiver, he might use these 56 cars, paying the usual mileage rate of one cent per mile run, when the replevin suit should be determined, but that the cars should only be used for the local business of the receiver's road, and should not be allowed to run or go off from that road. The answer further stated that he had used the cars to some extent under his agreement, and was ready to account for such use when the replevin suit should be determined, and to surrender the cars at that time.

The answer further stated that in 1875 the general agent of the car company was in Peoria, and that Ingersoll and this general agent then expected the replevin suit to be decided before the December following; and this agent desired, if this was done, to make some arrangement for renting these 56 cars without being required to return them again to Peoria; and the copy of the contract of June 11, 1875, belonging to the receiver, being then in the possession of Ingersoll, as the receiver's attorney, Ingersoll indorsed upon it the additional clause or memorandum, a copy of which the car company had set out in its amended petition, and the receiver signed this as a *memorandum, but* it was never given to or delivered to the car company or any one for it, and never passed out of the control of the receiver; and that the receiver had, and claimed to have, no power or authority or intention to make any contract for the rental of the said cars, and instructed his attorney not to allow this memorandum to go out of his possession, or to make any contract in relation thereto, even if the replevin suit should be decided, unless the court should first authorize the making of such contract as to the said 56 cars. And the receiver averred that the replevin suit had never been decided; that he had never had the full use of the cars; and denied that he owed any rental thereon; and stated that he had never applied for leave of court to make any contract for the rental of the 56 cars, because the circumstances under which such contract was to be made had never arisen.

On July 3, 1877, the complainants in the original cause filed an amended answer to the petition of the car company, in which the car company asserted and asked for payment of the balance due for rentals prior to the appointment of the receiver. This amended answer sets out more strongly the alleged fraudulent character of these car contracts between the car company and the railway company.

It shows the construction contract on June 1, 1870, made by the railway company with Benjamin E. Smith and his associates; that Smith was the president of the car company, and Dennison and others were associates of Smith in the construction contract, and in the car partnership and company; that Smith and his associates received from the railway company 12,000 shares of its stock, which constituted a large majority of the entire stock, and also received all of the first mortgage bonds of the company; that they caused these bonds to be advertised for sale, and procured their sale by means of false representations, representing, among other things, that the bonds were sold by the railway company for the purpose of placing the necessary equipment upon its road, and that complainants purchased their bonds relying upon these false representations; and they charged that in fact the bonds were not held by the railway company, nor were the proceeds thereof *used* in furnishing the equipment for its road, but were used for the private benefit of Smith and his associates.

This amended answer further shows that about January 1, 1872, Smith and his associates united themselves together in a partnership known as the "Western Car Company," and that Hamilton, who was then the president of the railway company, and

Charles W. Smith, who had been appointed by Benjamin E. Smith the general manager of the railway company, also became partners in this car partnership, and that the partnership furnished the cars to the railway company, and made these contracts with it, under these circumstances; that afterwards Smith and his associates and other partners in the Western Car Company organized themselves into a corporation under the laws of Delaware, but that this corporation was but a continuation of the partnership bearing the same name, and was controlled, governed, and directed by Smith and his associates.

That during 1872, and until the 1st of February, 1875, Smith and his associates controlled and dictated all the contracts and business operations of the railway company; that Hamilton, its president, Benjamin E. Smith, its vice president, and all of its directors were chosen and appointed by Smith and his associates; that the contracts made and dictated by them were fraudulent and void in equity; and that the amount agreed by these contracts to be paid as rental was grossly excessive.

They claimed, further, that the railway company had paid to the car company for the use of its cars more than their use was worth, and that the car company should be precluded from claiming any sum whatsoever as due for rental, and was estopped from claiming to own the cars.

On October 16, 1877, which was after the time fixed by the court for closing proofs in all intervening claims, the car company filed a further amendment to each of its intervening petitions. Its original petition it amended by praying that whatsoever sum should be found due to it might be paid out of the proceeds of the sale of the road. It also alleged that the reasonable rental for all the cars named in each of its petitions, irrespective of any contract price, was, up to the end of July, 1874, $20 per month per car, and from that time to the appointment of the receiver $15 per month per car, and from that time on at least such amount as is named in the contract between it and the receiver.

Its petition against the receiver it amended by charging that at the time of the appointment of the receiver, and of his entry into the possession of the railway, he took possession of 100 cars which had been rented by it to the railway company, and which were known as "White Line cars;" that the receiver held these cars for some months, and returned them some time in March or April, 1875, in bad condition and out of repair; and that the petitioner, upon receiving them, was obliged to expend moneys in their repair.

It also charged, as to the 56 cars, that the replevin suit concerning them had been decided by the court in favor of the car company; that since the receiver was appointed he had held, and claimed the right to hold, these cars pending the replevin suit, and refused to pay rent for them; and it claimed rental due for their use, amounting to $13,000. It also claimed that these 56 cars were badly out of repair, and so damaged for want of ordinary necessary repairs that it would cost the car company $9,500 to put them in good repair.

Afterwards, and on October 31, 1877, it filed a petition praying for an order directing the receiver to return the 56 cars, and on this petition the receiver was ordered to surrender and deliver these cars to the car company.

On these issues a large quantity of evidence was offered before the master by both parties.

The respondents claimed that the only amounts that were in equity due to the petitioner, and should be allowed to it from the fund in court, were the balance of rentals due from the receiver on the 134 cars, $8,789.86; the mileage earned by the 56 cars, $3,496.78; and the value of 1 car lost and not returned by the receiver, $450,—making a total of $12,736.64.

The master's report in this intervening cause, filed June 22, 1885, found, as to the amount claimed as due from the railway company prior to the receivership, that the question as to whether the contracts were fraudulent and void was "unimportant," in view of "the practice of the court, in cases of this character, to allow against the fund or the receiver claims of this kind established by the testimony as reasonable and just, which have accrued during the period of six months prior to the appointment of the receiver, and during the receivership, independent of any contracts which may have previously existed, unless such contracts have been recognized and adopted by the court;" and that for the period of six months prior to the receivership there was due the car company a balance of $2,062.99. The master disallowed claims as to lost cars and repairs on White Line cars.

As to the claims against the receiver, the master found the car company entitled to the balance remaining unpaid of the rental of the 135 cars, at the rate which the receiver had agreed to pay, amounting to $8,807.97. He also found under protest the car company entitled to the sum of $14,046.55, paid out for repairing these cars after their return by the receiver. As to this allowance for repairs, the report says: "I have found it difficult to deal with this branch of the case for the reason that, while it appears that the bills which have been presented for these repairs were actually paid by the petitioner, it is also evident in many instances these repairs were extravagantly conducted, and that in many respects they were rendered necessary by their condition before they came into the hands of the receiver, and there is much testimony in the case showing this to have been the fact. It is also appar-

ent from the testimony that in many cases cars were practically rebuilt and renewed. Upon a very careful examination of all the testimony bearing on this branch of the petitioner's claim, I find it impossible to separate items of this account in such a way as to equitably charge this respondent with such portion of the repairs as he should be called upon to pay upon the basis of the claim of the petitioner, although in my estimation the effect of the testimony is to show that a credit at least to some extent of the amount charged by the petitioner upon this item should be applied to the reduction of this claim."

*The master allowed the petitioner mileage on the 56 cars up to December 1, 1875, and a rental of $10 per car per month from then until they were surrendered, although, as he says, "perhaps it [a contract as to these cars] was not finally consummated or delivered." He also allowed $5,650, the full amount claimed as expended in repairing these latter cars, though he finds that they came into the receiver's possession in bad condition, for the same reason which he had given as to the claim for repairs to the 138 cars, that he was unable to make an equitable distribution of this. The master disallowed all claims for interest, and found the total amount of $43,816.69 due to the car company.

To this report exceptions were taken by the car company, the complainants in the original bill, and the receiver, which were argued before Mr. Justice Harlan in June, 1887, and on August 29, 1888, his opinion in this intervening cause was filed. 36 Fed. Rep. 808.

In this opinion the contracts between the car company and the railway company are held to be fraudulent and void as to the railway company; but the court holds that, nevertheless, the car company is entitled to be reasonably compensated for the use of its cars, without reference, however, to the contracts.

As to what would be a reasonable compensation, the court holds that "a fair compensation for the use of these * * * would be such amount as similar cars to be used in the same manner, and upon similar roads, would commonly rent for in the open market."

The court then states the general principles which have been established by the decisions of this court as to charging the income of the receivership with the payment of certain classes of liabilities of the railroad company incurred prior to the receivership, and their payment from the proceeds of the sale of the railroad prior to the mortgage indebtedness. It holds that the six-months rule, which is the general rule in the seventh circuit, should govern, and finds the car company entitled to $8,162.99, as the balance due to it for the use of the cars during the six months prior to the receivership, thus increasing by $6,100 the allowance made by the master on this branch of the case.

As to the claims against the receivership, the court found that the receiver was chargeable with the rental of 138 cars, instead of 135, as found by the master, amounting to $9,667, and with the $14,046.55 paid by the car company for repairs on these cars. The court also allowed the car company the rentals claimed for the 56 replevied cars, $12,857.32, though, as the opinion states, "with great difficulty." It also allowed the $5,650.32 claimed for repairs of the replevied cars. The total amount found due to the car company was $50,775.52, and interest at 6 per cent. was allowed on this sum from June 22, 1885, the date of the filing of the master's report.

On October 9, 1888, the final decree was entered, from which the complainants in the original foreclosure suit prayed, and were allowed, an appeal.

After the entry of the decree, Ransom R. Cable filed a petition, praying that the decree might be opened, and that he might be made a party defendant thereto and to the intervening cause, for the purpose of prosecuting an appeal therefrom, or be allowed to prosecute an appeal from said decree in the names of the complainants in the original cause. This petition represented that a decree directing the sale of the railroad property and franchises was rendered January 11, 1877, and that at this sale under this decree the petitioner had become the purchaser, and the sale to him had been confirmed, and he had been ordered to pay into court on his bid all of the first mortgage bonds held by him, and had deposited under this order 1,395 of the entire 1,500 first mortgage bonds of said company. On December 1, 1888, it was ordered that leave be granted Cable to prosecute the appeal in the name of the complainants to the original cause, and that this appeal should become a supersedeas on his filing an appeal bond in the sum of $80,000. The bond was therefore filed, and thereafter the record on this appeal was brought to this court.

C. M. Osborn and S. A. Lynde, for appellants. John M. Butler and H. B. Hopkins, for appellee.

*Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The questions presented by this record for our determination arise out of objections by the appellants to allowances made by the court below in favor of the Western Car Company, the appellee, and which company was permitted to intervene in the foreclosure proceedings brought by the appellants against the Peoria & Rock Island Railway Company.

The first contested question is as to the pro-

priety of the allowance of the sum of $8,162.99 for the use of cars of the Western Car Company for a period of six months prior to the receivership.

It cannot be said that in no case can indebtedness for necessary supplies, which accrued before the appointment of a receiver, be allowed priority to the mortgage bonds. It was held in Miltenberger v. Railroad Co., 106 U. S. 286, 311, 1 Sup. Ct. Rep. 140, that "many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the corpus of the property." It is, however, added that "the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, when a stoppage of the continuance of such business relations would be a probable result in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

This subject received further consideration by this court in the case of Kneeland v. Trust Co., 136 U. S. 89, 97, 10 Sup. Ct. Rep. 950, and where it was said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company when property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced." And, accordingly, all claims for rental of cars prior to the appointment of the receiver were disallowed.

Tested by the principles asserted in these cases, the claim for car rental that had accrued prior to the receivership cannot be maintained, but should have been disallowed.

The case of a corporation for the manufacture and sale of cars, dealing with a railroad company, whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employes, or of those who furnish, from day to day, supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity.

In the present case it appears, in the contract between the car company and the railroad company, that the former reserved the express right to terminate the contract and demand possession of the cars forthwith upon any failure by the railroad company to promptly pay the interest or the principal of any of its bonds or other liabilities. Such a provision shows that the car company was aware of the existence of the outstanding bonds, and protected itself by other methods than relying upon the possible order of a court which might appoint a receiver. Moreover, it appears in this case that the principal officers of the car company were in control of the railroad company and its operations, and must be treated as having full notice of the financial condition of the railroad company, and as having leased the cars to it in reliance upon its general credit, rather than in expectation of displacing the priority of the mortgage liens.

The item of $9,667, allowed for a balance of rental of cars that accrued during the receivership from February 1, 1875, to the sur-

render of the cars, appears to us to come fairly within the doctrine of this court as a proper allowance.

The next contested claim is for $12,857.32, allowed by the court below for rental of the 56 cars which had been replevied by the Western Car Company from the Chicago & Northwestern Railroad Company, and placed in the control of the receiver of the Peoria & Rock Island Railway Company.

*113 *It is contended by the appellants that these cars were not necessary for the use of the receiver, and were put in his custody as a matter of convenience for the car company, and that, at any rate, the amount charged for their use, and allowed by the court below, was excessive. They claim that a mileage charge for the actual use of the cars would be an equitable allowance. The evidence upon this branch of the case is conflicting and confusing. The learned judge of the court below, in his opinion, says: "Looking at all the circumstances, I am of opinion that the indorsement of the receiver on the agreement of June 11, 1875, signed by him, that the 56 cars delivered to him, 'being the cars replevied from the Chicago and Northwestern Railroad Company,' shall be retained by him 'upon the same terms set forth' in the above agreement, 'commencing on the first day of December, 1875,' should turn the scale; and as the terms of the agreement of June 11, 1875, were not unreasonable, and as the indorsement was one which the receiver might reasonably have made in the interest of a fair administration of the property in his hands, I approve the finding of $12,857.32 as the rental of the replevied cars while they were under the control of the receiver."

Our conclusion, reached with some difficulty, and after a careful consideration of the evidence, is to accept the views of the court below, and to allow this claim.

The next matters of contention are the allowances made by the court below on account of repairs of the rented cars, being $14,046.55 for repairs on the 138 cars rented under the agreement of June 11, 1875, and $5,650.32 for repairs on the 56 replevied cars.

It should be observed that the sums so allowed were not for repairs made by the receiver, but for moneys expended by the car company in rebuilding and repairing the cars after they were surrendered to the car company by the receiver. By the contract between the receiver and the car company it was provided that the former should keep the cars in good repair for use on the road. Hilliard, the receiver, testified that the condition of the cars, when he was appointed, *114 was very poor, and in this he was corroborated by other witnesses. He also states that when they were delivered up to the car company they were in as good condition as, and better than, when he received them. Mozier and Doyle, who were familiar with their condition when the receiver took possession of them, and who had made repairs on them while the receiver used them, testified that the condition of the cars was better when delivered up than when they came into the hands of the receiver.

There is, however, testimony on behalf of the car company to the contrary. Our consideration of the conflicting evidence brings us to the conclusion that the car company is entitled to an allowance on account of repairs, but not to the amount awarded by the court below. The master reported on this subject as follows: "I have found it difficult to deal with this branch of the case, for the reason that while it appears that the bills which have been presented for these repairs were actually paid by the petitioner, it is also evident that in many instances these repairs were extravagantly conducted, and that in many respects they were rendered necessary by their condition before they came into the hands of the receiver. It is also apparent from the testimony that in many cases cars were practically rebuilt and renewed." And in respect to the 56 replevied cars he says: "It is apparent from the testimony that these cars were received in bad condition, after having been used for two or three years by the railroad, from which they appear to have been taken by the receiver, partly, at least, upon the suggestion and for the accommodation of the petitioner."

He further reported that he found it impossible, from the testimony, to determine to what extent the respondent was liable for the payment of this charge, and that he was unable to make what might finally be regarded as an equitable distribution of this liability, and was therefore obliged to charge the respondent with the full amount of the payments shown to have been made on this account. If, indeed, it was impossible, under the evidence, for the master to discriminate between what was expended to put the cars into running order for use, as stipulated for in the contract, and the amount expended in rebuilding the cars, it may be that the proper conclusion would have been to disallow the claims altogether. However, we are not disposed either to allow the claims for repairs in full, or to refuse wholly to regard them. We agree with the court below in thinking that the contract bound the receiver to keep the cars in good running order, and, if he did not do so, to be charged with what was reasonably expended by the car company on that behalf after they were surrendered. Our examination of the evidence leads us to the conclusion that some allowance is properly chargeable against the receivership on this account.

In fixing the amount of such allowance we do not find ourselves wholly left to conjecture. Theodore Mozier, the master re-

chanic of the Peoria & Rock Island Railroad Company, certified that he made an inspection of 138 of these cars at the time they were surrendered to the car company by the receiver, and he estimated that the sum of $994.20 would suffice to put them in fair running order. James Doyle, who was for some years in the employ of the Peoria & Rock Island Railway Company, and afterwards in that of the receiver, in the car shops, assisted Mozier in inspecting these cars. He states that, in his opinion, the cars were in poor condition when they came into the hands of the receiver, and were in better condition when surrendered by him. He gave a detailed statement of repairs put upon these cars while in possession of the receiver, amounting to $1,440. The testimony on the part of the car company consists chiefly of evidence of the amounts actually paid for repairs and reconstruction of the cars after they were surrendered; but it fails—indeed, does not pretend to try—to show how much of such payments was due to the original condition of the cars, and how much to the wear and tear while in the hands of the receiver.

It is affirmatively found by the master that in many instances the repairs were extravagantly conducted, that in many cases the cars were practically rebuilt and renewed, and that in many respects the repairs were rendered necessary by their condition before they came into the hands of the receiver.

"We think it is clear that the object and scope of the repairs put upon the cars were not merely to put them in running order, but to renew them, so as to put them in a condition acceptable to a new lessee. The expenditure for such repairs is shown to have been about $100 per car; and it was testified by General Huidekoper, a witness on behalf of the car company, and a person of large experience in such matters, that the cost of a general overhauling and rebuilding of cars is from $50 to $80; and that $36 a year for ordinary repairs, and $80 every two years for general repairs, would keep the cars in good order.

Assuming, then, that the proportion of the amount shown to have been expended in the renewal of these cars was $80 per car, and the rest in ordinary repairs of the kind contemplated by the contract, and deducting from the claims as made for the entire number of the cars, to wit, $19,695, the estimated cost of reconstruction, as certified to by Huidekoper, $13,920, there remains the sum of $5,775, representing ordinary repairs, and to that extent we approve the decree of the court below in allowing for repairs.

The final matter of contention is the allowance of interest. We think the court below was plainly right in rejecting the car company's claim for interest based upon the statute of Illinois, prescribing interest at the rate of 6 per cent. per annum for moneys after they become due on "any bond, bill, promissory note, or other instrument of writing." But the learned judge was of opinion that some allowance of interest should be made, because of what he deems to have been a vexatious and unreasonable delay in the payment of what was justly due the car company. As against this view of the case it is urged that the delay was occasioned by resisting demands made by the car company, which the result of the litigation shows were excessive, if not extortionate.

We cannot agree that a penalty in the name of interest should be inflicted upon the owners of the mortgage lien for resisting claims which we have disallowed. As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate. Williams v. Bank, 4 Metc. (Mass.) 323; Thomas v. Minot, 10 Gray, 263. We see no reason in departing from this rule in a case like the present, where such a claim would be paid out of moneys that fall far short of paying the mortgage debt.

We therefore reverse the decree of the court below in the particulars hereinbefore mentioned, and remand the record, with directions to modify the decree in accordance with this opinion. Reversed.

(149 U. S. 231)

PEARSALL v. SMITH et al.

(May 1, 1893.)

No. 198.

BANKRUPTCY — ASSIGNEE — FRAUDULENT CONVEYANCES—LIMITATION OF ACTIONS.

An assignee in bankruptcy, appointed in 1879, brought suit in 1886 to set aside, as fraudulent, certain conveyances made by the bankrupt in 1874. It appeared that in 1875 certain creditors had brought an action in a New York court to set aside these conveyances, and had filed a lis pendens therein, and that a judgment was rendered in their favor in 1885. The plaintiff alleged that he had no knowledge of the conveyances in question, or any facts relating thereto, until he was informed of this decree, which was in July, 1886; but he failed to show how he came to be so long ignorant of his rights, or the means, if any, used by defendants fraudulently to keep him in ignorance, or how or when he obtained knowledge of the matters alleged in the bill. *Held*, that the claim was barred, both by the two-years limitation in the bankruptcy statute of 1867, and by the six-years limitation prescribed by the New York statute. Code Civil Proc. N. Y. § 382, subd. 5.

Appeal from the circuit court of the United States for the eastern district of New York. Affirmed.

Benj. G. Hitchings and B. F. Tracy, for appellant. Matthew Daly, F. R. Coudert, and Paul Fuller, for appellees Slauson & Moses. James R. Angel, for appellees Smith

& Willetts. Elmer A. Allen, for appellee Jones.

*232 * Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a bill in equity, filed in the circuit court of the United States for the eastern district of New York, by Charles Jones, as assignee in bankruptcy of David M. Smith, against David M. Smith, Ella F. Willetts, Richard S. Jones, and Albert Slauson, and is a creditors' bill to set aside several distinct transfers of property to several of the defendants, alleged to have been made by Smith in the year 1874, in fraud of the rights of creditors. The bill was filed September 11, 1886. The answers set up the statute of limitations of the state of New York of six years, and the bankruptcy statute limitation of two years. Albert Slauson, Austin M. Slauson, and Robert H. Moses, composing the firm of A. Slauson & Co., were added as defendants to the bill. They demurred to it, and the demurrer was overruled. The opinion of the court overruling the demurrer is reported in 33 Fed. Rep. 632.

Replications to the answers were filed, proofs were taken, and the court, held by Judge Lacombe, dismissed the bill. His opinion is reported in 38 Fed. Rep. 380. The assignee, Charles Jones, appealed to this court. Thomas E. Pearsall has been appointed his successor, and has taken his place as appellant in this suit. Pending the appeal, Richard S. Jones, one of the appellees, has died, and Frances A. Jones, as his sole executrix, has been admitted as appellee in his place.

*233 The conveyances sought to be set aside are those of three separate parcels of real estate to the several defendants. * David M. Smith was adjudged a bankrupt in 1878, and was discharged from his debts in June, 1879. The conveyances complained of were all made and recorded prior to June 1, 1875. Smith's petition in voluntary bankruptcy was filed August 31, 1878. The assignment in bankruptcy to Charles Jones was made February 10, 1879.

The opinion of the circuit court dismissing the bill considered, first, the New York state statute of limitations, (section 382, Code Civil Proc. subd. 5,) which provides that there must be commenced, within six years after the cause of action has accrued, "an action to procure a judgment other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery," and that "the cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." The circuit court held that this suit was one of the class provided for by the terms of section 382, subd. 5, and that, if the plaintiff would be barred of his relief in the state court by lapse of time he would be barred in the federal court also; citing Burke v. Smith, 16 Wall. 390, 401; Clarke v. Boorman's Ex'rs, 18 Wall. 493, 509; Wood v. Carpenter, 101 U. S. 135, 138; Kirby v. Railroad Co., 120 U. S. 130, 138, 7 Sup. Ct. Rep. 430. The circuit court further said that the assignee in bankruptcy takes from the bankrupt all the rights of property and of action previously held by him, but that the right to maintain an action such as the present one does not come to the assignee from that source; that a transfer made to defraud creditors is valid between the parties to it; that the debtor has no right of action to set it aside; and that, therefore, no such right passes to the assignee as part of the debtor's estate.

Section 5046 of the Revised Statutes of the United States, which is an embodiment of section 14 of the act of March 2, 1867, c. 176, (14 St. p. 522,) provides as follows: "All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention, or of injury to, the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover, or defend the same, as the bankrupt might have had if no assignment had been made, shall in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, [which are exemptions,] be at once vested in such assignee."

Section 5057 of the Revised Statutes, which is an embodiment of section 2 of the act of March 2, 1867, c. 176, (14 St. p. 518,) provides as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property, or rights of property, transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee; and this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

The circuit court remarked that, by operation only of the express terms of section 5046, the right of action which, before the adjudication in bankruptcy, belonged to the creditors, was taken from them and given to the assignee, and that, when the assignee asserted such right, he claimed under the creditors and not under the bankrupt, citing Brownell v. Curtis, 10 Paige, 210; Jones v. Yates, 9 Barn. & C. 532; Van Heusen v.

Radcliff, 17 N. Y. 580; Bradshaw v. Klein, 2 Biss. 20; Kane v. Rice, 10 N. B. R. 469; In re Leland, 10 Blatchf. 503, 507; Trimble v. Woodhead, 102 U. S. 647; Dudley v. Easton, 104 U. S. 99.

The circuit court further said that, in determining as to the effect of lapse of time upon the right of action in this case, it became necessary, first, to inquire whether there was a discovery of the fraud by those under whom the plaintiff claims; that actual personal knowledge of the facts constituting the fraud need not be shown, to charge a person who had been quiescent for a period longer than that fixed by statute with discovery thereof; that it was enough if he was put upon inquiry, with the means of knowledge accessible to him,—citing Burke v. Smith, 16 Wall. 390, 401, and Wood v. Carpenter, 101 U. S. 135, 138; that, in the present case, Joseph Kittel and Joseph J. Kittel were judgment creditors of the bankrupt, and as such included in his schedules in bankruptcy; that, appearing by the attorney who brought the present suit, and represents the other creditors, the Kittels, on July 7, 1875, brought a suit in the supreme court of the state of New York against those who are defendants in the present suit, to set aside as fraudulent the very conveyances attacked in this suit, and duly filed a lis pendens; that, in their complaint in that suit, the Kittels averred not only that those conveyances were made by an insolvent, but also that the grantees had full knowledge of the insolvency, and participated in the fraud, and that the conveyances were without adequate consideration; that as to one parcel the Kittels expressly alleged that the nominal consideration for the conveyance was $1,000, "a grossly inadequate consideration;" as to another parcel, that, though there was a pretended consideration of $18,000 in the deed, there was "really no consideration whatever;" and as to the third parcel, that, though the alleged consideration expressed in the conveyance was $4,300, the transfer was made "in reality, if for any consideration whatever, for a debt of $500;" that it was by endeavoring to prove that the facts as to those conveyances are substantially as they were set forth in the Kittels' suit that the plaintiff in this suit sought to make out his case; that it, therefore, appeared that, upwards of 11 years before the plaintiff brought this suit, all the facts constituting the fraud had been discovered by one of the creditors under whom he claims; that the six-years statute of limitations began to run at least from the commencement of the Kittels' suit; and that the bar became complete long before the beginning of the present suit.

*235 *236 The plaintiff alleges in his bill that a decree was made in the Kittels' suit on November 30, 1885, in favor of the plaintiffs therein; and that it was not until he was informed of that decree, which was in July, 1886, that he received any knowledge or information of the conveyances and transfers of Smith's property, or of any facts or circumstances relating thereto, or tending to show, or to lead to inquiry as to, any fraudulent conveyance, transfer, or disposition of property by Smith.

But this is not sufficient to avoid the allegation of laches in bringing the present suit, or to bar the application of section 5057 of the Revised Statutes in regard to the two-years limitation. Bailey v. Glover, 21 Wall. 342; Wood v. Carpenter, 101 U. S. 135; Kirby v. Railroad Co., 120 U. S. 130, 7 Sup. Ct. Rep. 430; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. Rep. 942.

Although this court has attached to section 5057 of the Revised Statutes a qualification, that qualification is that, where relief is sought on the ground of fraud, it is necessary, in order to postpone the right of action on the part of the assignee in bankruptcy until the discovery of the fraud, that ignorance of it should have been produced by affirmative acts of the guilty party, in concealing the facts, and that there should have been no fault or want of diligence or care on the part of the person who claims the right of action; in other words, that when there has been no negligence of laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him, or ought to have been so discovered or known.

In the present case the deeds of conveyance by Smith were recorded. The suit by the Kittels was a public suit. Notice of lis pendens was filed in it, giving the name and the address of the attorney for the plaintiffs, and they were creditors through whom the present plaintiff claims, their names being included as creditors in the bankruptcy schedules. Charles Jones, the assignee in bankruptcy, was a lawyer of long standing, familiar with such matters. The bill does not set forth what were the impediments *237 to an earlier prosecution of the claim, how the plaintiff came to be so long ignorant of his rights, the means, if any, used by the defendants fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matters alleged in his bill. Badger v. Badger, 2 Wall. 87, 95; Richards v. Mackall, 124 U. S. 183, 189, 8 Sup. Ct. Rep. 437; Greene v. Taylor, 132 U. S. 415, 443, 10 Sup. Ct. Rep. 138.

We think the present is a clear case in favor of the bar of limitation, both by the statute of New York and by the bankruptcy statute.

Decree affirmed.

(149 U. S. 261)

ABADIE v. UNITED STATES.

(May 1, 1893.)

No. 260.

APPEAL—JURISDICTIONAL AMOUNT—PUBLIC LANDS—UNLAWFUL INCLOSURE.

An appeal to the supreme court from a decree under the act of February 25, 1885, (23 St. p. 321, c. 149,) directing defendant to remove, within 30 days, a certain fence inclosing public lands, and, in default thereof, requiring the marshal to destroy the same, cannot be supported by showing that the fence is worth over $5,000, for the fence is not the matter in dispute, nor does the decree deprive defendant thereof. Cameron v. U. S., 13 Sup. Ct. Rep. 184, 146 U. S. 533, followed.

Appeal from the circuit court of the United States for the northern district of California. Dismissed.

James Herrman, for appellant. Asst. Atty. Gen. Maury, for the United States.

*262 *Mr. Chief Justice FULLER. This is an appeal from a decree of the circuit court of the United States for the northern district of California, in a proceeding under the act of congress of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands," (23 St. p. 321,) whereby appellant was directed to remove a fence and inclosure from certain sections of land therein described, in default of which it was decreed that the same should be destroyed by the marshal for said district. The value of the fence was claimed to exceed $5,000; but the fence was not the matter in dispute, nor was the appellant deprived thereof. For want of the jurisdictional amount (Cameron v. U. S., 146 U. S. 533, 13 Sup. Ct. Rep. 184) the appeal must be dismissed.

(149 U. S. 192)

Ex parte HUMES et al.

(April 24, 1893.)

No. 20, Original.

MANDAMUS—ISSUANCE—SUPERSEDEAS—RIGHTS OF SURETIES.

After the giving of a supersedeas in the usual form, a judgment of the circuit court was affirmed by the United States supreme court. On the coming down of the mandate, which was also in the usual form, a motion was made, on notice, for judgment against the defendant and his sureties, and a demurrer thereto by the sureties was overruled. The sureties then offered a plea of partial payment, but the court refused to allow it to be filed, and entered judgment against both principal and sureties. The sureties thereupon obtained a writ of error from the circuit court of appeals, but the same was dismissed because the principal did not join in it, and there was no summons and severance, or equivalent proceeding. The sureties then applied to the supreme court for a writ of mandamus to review the action of the circuit court. *Held* that, as they were not parties to the original judgment or the writ of error thereon, they were not so concerned in the mandate as to be entitled to have it reviewed by writ of mandamus.

Petition by Milton Humes and C. C. Harris for a writ of mandamus. Denied.

W. Hallett Phillips, for petitioners. Geo. T. White and Wm. Richardson, for respondent.

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

The Third National Bank of Chattanooga recovered a money judgment in the circuit court of the United States for the northern district of Alabama against Eugene C. Gordon, April 14, 1888, to reverse which Gordon sued out a writ of error from this court, giving a supersedeas bond in the usual form, with Milton Humes and C. C. Harris as sureties thereon. March 21, 1892, the judgment of the circuit court was affirmed by this court, and the mandate was thereafterwards issued in the usual form. 12 Sup. Ct. Rep. 657, 144 U. S. 97. On the 12th of October, 1892, at a regular term of the circuit court, the bank made a motion upon notice for judgment against the defendant Gordon and his sureties. To this motion Humes and Harris appeared and filed a demurrer, which was overruled, and they then proposed to interpose a plea of partial payment, which the court refused to permit to be filed, or to hear any evidence upon that subject; whereupon, without any other evidence than the supersedeas bond and the mandate of this court, the circuit court rendered judgment against Gordon, Humes, and Harris for the principal, interest, and costs, as shown in the original judgment. To this judgment, Humes and Harris prosecuted a writ of error from the circuit court of appeals, which dismissed the writ (54 Fed. Rep. 917) because Gordon did not join in it, and there was no summons and severance, or equivalent proceeding. Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. Rep. 39; Mason v. U. S., 136 U. S. 581, 10 Sup. Ct. Rep. 1062.

Thereupon Humes and Harris applied to this court for leave to file a petition for writ of mandamus, and for a rule requiring the judge of the circuit court to show cause why he should not be commanded to execute the mandate of this court by vacating the judgment in so far as it was rendered and directed execution against petitioners, and to enter judgment and direct execution against the defendant Gordon, without more. Leave was granted to file the petition, and a rule was entered thereon accordingly, to which return has been duly made. The judgment rendered by the circuit court recites that it appears to the satisfaction of the court that judgment was recovered against Gordon, a writ of error sued out, and a supersedeas bond given; and further, from an inspection of the mandate of this court, that that judgment was affirmed, "and the said cause

194 remanded, with directions to this court to take such further proceedings in said case as right and justice and the laws of the United States direct, in accordance with the opinion of the said supreme court;" and judgment was then given, as before stated, against Gordon, Humes, and Harris.

We are of opinion that this application must be denied. The argument for petitioners is that the circuit court was proceeding wholly in execution of our mandate, that in doing so the judgment rendered went beyond its requirements, and that therefore petitioners are entitled to the remedy by mandamus to correct action in excess of the jurisdiction of the court below. Ex parte Washington & G. R. Co., 140 U. S. 91, 11 Sup. Ct. Rep. 673; Gaines v. Caldwell, 148 U. S. —, 13 Sup. Ct. Rep. 611. But, without considering or determining any other question, it is sufficient to observe that these petitioners were not parties to the original judgment or to the writ of error, and were not so concerned in the execution of the mandate as to be entitled to ask for a review of the action of the circuit court in that regard by mandamus. The judgment against them was rendered in the exercise of judicial determination, and not in the discharge of a ministerial duty, and their remedy, if they deem themselves aggrieved, lies in a writ of error. Ex parte Flippin, 94 U. S. 348.

Writ denied.

(149 U. S. 264)

INTERSTATE COMMERCE COMMISSION v. ATCHISON, T. & S. F. R. CO. et al.

(May 1, 1893.)

No. 1,275.

SUPREME COURT—APPELLATE JURISDICTION—INTERSTATE COMMERCE LAW.

Section 16 of the interstate commerce law, as amended by the act of March 2, 1889, (25 St. p. 855, c. 382,) which gives to the interstate commerce commission a summary proceeding in the circuit court to enforce its orders, was repealed by the judiciary act of March 3, 1891, (26 St. p. 826, c. 517,) in so far as it allowed an appeal direct to the supreme court when the matter in dispute exceeded $2,000, and the appeal should now be taken to the circuit court of appeals. McLish v. Roff, 12 Sup. Ct. Rep. 118, 141 U. S. 661; Lau Ow Bew v. U. S., 12 Sup. Ct. Rep. 517, 144 U. S. 47; Hubbard v. Soby, 13 Sup. Ct. Rep. 13, 146 U. S. 56; Railway Co. v. Osborne, 13 Sup. Ct. Rep. 281, 146 U. S. 354,—followed.

Appeal from the circuit court of the United States for the southern district of California.

In Equity. This was a petition by the Interstate Commerce Commission against the Atchison, Topeka & Santa Fe Railroad Company the Atlantic & Pacific Railroad Company, the Burlington & Missouri River Railroad Company, the California Central Railway Company, the California Southern Railroad Company, the Chicago, Kansas & Nebraska Railway Company, the Missouri Pacific Railway Company, the St. Louis & San Francisco Railway Company, and the Southern California Railroad Company, to enforce an order requiring these companies to desist from charging a greater rate for a shorter than for a longer haul. In the circuit court the petition was dismissed on the ground that the "circumstances and conditions" shown were substantially dissimilar, thus justifying the charges made. 50 Fed. Rep. 295. From this order of dismissal the Interstate Commerce Commission appeals. Appeal dismissed.

The proceeding was brought in the circuit court under the sixteenth section of the interstate commerce law, as amended March 2, 1889, (25 St. p. 855, c. 382,) which gives to the interstate commerce commission a summary remedy to enforce its orders by a petition to the United States circuit court sitting in equity. The statute, as thus amended, provides that—

"When the subject in dispute shall of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the supreme court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon, and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable."

The motion to dismiss the appeal was based upon the ground that this provision was repealed, in so far as it provides for a direct appeal to the supreme court, by the judiciary act of March 3, 1891, (26 St. p. 826, c. 517,) and that the appeal should have been taken to the circuit court of appeals, as the case did not belong to any of the classes in which that act allows appeals to the supreme court direct.

Geo. R. Peck, A. T. Britton, and A. B. Browne, for the motion. Wm. A. Day, opposed.

*265 *Mr. Chief Justice FULLER. The motion to dismiss is granted. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. Rep. 517; Hubbard v. Soby, 146 U. S. 56, 13 Sup. Ct. Rep. 13; Railway Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. Rep. 281.

Appeal dismissed.

(149 U. S. 266)

RICHMOND & D. R. CO. v. ELLIOTT.

(May 1, 1893.)

No. 199.

DAMAGES—PERSONAL INJURIES—EVIDENCE—DEFECTIVE LOCOMOTIVES.

1. An engine belonging to defendant railroad company, and standing in its yard, ex-

ploded, and inflicted permanent injuries on plaintiff, who was in the service of another company, to which defendant had granted the right to use such yard. In his action for damages based on this injury, plaintiff was allowed to testify as to the wages received in the higher grades of the employment in which he was engaged, and to state that, had he remained in the service of the company, there was a chance or probability that he would be promoted, but it was not shown that there was any rule or recognized custom governing promotions that would have inured to plaintiff's benefit. *Held*, that the admission of such evidence was reversible error; especially where the judge charged the jury that in estimating the damages they might consider the probability of plaintiff's promotion, if such were shown by the evidence.

2. If the defendant, after purchasing the engine, made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all ordinary tests for determining the efficiency and strength of completed engines, and no defects were thereby disclosed, it cannot be held guilty of negligence as to plaintiff, a stranger to the company, because there existed in the engine a latent defect that afterwards caused the explosion.

In error to the circuit court of the United States for the northern district of Georgia.

This was an action by Henry Elliott against the Richmond & Danville Railroad Company for damages for personal injury. There was judgment for plaintiff in the court below, and defendant brings error. Reversed.

Statement by Mr. Justice BREWER:

On February 8, 1887, defendant in error commenced this action in the superior court of Fulton county, Ga., to recover damages for personal injuries. The case was removed to the circuit court of the United States for the northern district of Georgia, in which court a trial was had on the 2d of November, 1888, and a verdict returned in favor of the plaintiff for $10,000. Judgment having been entered thereon, defendant sued out a writ of error from this court.

The facts were these: The plaintiff was an employe of the Central Railroad & Banking Company, which company had, under an arrangement with the defendant, the *267 right to use its yard in Atlanta, Ga., for switching purposes, and in the making up of trains. He was one of the crew of a switch engine belonging to the Central Company, and on the night of November 25, 1886, while in the discharge of his duties in the yard, engine No. 515, belonging to the defendant, exploded its boiler, and a piece of the dome thereof struck him on the leg, and injured him so that amputation became necessary. The explosion of this boiler was charged to be owing to negligence on the part of the defendant in this respect: "That more steam was allowed to generate than the engine had capacity to contain;" that the boiler was defective, and that the defendant had notice of the defect.

Henry Jackson, for plaintiff in error. C. T. Ladson, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The first question to which our attention is directed arises on the admission of testimony in respect to the probability of plaintiff's promotion in the service of his employer, and a consequent increase of wages. It appears that he was working in the capacity of coupler and switchman for the Central Company, and had been so working for between 4 and 5 years; that he was 27 years of age, in good health, and receiving $1.50 per day. He was asked this question: "What were your prospects of advancement, if any, in your employment on the railroad, and of obtaining higher wages?" In response to that and subsequent questions he stated that he thought that by staying with the company he would be promoted; that, in the absence of the yard master, he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employes of the company of a higher grade of service than his own; that there was a "system by which you go in there as coupler or train hand, or in the yard, and, if a man falls out, you stand a chance" *268 of "taking his place;" and that the average yard conductor obtained a salary of from sixty to seventy-five dollars a month.

We think there was error in the admission of this testimony. It did not appear that there was any rule on the part of the Central Company for an increase of salary after a certain length of time, or that promotion should follow whenever a vacancy occurred in a higher grade of service. The most that was claimed was that, when a vacancy took place, a subordinate who had been faithful in his employment, and had served a long while, had a chance of receiving preferment; but that is altogether too problematical and uncertain to be presented to a jury in connection with proof of the wages paid to those in such superior employment. Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, but upon the judgment, or even whim, of those in control. Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury, in estimating the damages sustained, will doubtless always give weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating in the minds of the jury the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and strength before the injury, his condition since, the business he was doing, (Wade v. Leroy, 20 How. 34;

Nebraska City v. Campbell, 2 Black, 590; Railroad Co. v. Putnam, 118 U. S. 545, 554, 7 Sup. Ct. Rep. 1,) the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that it is not right to go, and introduce testimony which simply opens the door to a speculation of possibilities. Nor was the error in the admission of this testimony cured by the instructions. On the contrary, they seem to emphasize that this chance of *269 promotion was a matter to be considered. This is what the court said: "I permitted some evidence to be introduced on the subject of the line of promotion in the business in which he was engaged. The plaintiff says, and the jury could consider the fact, that he had a probability of promotion in the line of services in which he was engaged; that the salary of the next grade of services in which he was engaged is from sixty to seventy-five dollars per month. The jury can consider that in finding what his financial or pecuniary loss is. I have permitted the evidence to go to the jury, and I will state to you that the jury ought not to be governed by a mere conjecture or possibility in a matter of that sort. It ought to be shown to the reasonable satisfaction of the jury that the man, after a while, would earn more money than he was then earning. It ought to be shown to your reasonable satisfaction. It is a matter for you to determine. The evidence has gone to you, and if you believe—if it has been shown to your reasonable satisfaction—that this man would earn more money at some future period, you would be authorized to consider that fact." Obviously, this directs their attention to this matter, and invites them to consider it in determining the damages which the plaintiff has sustained. While it does say that the jury should not be governed by any mere conjecture or possibility, yet it speaks of the matter as though there was placed before them a probability of promotion which they ought to consider. That probability was only such as was disclosed by the testimony we have referred to. Such an uncertainty cannot be made the basis of a legal claim for damages. The Code of Georgia of 1882 (in section 3072) declares: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer." Such declaration is only an affirmation of the general law in respect thereto.

A case very much in point was before the supreme court of Georgia. Railroad Co. v. Allison, 86 Ga. 145, 12 S. E. Rep. 352. *270 In that case the plaintiff (the action being one for personal injuries) was a postal clerk in the railway mail service of the United States, and on the trial the assistant superintendent of the railway mail service, under whom the plaintiff was employed, was permitted to give testimony as to the chances of promotion. This was adjudged error. The court thus discussed the matter: "We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from $1,150 to $1,300 too remote, to go to the jury, and for them to base a verdict thereon. While it is proper, in cases of this kind, to prove the age, habits, health, occupation, expectation of life, ability to labor, and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons. The deputy clerk of this court, for example, is very efficient and faithful, and, if there should be a vacancy in the office of clerk of the court, it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary then he now receives; but if he should be injured as Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility or probability of his appointment to fill a vacancy in the office of clerk, especially as the personnel of the court, upon which such appointment must depend, might change in the mean time. To allow the jury to assess damages in behalf of the plaintiff on the basis of a large income arising from a public office which he has never received, which is merely in expectancy and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong and unjust to the defendant. We believe the rule of most of the railroads in this state is to promote their employes. An employe commences at the lowest grade, and, if he is competent, capable, and efficient, he is very likely to be promoted upon the happening of a vacancy above him. If one occupying a lower grade of service were *271 injured, would he be allowed to prove, unless he had a contract to that effect, that his prospects of promotion to a higher grade and better salary were good, and would the jury be allowed to base their calculation and estimate of the damages upon a much larger salary, which he never received, but merely had a prospect of receiving? It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been preferred to each of them in case of vacancy, and promoted above them; so it could not be said that he was in direct line of promotion." And this de-

cision is in harmony with the general course of rulings. Brown v. Cummings, 7 Allen, 507; Brown v. Railroad Co., 64 Iowa, 652, 21 N. W. Rep. 193; Chase v. Railroad Co., 76 Iowa, 675, 39 N. W. Rep. 196. For this error, which it may well be believed worked substantial injury to the rights of the defendant, the judgment will have to be reversed.

Another matter is this: The injury was caused by the explosion of the boiler of an engine, and it is insisted that the testimony shows that the engine was handled properly and carefully; that the defect in the iron casting of the dome ring, which, after the explosion, was found to have existed, was a defect which could not, with the exercise of reasonable care, have been discovered by the company; and that it took all reasonable and proper care to test the boiler and engine, and from such test no defect was discovered. Hence the contention is that the court should have instructed the jury to find a verdict for the defendant. Perhaps, in view of what may be developed on a new trial, it is not well to comment on the testimony in respect to these matters. Whether there was negligence in respect to the accumulation of steam is a question of fact, involving, first, the capacity of the boiler, the amount of steam which had accumulated, and the precautions which were taken to prevent its going above a certain pressure. With regard to the defect in the iron casting, which seems to have been revealed by the explosion, it may be said that it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see if there be not some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty, when placing the machine in actual use, to subject it to ordinary tests for determining its strength and efficiency. Applying these rules, if the railroad company, after purchasing this engine, made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests had disclosed no defect, it cannot, in an action by one who is a stranger to the company, be adjudged guilty of negligence because there was a latent defect,—one which subsequently caused the destruction of the engine and injury to such party. We do not think it necessary or proper to go into a full discussion of the facts, but content ourselves with stating simply the general rules of law applicable thereto.

For the error first above noticed the judgment will be reversed, and the case remanded with instructions to grant a new trial.

Reversed.

(149 U. S. 283)

UNITED STATES v. JONES et al.

(May 1, 1893.)

No. 262.

APPEAL—BILL OF EXCEPTIONS—ALLOWANCE AFTER TERM—AFFIRMANCE.

When a bill of exceptions is presented to and signed by the judge after the close of the term, and the record fails to disclose any order extending the time for its presentation, or any consent of parties thereto, or any standing rule of court authorizing such approval, the supreme court will affirm the judgment.

In error to the circuit court of the United States for the western district of Louisiana.

Action brought by the United States against John R. Jones and George Freeman to recover damages for an alleged trespass in cutting timber from public lands. There was a verdict for defendants, and from the judgment entered thereon the United States bring error. Affirmed.

Asst. Atty. Gen. Parker, for the United States. T. Alexander and N. C. Blanchard, for defendants in error.

Mr. Chief Justice FULLER. Judgment was rendered in this case July 18, the writ of error sued out and allowed July 23, and the court adjourned for the term July 30, 1889. So far as disclosed by the record, the bill of exceptions was not tendered to the judge, or signed by him, until October 7, 1889, and no order was entered extending the time for its presentation, nor was there any consent of parties thereto, nor any standing rule of court which authorized such approval. The bill of exceptions was therefore improvidently allowed. Muller v. Ehlers, 91 U. S. 249; Jones v. Sewing-Mach. Co., 131 U. S. Append. cl.; Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. Rep. 450. As the errors assigned arise upon the bill of exceptions, we are compelled to affirm the judgment; and it is so ordered.

(149 U. S. 258)

CINCINNATI, H. & D. R. CO. v. McKEEN.

(May 1, 1893.)

No. 1,024.

SUPREME COURT—PRACTICE—RULE 37—CERTIFICATE FROM CIRCUIT COURT OF APPEALS.

1. A certificate of questions of law on which a circuit court of appeals desires the instruction of the supreme court is irregular when a quorum of the circuit court of appeals does not sit in the case.

2. Where such a certificate does not contain a proper statement of the facts upon which the questions of law arise, the case should be dismissed, under Sup. Ct. Rule 37, although the record is sent up. It is for the supreme court to say whether it will answer the questions as propounded, or direct the whole record to be sent up, in order to decide the case as if it were on writ of error or appeal.

On a certificate from the United States circuit court of appeals for the seventh circuit. Case dismissed.

Lawrence Maxwell, Jr., for appellant. W. H. H. Miller and John M. Butler, for appellee.

*260 *Mr. Chief Justice FULLER delivered the opinion of the court.

This is a certificate from the United States circuit court of appeals for the seventh circuit. It appears therefrom that the case came on to be heard before the circuit judge and two district judges holding that court, on January 13, 1892, the circuit justice not being in attendance, or able at that time to attend; that one of said judges was unwilling, and another disqualified, to sit upon the final hearing and determination of the appeal; and that, it appearing to the court that the appeal involved questions of law of great importance which should be certified to the supreme court of the United States, it was thereupon ordered that certain questions and propositions of law be, and the same were thereby, certified to this court as questions or propositions concerning which the circuit court of appeals desired the instruction of this court for their proper decision. After stating the questions, the certificate concluded with a direction to the clerk to transmit to the clerk of the supreme court of the United States, in connection with the certificate, 20 copies of the printed record in the cause, and it is apparent that reference to that record is necessary in order to the correct determination of the questions. On December 12, 1892, a motion was made in this court that the transcript of the record sent up by the circuit court of appeals be received, and that the whole record and the cause be retained in this court for its consideration. On December 19th this motion was denied, and it was further ordered that "counsel be allowed to submit briefs on the questions whether the certificate in this cause is valid, and, if so, whether it is sufficient, under the act creating the circuit court of appeals, to be proceeded upon by this court."[1] No suggestions have been made or briefs submitted by counsel.

We are of opinion that a certificate of *261 questions or propositions of law concerning which a circuit court of appeals desires the instruction of this court for their proper decision is irregular when a quorum of its members does not sit in the case, (U. S. v. Emholt, 105 U. S. 414;) and that this certificate does not comply with rule 37 of this court, inasmuch as it does not contain a proper statement of the facts on which the questions or propositions of law arise. While we have the power to require the whole record and cause to be sent up to us for consideration and decision, the sixth section of the judiciary act of March 3, 1891, does not contemplate that questions or propositions of law shall be propounded, and the entire record thereupon transmitted for us to answer such questions or propositions in view thereof. It is for us, when questions or propositions are certified, accompanied by a proper statement of the facts on which they arise, to determine whether we will answer them as propounded, or direct the whole record to be placed before us in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal.

We must decline, therefore, to answer the questions contained in this certificate, and order the case to be dismissed.

[1]There was no opinion filed with this order.

(149 U. S. 242)

HAGER, Collector, v. SWAYNE.

(May 1, 1893.)

No. 232.

CUSTOMS DUTIES—ACTIONS TO RECOVER PAYMENTS—WHO MAY MAINTAIN—ASSIGNEES.

Under Rev. St. §§ 2931, 3011, only the importer of goods can sue to recover duties paid under protest, and no mere assignee of the claim can maintain the action. Castro v. Seeberger, 40 Fed. Rep. 531, distinguished.

In error to the circuit court of the United States for the northern district of California. Reversed.

Asst. Atty. Gen. Parker, for plaintiff in error. Charles Page, for defendant in error.

*242 *Mr. Chief Justice FULLER delivered the opinion of the court.

This was an action brought by R. H. Swayne in the circuit court of the United States for the northern district of California, to recover from the defendant, Joseph S. Hager, collector of the port of San Francisco, the sum of $3,799.56 on account of duties illegally exacted by the collector on divers importations of cotton shoes and silk shoes, brought into said port in the year 1886 by several importers from ports in China. The complaint contained 47 counts for various amounts, alleged to be due upon an equal number of importations made by many different firms and persons, and the plaintiff claimed to be entitled to recover the aggregate sum by reason of having become the owner of these several claims by way of purchase and assignment.

Issue having been joined, a trial by jury was waived by stipulation, and it was agreed that all the importations of cotton shoes re-

ferred to in the several counts might be considered under one head, and all the importations of silk shoes under another. The circuit court thereupon made its findings of fact, and therefrom its conclusion of law that the plaintiff was entitled to recover the entire sum sued for. Judgment was accordingly entered against the collector, who brought the case by writ of error to this court.

The upper part of the shoes was composed of cotton or of silk, and a portion of the soles was of felt, made up of coarse animal hair of different kinds and of wood fiber and starch or glue, all of which had been felted, mixed, and pressed into layers, which layers were in turn pressed together until the requisite thickness was reached. *244 The most valuable material of the shoe was the silk or cotton, respectively, and no part contained hair of any kind in the textile fabric, nor were they made up by the tailor, seamstress, or manufacturer of similar character to a tailor or seamstress.

The collector decided that these shoes were dutiable under the paragraph of Schedule K of the tariff act of 1883 (22 St. p. 509) fixing duty on wearing apparel of every description not specially enumerated or provided for, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, at the rate of 40 cents per pound, and, in addition thereto, 35 per centum ad valorem, and exacted of the importers payment of the duties accordingly. The importers, as found by the court, "for the purpose of getting possession of their said merchandise, paid the amount so required of them, but within the time required by law notified the collector of their dissatisfaction with, and protest against, his decision, and appealed to the secretary of the treasury, who affirmed the decision of the collector. The importers thereupon, for value, assigned their claims to the plaintiff, who, within the time required by law, commenced this action for the recovery of the said excess of duties." The circuit court held that the cotton shoes fell under the paragraph of Schedule I (22 St. p. 506) imposing 35 per cent. ad valorem on manufactures of cotton not specially enumerated or provided for, and the silk shoes under the last paragraph of Schedule L, imposing 50 per cent. on goods not specially enumerated, made of silk, or of which silk was the component material of chief value. 37 Fed. Rep. 780.

It was held by this court in Arnson v. Murphy, 109 U. S. 238, 3 Sup. Ct. Rep. 184, that the common-law right of action against a collector to recover duties illegally collected was taken away by act of congress, and a statutory remedy given, which was exclusive. Rev. St. §§ 2931, 3011; Arnson v. Murphy, 115 U. S. 579, 6 Sup. Ct. Rep. 185; Cheatham v. U. S., 92 U. S. 85. While the common-law right was outstanding, the collector withheld, as an indemnity, the sum in dispute; but congress provided that he must pay into the treasury all moneys received officially, and that the secretary of the treasury should refund erroneous and illegal exactions. Rev. St. §§ 3010, 3012½.

The suit to recover back an excess of duties necessarily could only be maintained as affirmatively specified in the statute. Section 3011 of the Revised Statutes, as amended by the act of congress of February 27, 1877, (19 St. pp. 240, 247,) provides:

"Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid; but no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

Section 2931 reads as follows:

"On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation appeal therefrom to the secretary of the treasury. The decision of the secretary on such appeal shall be final and conclusive, and such vessel or merchandise or costs and charges shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the secretary of the treasury on such appeal, for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or

illegally exacted, until the decision of the secretary of the treasury shall have been first had on such appeal, unless the decision of the secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky mountains, or more than five months in case of an entry west of those mountains."

From these sections it appears that it is the "owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise," who must protest and appeal, and he is the person who, having made payment under protest "in order to obtain possession of merchandise imported for him," may maintain the action. It does not follow that devisees, representatives of the estates of deceased persons, assignees in bankruptcy or by operation of law, are excluded from bringing suit, for they take by devolution, and are regarded as succeeding in interest to the original party; but the statute does not contemplate that a stranger may bring the action, and such is a voluntary assignee of the mere naked right.

In Castro v. Seeberger, 40 Fed. Rep. 531, Castro had purchased the merchandise of the importer while it was in bond, and pending an appeal, and after the decision of the appeal paid the duties assessed in order to obtain possession of the property, and thereupon brought the suit; and it was decided by Judge Blodgett, holding the circuit court for the northern district of Illinois, that the claim against the collector became attached to and followed the merchandise, so as to make the purchaser, who paid the charges, *247 constructively the importer,* and entitled to maintain the action under the statute. The purchaser obtained an interest in the thing itself. The case here is wholly different, for these importers, after the decision of the secretary, paid the duties and took the goods themselves, and then attempted to assign a bare right of action to this plaintiff.

By section 3477 all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever might be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, were declared to be absolutely null and void, unless they were freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. The language is general which declares the nullity of such assignments, and the only cases where they are recognized is where a warrant has already issued. If there are any cases where the claim cannot be paid by warrant, then they do not come within the exception, but are affected by the general language. 16 Op. Atty. Gen. 261.

The mischiefs designed to be remedied by this section were declared by Mr. Justice Miller in Goodman v. Niblack, 102 U. S. 556, to be mainly two: First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; second, that, by a transfer of such claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the congress as desperate cases, where the award is contingent on success, so often suggest.

It has been frequently held that the section does not include transfers by operation of law, or by will, in bankruptcy or insolvency. Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. Rep. 84, and cases cited. But the legislation shows that the intent of congress *248 was *that the assignment of naked claims* against the government for the purposes of suit, or in view of litigation, or otherwise, should not be countenanced. At common law, the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and, although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy.

These considerations are apposite in arriving at the true construction of sections 2931 and 3011, and we are clear that the action provided for cannot be maintained by a stranger, suing solely in virtue of a purchase of claims from those who did not see fit to prosecute them themselves.

The judgment is reversed and the cause remanded, with a direction to dismiss the complaint.

Judgment reversed.

(149 U. S. 237)

TEXAS & P. RY. CO. v. ANDERSON et al.

(May 1, 1893.)

No. 1,312.

PRACTICE — SUBSTITUTION OF PARTIES — INTEREST ON JUDGMENT — CIRCUIT COURT OF APPEALS — JURISDICTION.

1. Judgment was had against the receiver of a railroad company, and pending a writ of error the receiver was discharged, and thereafter died. In accordance with written stipulation of counsel the railroad company was substituted, this change "not to affect any of the questions or controversies presented by the record," and the judgment was subsequently affirmed. *Held*, that the trial court, upon the remand of the cause, should issue execution directly against the company.

2. At the time when a judgment was recovered the rate of interest allowed by the state statutes was 8 per cent. Pending a writ of error the rate was changed to 6 per cent. on judgments thereafter obtained. Act Tex. April 13, 1891. *Held* that, upon affirmance, interest at the rate of 8 per cent. until paid should be recovered.

3. Where a circuit court, in a cause remanded to it after affirmance by the supreme court, issues execution in conformity to the mandate of the supreme court, there being no subsequent proceedings not settled by the terms of the mandate, a circuit court of appeals has no jurisdiction to review the judgment of the circuit court in execution of the mandate.

On a certificate from the United States circuit court of appeals for the fifth circuit.

Statement by Mr. Chief Justice FULLER:

On September 13, 1888, judgment was rendered in the circuit court of the United States for the eastern district of Texas against John C. Brown and Lionel A. Sheldon, as receivers of the Texas & Pacific Railway Company, in favor of Ida May Cox, for $10,000, with interest from date at 8 per cent. per annum, the then rate of interest in Texas, "to be paid in due course of their administration of their receivership." Sheldon having resigned as receiver, and his resignation having been accepted, Brown, as sole receiver, prosecuted a writ of error from this court, and gave a supersedeas bond. While the writ of error was pending, the receiver made known to the circuit court that the objects and purposes contemplated in the several proceedings under which he had been appointed had been accomplished by settlement and agreement of the parties, and he was thereupon discharged as receiver, and the property restored to the company. Subsequently, and before the case came on for hearing, the receiver died. Thereafter defendant in error filed a motion in this court to have the railroad company substituted in place of the receiver, and an order of substitution was entered by this court upon suggestion of the discharge and death of said receiver.

At the time of that order a stipulation, signed by counsel on both sides, was filed, which read as follows: "That the said Texas and Pacific Railway Company may be substituted as plaintiff in error in the above-entitled cause, now pending and undetermined upon writ of error in this court, such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this court the same as if said substitution had not been made."

The cause having been argued, the judgment was affirmed, May 16, 1892. Railway Co. v. Cox, 145 U. S. 601, 12 Sup. Ct. Rep. 905.

On May 19, 1892, the mandate of this court was issued, directed to the circuit court of the United States for the eastern district of Texas, which, after reciting the judgment of that court against the receivers, and the writ of error prosecuted by the remaining receiver, proceeded thus:

"And whereas, at the October term, A. D. 1889, of said supreme court, the discharge of John C. Brown as receiver of the Texas and Pacific Railway Company, and also his death, having been suggested, it was ordered that the Texas and Pacific Railway Company be made the party plaintiff in error in this cause;

"And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said supreme court on the said transcript of record, and was argued by counsel:

"On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and interest, until paid, at the same rate per annum that similar judgments bear in the courts of the state of Texas; and that the said plaintiff recover against the said the Texas and Pacific Railway Company for her costs herein expended, and have execution therefor. May 16, 1892.

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

Pending the writ of error, the defendant, Ida May Cox, intermarried with one Scott Anderson. Upon reception of the mandate, execution was issued by the clerk of the circuit court of the United States for the eastern district of Texas against the Texas & Pacific Railway Company for the full amount of the judgment, with 8 per cent. interest and costs. The company thereupon filed its bill against the marshal in whose hands the execution had been placed, asking that he be restrained from levying the same, upon the ground that there was no judgment to support the execution. A restraining order was granted, which was continued in force until November 22, 1892, when it was dissolved. On that day Mr. and Mrs. Anderson filed a motion that execution should issue in their names against the defendant company. This motion was resisted, but the objections of the company thereto were overruled, and the court entered an order directing the clerk to record the mandate, and to issue execution against the company for the sum recovered, with interest at 8 per cent. from the date of the original judgment, and costs; to which action of the court the company excepted, and a bill of exceptions having been signed and approved, a writ of error was allowed from the circuit court of appeals for the fifth circuit. The case came on to be heard in that court upon the motion of the defendants in error to dismiss the writ of error for want of jurisdiction and upon the merits, whereupon the court granted a certificate stating the facts as above given, though with greater particularity, which concluded as follows:

"Whereupon, the court desiring the instruction of the honorable the supreme court of the United States for the proper decision of the questions arising herein, it is hereby ordered that the following questions and propositions of law be certified to the honorable the supreme court of the United States, in accordance with the provisions of section 6 of the act entitled 'An act to establish circuit courts of appeals, and define and regulate, in certain cases, the jurisdiction of the circuit courts of the United States, and for other purposes,' approved March 3, 1891, to wit:

"First. Does the act of March 3, 1891, entitled 'An act to establish circuit courts of appeals, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes,' give to said circuit courts of appeals jurisdiction, by appeal or writ of error, or otherwise, to review the decrees, orders, or judgments made by district courts or existing circuit courts, construing a mandate from the supreme court of the United States, and in executing the same?

"Second. Was it the intention of the supreme court of the United States, in affirming the judgment in the case of John C. Brown, Plaintiff in Error, v. Ida May Cox, Defendant in Error, that said judgment should be subject to the general equitable jurisdiction of the court in which such receiver was appointed, and be paid in due course of the administration of said receivership, or did it intend that execution should issue directly against the Texas and Pacific Railway Company for the amount of said judgment?

*241 "Third. At the date said judgment was originally recovered, to wit, September 15, 1888, it bore interest under the law of the state of Texas at the rate of 8 per cent. per annum. Subsequently, to wit, on April 13, 1891, the statute of the state of Texas fixing the rate of interest that judgments of this kind should bear was amended, so that, instead of bearing eight per cent. interest, judgments thereafter obtained were made to bear only six per cent. interest per annum. Should the judgment in this case bear interest at the rate of eight per cent. per annum, or at the rate of six per cent. per annum?"

Jno. F. Dillon and Winslow S. Pierce, for plaintiff in error. Harry Hubbard and W. Hallett Phillips, for defendants in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The circuit court was correct in awarding execution against the company under the mandate. The judgment was originally against the receiver, to be paid in due course out of the assets in his hands; but the receiver had been discharged, and the property restored to the company, and the company had been substituted as the party to the writ of error here, and been made in all respects as liable to the defendants in error as if it had itself brought the writ. The judgment was made final by the order of this court, and was not again subject to be reviewed by the court below in the exercise of its equitable powers, or otherwise. If the judgment had been reversed, the company would have recovered its costs against the defendants in error, and the reversal would have been a bar to any liability on the judgment as such. It so happened that it was affirmed, and the company was equally concluded. While the only question is as to the order of this court, we do not think there is any conflict between the mandate and the stipulation, or that the language of the stipulation in any respect limited the liability of the company in case of affirmance. Every point the receiver could have presented was raised on behalf of the company, and disposed of after elaborate argument and careful *242 consideration, and the stipulation in that regard was fully complied with. If it had been intended to reserve the present contention, it is enough to say that that intention was not expressed, and cannot be inferred, and the matter was determined by our judgment. The circuit court properly attempted to exercise no discretion in the premises, but discharged its duty by carrying the mandate into effect, according to its terms. This court awarded execution against the company for the costs here, but it was for the circuit court to award execution for the amount of the judgment, as it was directed to do, and as it did; and interest was properly included at the rate which obtained under the law of Texas at the time judgment was rendered, the change in the law in that respect operating only prospectively. Inasmuch as its action conformed to the mandate, and there were no proceedings subsequent thereto not settled by the terms of the mandate itself, the case falls within the rule often heretofore laid down, and a second writ of error cannot be maintained. Cook v. Burnley, 11 Wall. 677; Stewart v. Salmon, 97 U. S. 361; Humphrey v. Baker, 103 U. S. 736.

For these reasons the answer to the first question certified must be that, upon the facts stated in the certificate, the circuit court of appeals cannot review by writ of error this judgment of the circuit court in execution of the mandate of this court. This dispenses with the necessity of answering the other questions certified. Ordered accordingly.

(149 U. S. 263)

NASH v. HARSHMAN.

(May 1, 1893.)

No. 957.

APPEAL—PARTIES—DISMISSAL.

An action was brought under the Ohio Code, seeking the foreclosure of a mortgage given to secure a note, and also a personal judgment against the maker. The land had been conveyed by the mortgagor to a third per-

son, who was also made a defendant. The cause was thereafter removed to a federal court, and there proceeded merely as a foreclosure suit in equity, and a decree of foreclosure was entered. *Held*, that from this decree the maker of the note could not appeal without joining therein his codefendant. Hohorst v. Packet Co., 13 Sup. Ct. Rep. 590, 148 U. S. 262, followed.

Appeal from the circuit court of the United States for the northern district of Ohio.

In Equity. This was originally a civil action, brought, under the Code of Civil Procedure of Ohio, in the court of common pleas of Logan county, by George W. Harshman, asking a personal judgment against John A. Nash on a note of $26,000, and setting up the execution of a mortgage by Nash to secure the same; also, alleging the subsequent conveyance of the mortgaged premises by Nash to Charles A. Dupee, who, with others, was made a defendant. Nash and Dupee filed answers, and, after the case was at issue it was removed to the circuit court for the northern district of Ohio, under the local prejudice act. In that court the action proceeded merely as a suit in equity to foreclose the mortgage, and a decree was rendered for the sale of the lands. From this decree, Nash appeals. The cause is now heard on motion to dismiss the appeal and affirm the judgment. Appeal dismissed.

One of the grounds relied on by the appellees was that the appeal was insufficient because it was taken by Nash, against whom, as the bill was treated in the circuit court, no relief was demanded, and no decree was made, and because Dupee, whose rights alone were affected by it, was not a party to the appeal.

Louis D. Johnson, for the motion.

*204 *Mr. Chief Justice FULLER. The appeal is dismissed. Hohorst v. Packet Co., 148 U. S. 262, 13 Sup. Ct. Rep. 590.

(149 U. S. 210)

UNITED STATES v. SNYDER et al.

(May 1, 1893.)

No. 229.

CONSTITUTIONAL LAW—FEDERAL TAXATION—LIENS—STATE RECORDING LAWS.

A state law requiring that all liens on real property must be recorded, in order to affect third parties, (Const. La. 1879, art. 176,) does not apply to tax liens in favor of the United States, and, though such liens are not recorded, they may be enforced against the lands in the hands of purchasers for value without notice.

Appeal from the circuit court of the United States for the eastern district of Louisiana.

In equity. Bill by the United States against Charles A. Snyder and wife and the International Cotton-Press Company to enforce a tax lien on certain real estate. The circuit court dismissed the bill as to the International Cotton-Press Company, and rendered a decree for complainants, who now appeal. Reversed.

Asst. Atty. Gen. Maury, for the United States. B. F. Jonas, for appellees.

Mr. Justice SHIRAS delivered the opinion of the court.

The facts of this case, as appearing by the record, are undisputed, and are as follows: Charles A. Snyder was, during the year 1878, engaged in the business of the manufacture of tobacco in the city of New Orleans, and while so engaged became indebted to the United States for internal revenue taxes in the sum of several thousand dollars; and these taxes were duly assessed and certified to the collector of internal revenue, who made demand for payment.

On the 20th day of November, 1879, at the time of such indebtedness and demand for payment, and for more than a year prior and subsequent to said date, the said Charles A. Snyder was the owner of certain pieces and parcels of real estate situated in the city of New Orleans, to wit, 9 several lots designated as Nos. 4, 5, 6, 9, 10, 11, 12, 13, and 14, with the buildings and improvements thereon, in the square bounded by Peters, Erato, Galennie, and Tchoupitoulas streets; and by act of sale passed before Theodore Guyol, notary, on February 5, 1881, Charles A. Snyder sold, conveyed, and delivered, for valuable consideration, the said lots of ground to the International Cotton-Press Company, which has been ever since in the continuous use and occupation of the same.

On April 15, 1885, a bill of complaint was filed in the circuit court of the United States for the eastern district of Louisiana, against Charles A. Snyder, for the collection of said taxes. Nannie Mary Torian, wife of said Snyder, and the International Cotton-Press Company were named as codefendants with him; it being alleged in said bill that they claimed to have liens and interests in the said pieces or lots of ground.

Mrs. Snyder was not served with process, nor was any appearance entered for her. The cause was put at issue, and so proceeded in that a personal judgment was entered against Charles A. Snyder, and in favor of the United States, in the sum of $35,643.29, but the bill was dismissed as to the International Cotton-Press Company, and from this decree an appeal was taken to this court.

The assessment on which the lien for taxes was claimed in behalf of the United States was never filed or inscribed in the mortgage office of the parish of New Orleans, as required by the laws of the state of Louisiana in order to affect third persons; and the International Cotton-Press Company purchased the property on which said tax lien was claimed to exist for full value, in good faith, and in ignorance of the said alleged assessment.

Section 3371 of the Revised Statutes, as amended by section 14 of the act of March 1, 1879, under which the taxes in question were assessed, is in the following terms:

"Whenever any manufacturer of tobacco, snuff, or cigars sells, or removes for sale or consumption, any tobacco, snuff, or cigars upon which a tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the commissioner of internal revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor, and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal: provided, however, that no such assessment shall be made until and after notice to the manufacturer of the alleged sale and removal to show cause against said assessment; and the commissioner of internal revenue shall, upon a full hearing of all the evidence, determine what assessment, if any, should be made."

Section 3186 of the Revised Statutes, as amended by section 3 of the act of March 1, 1879, is as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person."

The method of remedy is provided by section 3207, Rev. St., as follows:

"In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell real estate to satisfy the same, the commissioner of internal revenue may direct a bill in chancery to be filed in a district or circuit court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. All persons having liens upon or claiming any interest in the real estate sought to be subjected as aforesaid shall be made parties to such proceedings, and be brought into court as provided in other suits in chancery therein. And the said court shall * * * proceed to adjudicate all matters involved therein, and finally determine the merits of all claims to and liens upon the real estate in question, and, in all cases where a claim or interest of the United States therein shall be established, shall decree a sale of such real estate by the proper officer of the court, and a distribution of the proceeds of such sale, according to the findings of the court in respect to the interest of the parties and of the United States."

The record discloses, in the present case that the commissioner of internal revenue did, within two years after sale and removal by Snyder of tobacco without the proper stamps, in the mode authorized and directed by law, estimate the amount of the tax omitted to be paid, make an assessment thereof, and certify the same to the collector.

The bill of complaint was in the form prescribed by law, and upon the facts admitted the government was entitled to a decree for a sale of Snyder's real estate in satisfaction of the sum found due by him, unless, indeed, the defense set up on behalf of the International Cotton-Press Company was valid.

That defense was founded in the provisions of article 176 of the Louisiana constitution of 1879, in these terms: "No mortgage or privilege on immovable property shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law, except privileges for expenses of last illness, and privileges for taxes,—state, parish, or municipal: provided, such privileges shall lapse in three years."

That the lien or assessment of the taxes in question was not recorded or filed in the mortgage office of the parish of New Orleans within which Snyder's real estate was situated, and that no proceedings to enforce the lien were brought within three years, are admitted facts.

The single question thus presented for our consideration is whether the tax system of the United States is subject to the recording laws of the states.

The court below answered this question in the affirmative, but filed no opinion. Nor have the counsel of the appellees sustained the proposition on which they rely by the citation of any authorities. It is true that, on the other hand, the attorney of the government has not referred us to any decision of this court which can be said to be directly in point. This absence of authority is doubtless attributable to the fact that the subject of federal taxation, dealt with by federal statutes creating liens for taxes, and providing remedies for their collection, has always been conceded to be independent of the legislative action of the states.

The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot, by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions, is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and lim-

iting the time within which such tax shall be a lien, it would follow that the potential existence of the government of the United States is at the mercy of state legislation.

Moreover, it scarcely seems necessary to look beyond the constitution itself for a decisive reply to the question we are now considering. The eighth section of the first article declares that "the congress shall have power to lay and collect taxes, duties, imposts, and excises, * * * but all duties, imposts, and excises shall be uniform throughout the United States." The power to impose and collect the public burdens is here given in terms as absolute as the language affords. The provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government; and both the grant of the power, and its limitation, are wholly inconsistent with the proposition that the states can, by legislation, interfere with the assessment of federal taxes, or set up a limitation of time within which they must be collected.

Although decisions of this court upon the
*215 precise question before us cannot be cited,
* there are some on analogous subjects, which lead clearly to the conclusion that the tax system of the United States is regulated by the federal statutes and practice, and are not controlled by state enactments.

In Savings Bank v. U. S., 19 Wall. 227, it was held that the United States could maintain an action of debt for taxes due by a state bank in a circuit court of the United States, in disregard of a state statute prescribing a special form of remedy for the assessment and collection of taxes due by banks.

In Murray's Lessee v. Land Co., 18 How. 281, it was said: "Among the legislative powers of congress are the powers 'to lay and collect taxes, duties, imposts, and excises, * * * and to make all laws which may be necessary and proper for carrying into execution these powers.' * * * The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution."

Arnson v. Murphy, 109 U. S. 238, 3 Sup. Ct. Rep. 184, was a suit under the revenue laws of the United States, wherein the plaintiffs sought to recover moneys alleged to have been illegally exacted by the collector for custom duties. The circuit court applied the state statute of limitations, and directed a verdict in favor of the defendant. This court held that the limitation laws of the state in which the cause of action arose, or in which the suit was brought, did not furnish the rule of decision, and that it was error in the circuit court to apply, as a bar to the action, the limitation prescribed by the state statute.

The conclusion reached is that that part of the decree of the court below which dismissed the bill as to the International Cotton-Press Company must be reversed, and that the cause be remanded, with directions to the court below to proceed therein in conformity with this opinion.

Reversed.

(149 U. S. 273)

UNITED STATES v. MOCK.

(May 1, 1893.)

No. 233.

PUBLIC LANDS — CUTTING TIMBER — ACTION OF TRESPASS—EVIDENCE—INSTRUCTIONS.

1. In an action of trespass brought by the United States to recover for timber cut from the public lands, where it clearly appears that defendant cut some trees from the land in question, sawed them into lumber, and sold the same for eight or nine dollars per thousand feet, the government is entitled, at least, to a verdict for nominal damages, although there is no evidence as to the value of the standing trees.

2. Where, in an action of trespass for cutting timber from the public domain, it appears that defendant had a sawmill near the land, and cut and sawed lumber, which he sold for profit, it is error for the court, in its charge, to refer, as a ground of justification to the fact that the government has always tacitly permitted pioneer settlers to cut timber from the public domain for domestic use.

In error to the circuit court of the United States for the northern district of California.

Action of trespass by the United States against Moses Mock to recover damages for cutting of timber from the public lands. There was a verdict and judgment for defendant, and the United States brings error. Reversed.

Statement by Mr. Justice BREWER:

This action was commenced by the filing of a complaint on May 6, 1884, in the circuit court of the United States for the northern district of California, in which complaint it was alleged that the plaintiff was the owner, in 1879, of a certain tract of land in the county of Fresno, state of California, (describing it,) upon which tract of land were growing trees; that during that year the defendant unlawfully and wrongfully cut down and carried off certain of these trees, to wit, 500 pine trees, and manufactured them into lumber, producing 1,500,000 feet of lumber, of the value of $15,000, for which sum judgment was asked. Defendant answered with a general denial. The case was tried before a jury in April, 1888. On the trial it appeared from the testimony of defendant, as well as that of other witnesses, that in 1879 defendant had built a sawmill adjoining the tract, and operated it for a little less than three months; that it had a capacity of about 10,000 feet, board measure, a day; that he had five white men and two or three Indians employed at the

mill; and that the timber was cut in the vicinity of the mill. The defendant also admitted that he knew that the tract described in the complaint was government land, and that he did not at any time enter *274 it as a homestead or pre-emption, and that *a portion—though only a small portion—of the timber which he sawed was cut from that tract. There was the further testimony on the part of the government, of two timber agents, that after the commencement of this action they went upon the land, and counted the number of stumps, and found 814 stumps of pine trees, of the diameter of from two to three feet. There was also given in evidence an estimate of the amount of lumber that would be made from a tree of the size indicated by such stumps. There was evidence tending to show the price and value of lumber in that vicinity in the year 1879, but not of the value of standing trees. In its instructions the court referred to the estimate made by the timber agents of the amount of lumber that would have been manufactured from the timber cut upon the premises, and the admission made by the defendant that he had cut some timber; stated that there was no testimony that he had cut all the timber that had been cut thereon, and that the jury had no right to guess, and that unless proof had been offered which created a reasonable certainty in their minds as to the amount of timber cut by the defendant, and its value, the verdict must be for the defendant, and then proceeded as follows:

"There are two elements entering into these cases. This is an action of trespass, —a tort. It is wrong for one person to go on another person's land, and cut and remove timber, without the consent of the owner; so the going of any person on the public domain, and cutting and removing from it timber, without the consent of the government is wrong, just as much as if I went on any of your ranches or vineyards, cut and removed the crops, without your consent. But there is a vast difference in the character and quality of actions. A gentleman may permit the public to use a portion of his domain as a highway for years, and, as long as it is being done with his tacit consent, nobody would be held a trespasser for doing so; but, when he notifies the public that it must cease, then that tacit right ceases, and anybody who went on there might be justly held as a trespasser. The history of the country in regard to trespassing on the public domain, and cutting *275 timber for the use of the people in building *their homes upon their farms and for *general domestic purposes, may be considered. As I observed, the government is the proprietor of the soil. It has always owned the soil, and the timber on it, and the mines beneath it; but it is a matter of common knowledge in this country that the country could not have been settled up otherwise than by the practice and custom which has grown up in advance of legislation.

"It is a matter of history that the government permitted the early pioneers, as they went ahead to make their homes for themselves, to go on the public domain, and take such timber as was necessary for domestic use; and, although there never was any law or license to that effect, it was done with the knowledge of every department of the government,—legislative, judicial, and executive. The earliest law that was passed, that I remember, was in 1833, forbidding, under pains and penalties, the entering on lands that had been reserved, on which there were valuable forests of live oak and pine for shipbuilding. It is possible that there was other legislation following that, but I do not remember any until 1878, and during all that time every department of the government knew how the country was being settled, and that men went on and felled trees with this tacit permission,—or, if there was not a tacit permission, at least there was no reprehension of their acts. In this case, in order to judge wisely and fairly of this defendant, as to whether he was a wanton trespasser, you will have to take into consideration the concurrent circumstances surrounding his acts. While I wish you to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes. I say you will not judge correctly whether these men were willful and wanton trespassers, in the sense in which a trespass is willful and wanton, unless you take into account the contemporaneous history of the country and these matters, which are familiar to you all. If this party was a will- *276 ful* trespasser, and cut from the public domain this timber wantonly and maliciously, the government is entitled to recover from him the full value of the timber by him so cut and removed from the public domain, without allowing at all for the increased value that he put upon it; for it will not be permitted that a man shall trespass on your property, and commit waste and wanton destruction by removing it, that you shall be merely indemnified for the original value. In other words, you may recover your property, and its value, wherever you find it, whether the man has added to its value since he got it or not. This case is somewhat different from the case yesterday. This case presents this naked fact: That, if you return a verdict for the government, it must be for the value of the lumber manufactured. Now, no evidence has been offered in the case showing the market value of the trees, or if they had any

market value one way or the other. There is no evidence in the case to warrant you in concluding that the trees had any market value in 1879, or at any other time. The only evidence offered by the government is as to the value of the timber after it was cut and made into lumber, and in that way this case differs from the case yesterday. Yesterday I instructed you in that case that if you find that, although there was a trespass, that it was not willful, you might determine the value of the timber as it stood on the ground. In this case there is no evidence of that kind."

The jury found a verdict for the defendant, and the government has brought the case here on error.

Asst. Atty. Gen. Parker, for the United States.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The only errors alleged are in the charge. The specific portions to which the attention of the court was called at the time, and exceptions taken, are that which refers to the *277 history of the attitude of the government towards pioneers and others who took timber from government lands for domestic use, and that which declared that no verdict could be returned in favor of the government, except for the value of the lumber manufactured. In these there was obvious error. Although there was no direct evidence of the value of the standing trees, yet it did appear that they were manufactured into lumber, and that the lumber had commanded a price of from eight to nine dollars a thousand feet; and when the government proved, or defendant admitted, that he cut and carried away some of the timber on this tract, the government was entitled to at least a verdict for nominal damages. As to any further right of recovery, see Wooden-Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. Rep. 398; Benson Min., etc., Co. v. Alta Min., etc., Co., 145 U. S. 428, 12 Sup. Ct. Rep. 877.

Nor were the observations of the court in reference to the attitude of the government justifiable. Whatever propriety there might be in such a reference, in a case in which it appeared that the defendant had simply cut timber for his own use, or the improvement of his own land, or development of his own mine, (and in respect to that matter, as it is not before us, we express no opinion,) there certainly was none in suggesting that the attitude of the government upheld or countenanced a party in going into the business of cutting and carrying off the timber from government land, manufacturing it into lumber, and selling it for profit; and that was this case. There is no pretense that the defendant cut timber for his own use. He says himself he sold it all. He ran a sawmill, cut timber, manufactured it into lumber, and made profit out of the sale of the lumber. There is nothing in the legislation of congress, or the history of the government, which carries with it an approval of such appropriations of government property as that.

The judgment must be reversed, and a new trial ordered.

Reversed.

(149 U. S. 277)

UNITED STATES v. HUMPHRIES et al.

(May 1, 1893.)

No. 235.

PUBLIC LANDS—CUTTING TIMBER—DEFENSE.

The right of the government to recover damages for trees cut from the public domain, manufactured into lumber, and sold for profit, is not affected by the fact that the business, as carried on by defendant, was not in fact profitable.

In error to the circuit court of the United States for the northern district of California.

Action of trespass by the United States against John W. Humphries and Moses Mock to recover damages for the cutting of timber from the public lands. There was a verdict for defendants, and to review the judgment entered thereon the United States brings error. Reversed.

Asst. Atty. Gen. Parker, for the United States.

*Mr. Justice BREWER delivered the opinion of the court. *278

This case is so nearly like the case just decided (U. S. v. Mock, 13 Sup. Ct. Rep. 848) that it is unnecessary to refer to the facts in detail. There also appears in this a further matter of error, in that the court, over the objections of the government, permitted the defendants to introduce evidence that their mill was not profitable. Certainly, whether they made money or not does not affect the right of the government to recover, or the measure of recovery.

The judgment in this case will also be reversed, and a new trial ordered.

(149 U. S. 216)

DUER v. CORBIN CABINET LOCK CO.

(May 1, 1893.)

No. 191.

PATENTS FOR INVENTIONS—NOVELTY—FURNITURE LOCKS.

1. Letters patent No. 262,977, issued August 22, 1882, to Morris L. Orum, for a furniture lock having a dovetailed cap and top plate, and a front plate projecting laterally and below the cap, and rounded at the bottom so as to adapt the lock for insertion in a mortise formed by a laterally cutting bit, in which position it is sustained by a countersunk front plate, are void for want of novelty, as every element of the device is found in one or more of the following patents: No. 133,148, issued April 22, 1873, to Gory; No. 241,828, issued May 24, 1881, to Henry L. Spiegel;

and the subsequent patent issued to Spiegel April 21, 1885, on an application filed April 23, 1883,—and as the combination and modification of these elements involved nothing but mechanical skill. 37 Fed. Rep. 338, affirmed.

2. In view of this want of novelty, the fact that the Orum lock went into immediate, extended, and increasing use, while the prior locks were not commercially successful, will not avail to save the patent.

Appeal from the circuit court of the United States for the district of Connecticut.

This was a suit in equity by A. Adgate Duer against the Corbin Cabinet Lock Company for the infringement of a patent. The court below dismissed the bill, (37 Fed. Rep. 338,) and complainant appeals. Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity for the infringement of letters patent No. 262,977, issued August 22, 1882, to Morris L. Orum, for an improvement in locks for furniture, such as are used on bureau or desk drawers, or the doors of wardrobes, washstands, etc.; and, as stated by the patentee in his specification, "it has for its object to provide a lock of such shape as to adapt it for insertion in a mortise of peculiar form, whereby a pair of the securing screws or nails is dispensed with, and the case of the lock is held laterally in the mortise by reason of its conformity thereto in shape."

The following drawings illustrate the lock, and mortise in which it is held:

Fig. 1.

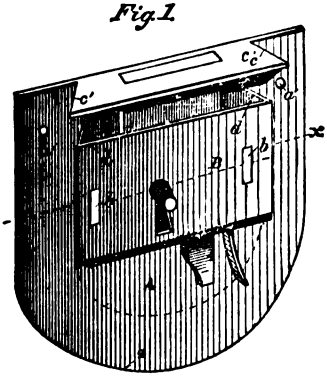
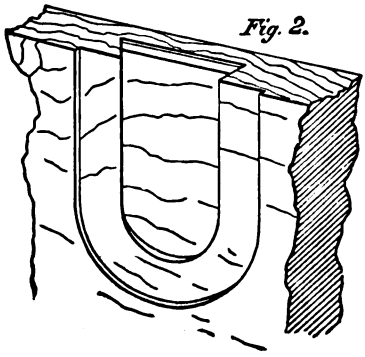


Fig. 2.



The patentee further said in his specification:

"The lock costs no more than an ordinary one of equal quality, and to attach it one tack is used, instead of four screws, as usual; but the main advantage is due to the saving of time and labor in making the mortise, and to the superiority of the finished job, by reason of the fact that the lock plate is countersunk in the wood, instead of lying upon its surface. This result has never heretofore been attained, except by hand chiseling, which is a slow and tedious process.

"I am aware that locks arranged to dovetail into their mortises are not broadly new, and such I do not claim."

His claim—and there was but a single one—was as follows:

"The lock herein described, having a dovetail cap and top plate, and a front plate projecting laterally and below the cap, and rounded at the bottom, whereby the lock is adapted for insertion in a mortise formed by a laterally cutting bit, and when in place is sustained by a countersunk front plate, as set forth."

The answer set up certain anticipating devices owned by the defendant, and the case was heard in the court below upon the pleadings and proofs, and the bill dismissed. 37 Fed. Rep. 338. Plaintiff thereupon appealed to this court.

Benjamin Price and Wilmarth H. Thurston, for appellant. Chas. E. Mitchell and John P. Bartlett, for appellee.

*217 *Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The old and familiar style of furniture lock, in use from time out of mind, was inclosed in a shell or case,—square, or nearly so,—and attached to a rectangular plate turned over at the top to form what is termed a "selvedge," through which the bolt passed. A key post also projected some distance beyond the back plate of the shell towards the front of the drawer. The lock, so constructed, was inserted in a rectangular mortise cut out to receive it, and secured to the drawer by four screws through the four corners of the broad front plate.

The peculiar shape of the cavity required the mortising to be done by hand, which took considerable time, and added largely to the expense of the furniture. Indeed, the lock itself, in some instances, cost less than the expense of mortising the recess to receive it. The need had been felt for a long time of a lock of such shape that it could be received into a rounded cavity, which was capable of being excavated by machinery.

This want was first met by a lock invented by one Gory, for which a patent was issued to him April 22, 1873, numbered

138,148. This patent consisted of "such a construction of the shell or frame of the lock that it is adapted to fasten itself within a routed cavity in the wood, and thus dispense with mortising and fastening screws." "The shell, A," said the patentee, "is so constructed that upon each side of the rear face (and by the rear face is understood the face nearest the front of the drawer) an extension projection or wing, a, is formed, which, when snugly fitted into a corresponding depression, b, at each side of the routed cavity, B, serves to retain the lock securely in the routed cavity. In this way the recess for the reception of the lock for drawers or similar uses, instead of being a mortise necessarily cut by a slowly-operating mortising machine, is an open-sided recess, made *219 almost instantly by the rapidly-revolving tool of a routing machine or groover. * * * This improved form of lock, when driven snugly into a routed cavity such as is described, requires no fastening screws to hold it in place, and consequently reduces the expense of the lock and fastening, in addition to the reduced cost of producing the cavity to receive it." This was the underlying patent of all similar devices, and, while it never seems to have come into general use, subsequent patents have been merely improvements upon it.

The peculiar feature of his patent was not only in rounding the bottom of the lock so that it could be admitted into a cavity cut out by a revolving tool known as a "router," but in making the cavity larger in the rear than in the front, so that a lock correspondingly shaped might be slipped into the cavity from above, and held there without the aid of screws.

While the single claim of this patent was confined to a lock whose frame is made with side extensions at the rear face, to enable the lock to be firmly secured in the routed cavity, several different forms of cavity are shown in the drawings, nearly all of which are dovetailed in such manner that the lock is received and held in position without the aid of other fastenings. This lock was a most ingenious device, and no doubt involved patentable novelty. Three fourths of this patent now belongs to the defendant. There was a difficulty with it, however, in the fact that the patentee took off all the projections from the old style of lock, including those of the broad front plate, through which the screws were inserted, which was cut off so as to be flush with the side of the shell, the projecting key post, which was cut flush with the face of the cap, and the top plate or selvedge through which the bolt is passed. It consisted merely of a shell fitted snugly upon all sides into a cavity routed out of the exact size to receive it. For these or other reasons the lock never seems to have gone into general use. Indeed, the evidence is that it was never used at all.

Next in order of time is patent numbered 241,828, issued May 24, 1881, to Henry L. Spiegel. In this device "the back plate of the lock" (that is, the plate nearest the front of the drawer) "is made to project on each side of the lock, and adapted to fit a groove or dovetail formed in the inner surface of the drawer front," the object of the improvement being to provide a lock which may be secured in its receptacle without the aid of screws. The lock shown was of the ordinary pattern, except that its back plate was provided with projecting edges, designed to fit in a groove, and hold the lock fast. "It is obvious," said the patentee, "that the groove, B, may be made dovetailed, and the edges, G, of the back plate, bent to a corresponding angle to fit therein, if desired." His claim was for a cabinet lock with its rear plate projecting beyond each side of the lock case, and having the upper part of each projection bent towards the front plate, which front plate had a slit and strip, which, when the lock is forced home, was set into the wood by a hammer, and thus the lock was held from working out of its receptacle. This patent is also owned by the defendant.

His idea was, in substance, that of so constructing the lock that there should be a space between the front and rear plates to receive the walls of a routed mortise. Both the front and back plate, however, as well as the selvedge, were made rectangular, and hence the lock was no better adapted for insertion in a routed cavity than was the old-style lock. This lock also seems to have been a failure in practical use, and, so far as the record shows, none were ever constructed under the patent.

On April 23, 1883, Spiegel filed an application for another patent, which was issued to him April 21, 1885, 2½ years after the Orum patent in suit; but as the lock was invented before that of Orum, and as Orum had full knowledge of it before he made his alleged invention, it should be considered as part of the art as it existed at the date of the Orum patent.

In his specification, speaking of prior devices, and apparently of the Gory patent, the patentee states: "In view of the fact that locks constructed with projecting key posts possessed certain advantages that met the demand of the trade, the peculiar construction of lock above described, with its flush key post, and adapted to be driven into a routed cavity, failed of introduction, preference being given to the old form of lock case, with its projecting key post, though it necessitated the hand-chiseled mortise and fastening screws for its attachment." Speaking of his own prior patent of May 24, 1881, he says: "The lock case, being thus secured at its sides, allowed of a space or recess being formed in the rear wall of the mortise,

and in rear of the cap plate, for the reception of the projecting key posts, which space was covered and concealed from view by the projecting top plate for selvedge. While this latter construction of lock possessed valuable features of improvement not disclosed by the prior art, yet the form of lock shown and described in the patent is such as to preclude its adoption for use in routed cavities, because this front plate is not of the proper form to fit within and cover a cavity made by a routing tool. The object of this invention is to obviate the objectionable features and defects hereinbefore set forth, and provide a lock case of such form and construction that it may have a projecting key post, if so desired, and be secured within a routed cavity, and snugly retained therein, so as to conceal the cavity from view, and form a neat and finished appearance when in place. With these ends in view, my invention consists in a lock case having its edges constructed to engage or interlock with the side walls of a routed cavity, and provided with a front plate having a rounded bottom adapted to fit within a countersunk recess around the routed cavity, and constitute a support for the lock case, and conceal the cavity from view." This lock differs from the prior Spiegel patent principally in being rounded at the bottom so as to be fitted to a routed cavity, and prevent the displacement of the lock either in a forward or backward direction, and also in having a space in the rear wall of the cavity for a projecting key post.

This was practically the state of the art when Orum's patent was granted. In this patent the shell or case of the lock is dovetailed to fit a corresponding dovetailed cavity, and the selvedge is also made of similar dovetail shape. The front plate projects upon each side of the case, and is rounded at the bottom so that it may be fitted to a routed cavity. The lock is held in position by two tacks through the upper corners of the front plate, or by a single tack driven through a hole at the base of the plate. To insert the lock, it is simply slipped down into place in the mortise and secured against lifting by one or more tacks which are used merely to prevent the lock from slipping out of the mortise, and are not called upon to resist a strain. His claim is for "the lock herein described, having a dovetail cap and top plate, and a front plate projecting laterally and below the cap, and rounded at the bottom, whereby the lock is adapted for insertion in a mortise formed by a laterally cutting bit, and when in position is sustained by a countersunk front plate, as set forth." There is no mention made, in the specification or claim, of a projecting key post, or of any space for its reception, although such a key post is shown in the drawing, and it was evidently intended that the mortise should be made deep enough to receive it, or that a special channel should be cut out for that purpose. The selvedge was made wide enough to cover a cavity corresponding in depth to the projection of such key post.

In view of the advance that had been made by prior inventors, it is difficult to see wherein Orum displayed anything more than the usual skill of a mechanic in the execution of his device.

All that he claims as invention is found in one or more of the prior patents. The dovetailed cavity and the correspondingly shaped case or shell is only a copy of a cavity shown in Fig. 8 of the Gory patent, and it certainly required no invention to make the top plate or selvedge of the same shape so as to completely cover the cavity. The projecting front plate, rounded at the bottom, is shown in the second Spiegel patent, both of these patents also exhibiting a projecting back and front plate, and a projection or groove in the mortise between them. Neither is the countersunk recess for the reception of the front plate novel, since it is also found in the second patent to Spiegel, and expressly set forth as an element of his first two claims. In each case it is used for the purpose of supporting the lock vertically, and also of preventing it falling backward against the inner wall of the mortise.

In view of the fact that Mr. Orum had no actual knowledge of the Gory patent, he may rightfully claim the quality of invention in the conception of his own device; but as he is deemed, in a legal point of view, to have had this and all other prior patents before him, his title to invention rests upon modifications of these too trivial to be the subject of serious consideration. His "radically new idea of making the mortise as deep as the width of the projecting selvedge, and of cutting out the selvedge at its ends," as claimed by his counsel, was such as would have occurred at once to an ordinarily intelligent mechanic, who had the previous devices before him. To speak of these trifling variations as involving months of labor, thought, and experiment is a misuse of words. In his own testimony, Mr. Orum, who was called as a witness by the defendant, says that if he had been acquainted with the Gory patent he would have had no difficulty in making the top plate of the Spiegel lock conform to a dovetail cavity, or any other routed cavity. While the testimony of a patentee in derogation of his own patent is usually open to some suspicion, this opinion is so obviously correct that it needs only a comparison of his device with those of Gory and Spiegel to confirm it.

It is true the Orum lock seems to have gained an immediate popularity, to have met with large and increasing sales, and to have had the usual effect of successful patents, in stimulating the activity of business competitors to produce an equally useful and popular device. Were the question of patentability one of doubt, this might suffice to

turn the scale in favor of the patentee. But there are so many other considerations than that of novelty entering into a question of this kind that the popularity of the article becomes an unsafe criterion. For instance, a man may, by the aid of an alluring trade-mark, succeed in catching the eye of the people, and palming off upon them wares of no greater intrinsic value than those of his rivals; but such trade-mark may be, and usually is, wholly destitute of originality, often taken from some prior publication, and appropriated to the specific purpose of the owner. The same result may follow from the more attractive appearance or the more perfect finish of the article, from more extensive advertising, larger discounts in price, or greater energy in pushing sales. While the popularity of the Orum lock may be due to its greater usefulness, or to the fact that it was put upon the market just at the time when cabinetmakers were looking for a lock of this description, it is certainly not due to any patentable feature in its construction.

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The decree of the court below dismissing the bill is therefore affirmed.

(149 U. S. 224)

UNDERWOOD et al. v. GERBER et al.

(May 1, 1893.)

No. 217.

PATENTS FOR INVENTIONS—NOVELTY—TRANSFER PAPER.

Letters patent No. 348,073, granted August 24, 1886, to John T. Underwood and Frederick W. Underwood, were for "an improved reproducing surface adapted to be employed for obtaining copies * * * by means of a typewriter," or other means of printing or writing, which consisted of a sheet of material or fabric coated with a composition composed of a precipitate of dye matter, obtained as described, "in combination with oil, wax, or oleaginous matter." *Held*, that the patent was void; for patent No. 348,072 was issued the same day, to the same parties, for precisely the same coloring or dye matter described therein, and, in view of the prior state of the art, there was no invention in applying an existing coloring matter to paper or other fabric for the purpose in question. 37 Fed. Rep. 682, affirmed.

Appeal from the circuit court of the United States for the eastern district of New York. Affirmed.

James A. Hudson and Livingston Gifford, for appellants. A. v. Briesen, for appellees.

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*Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the circuit court of the United States for the eastern district of New York, by John T. Underwood and Frederick W. Underwood, against Henry Gerber and Anton Andreas, founded on the alleged infringement of letters patent No. 348,073, granted to the plaintiffs August 24, 1886, on an application filed March 22, 1886, for a "reproducing surface for typewriting and manifolding."

The specification reads as follows:

"Our invention relates to an improved reproducing surface, adapted to be employed for obtaining copies of typewriting, or other printed or written impressions, by means of a typewriter or other printing device, or by the employment of a stylus or other writing means.

"Our improved transfer surface is spread upon a sheet or vehicle, and when so applied is adapted to be employed in place of the articles of trade commonly known and designated as 'carbon paper' or 'semicarbon paper,' which are employed by typewriters and others to produce copies of impressions either obtained by a machine or by a stylus, or other writing means.

"[In carrying out our invention we employ, in the manufacture of our improved transfer service, dyewood solutions, or their active principles, which we filter and precipitate with alkalies and mineral salts, or with alkalies, acids, and mineral salts, or with acids or alkalies alone. After the solution has been filtered the precipitate is removed from the filtering device and dried. The precipitate is then mixed with lard oil and wax, or their equivalents, and the mixture is then ground together in a warm state.

* "The dye solutions we prefer to employ are obtained from logwood or haematoxylin, the active principle of logwood, Brazil wood, sapan wood, peach wood, madder, or its active principle, alizarine.

"The proportions we find to answer well in producing our improved surface are as follows: Take one pound of extract of logwood, and dissolve the same in one gallon of water, then add to the solution one pound of soda and one pound of mineral salt, using one of the salts of iron or copper,—preferably, sulphate of copper. The mixture thus obtained is then placed in a filter. After the solution has been filtered the precipitate is removed from the device employed *for filtering*, and *then* dried, *after which the precipitate is ready for use.* To every two pounds of precipitate thus obtained, we add one pound of oil and one pound of wax, and then grind the mixture, in a warm state, in what is commonly known as a 'paint' or other suitable grinding mill. The heated mixture thus obtained is *then* applied to tissue paper, or other suitable paper or fabric, by means of a sponge or other suitable transferring device.

"The paper or fabric to which our improved surface is to be applied is placed upon a heated table, by preference formed of iron, and heated by steam; but this may be varied.

"In place of employing oil or wax, or both combined, we can employ any other suitable oleaginous matter, or combination of oleaginous matter, having equivalent, or approximately equivalent, properties.]"

The claim is as follows:

"A sheet of material or fabric coated with

a composition composed of a precipitate of dye matter, obtained as described, in combination with oil, wax, or oleaginous matter, substantially as and for the purposes set forth."

The answer sets up as defenses want of novelty and noninfringement. There was a replication, proofs were taken, and the case was brought to a hearing before Judge Lacombe, who entered a decree dismissing the bill. His opinion is reported in 37 Fed. Rep. 682. The plaintiffs have appealed to this court. Since the appeal was taken, Frederick W. Underwood has died, and John T. Underwood and Hannah E. Underwood, as his executors, have been substituted as coappellants with the surviving appellant, John T. Underwood.

Among the proofs introduced by the defendants was a patent, No. 348,072, granted by the United States to the same persons to whom No. 348,073 was granted, dated August 24, 1886, on an application filed March 22, 1886, the specification of which states as follows: "Our invention relates to the process of producing a transfer surface adapted to be employed upon a sheet or vehicle to take the place of the articles of trade commonly known and designated as 'carbon papers' or 'semicarbon papers,' which are employed by typewriters or others to produce copies of impressions either obtained by a machine or by a stylus, or other writing means." Then the specification proceeds in the same words that are contained in brackets in the foregoing specification of No. 348,073, leaving out the words that are in italics, and changing the word "paint" to "paint mill."

The claim of No. 348,072 is as follows: "The coloring composition herein described for the manufacture of a substitute for carbon paper, composed of a precipitate of dye matter, in combination with oil, wax, or oleaginous matter, substantially as set forth."

This suit was not brought on No. 348,072. The defendants have made the composition of matter described in both of the patents, and have combined paper with it, as indicated in No. 348,073. The only difference in the two patents is that No. 348,073 is for spreading upon paper the composition described in No. 348,072.

The opinion of the circuit court says that, in view of the earlier patents and publications put in evidence, it was difficult to see what novelty or invention there was in taking a coloring substance already known, and applying it to paper; that, if No. 348,072 had been granted to some person the day before the plaintiffs applied for No. 348,073, the latter would clearly be void for want of novelty or invention; that if No. 348,072 were held by an assignee of the plaintiffs, near or remote, he could not be held as an infringer of No. 348,073; that an assignee of No. 348,072 could not be so held except for the combination of paper with the coloring substance for the purpose named; that such a combination was old; that the plaintiffs insisted that their position was the same as if they held a patent with two claims, one for the composition of matter producing the coloring substance, and the other for the combination of that substance with paper; that this might be so, if they could be considered as holding both of the patents, but in the suit they had abstained from declaring on No. 348,072, or even referring to it; that its issue was known to the court only through the defendants, who set it up in defense; that the plaintiffs based their claim to a monopoly solely upon No. 348,073; that, as that patent might stand or fall, so the case which they made out upon their bill must also stand or fall; that the holders of No. 348,073 must submit it to a comparison with No. 348,072, as if the latter patent were outstanding; that thus, at the time when No. 348,073 was issued, the composition of matter which enters into the combination with paper was known, and the right to exclude all persons from making such composition was conferred upon the holder of No. 348,072; that the right to exclude all persons from combining paper with that composition was conferred upon the holders of No. 348,073, but in view of the state of the art such a grant was void; that the combination which No. 348,073 sought to cover was not patentable; that this suit, being based upon that patent alone, must therefore fail; and that to the holder of No. 348,072, whoever he might be, belonged the right to exclude all others from making the new composition of matter, the only invention which (if the other issues in the case were decided against the defendants) was sufficiently novel to warrant the granting of letters patent.

This opinion was filed February 13, 1889, and on March 20, 1889, the plaintiffs moved the court for leave to amend their bill, and to take further proofs. The court made an order on that day that on the payment of the defendants' costs on the final hearing the plaintiffs should have leave to amend their bill by the insertion of apt words, whereby they should allege their ownership, and the infringement by the defendants of letters patent No. 348,072; that on the service of the amended bill the defendants should answer, plead, or demur, and after replication proofs should be taken, strictly limited to the questions arising on No. 348,072, and the case should stand for final hearing on all the issues; but that if the plaintiffs failed to pay such costs within 10 days after taxation, or failed to file their amended bill within 10 days after paying such costs, the bill should be dismissed. The plaintiffs did not pay such costs or amend their bill, and the decree of dismissal was entered on April 26, 1889.

We are of opinion that the decree of the circuit court must be affirmed. There was no patentable novelty or invention, in view of the earlier patents and publications put in evidence, in applying an existing coloring substance to paper.

In the English patent granted to Ralph Wedgwood in 1806 there is described a carbonated paper, as follows: "I make use of a prepared paper, which I call 'duplicate paper.' This is made by thinly smearing over any kind of thin paper with any kind of oil, preferring those kinds of oil which are least liable to oxygenizement, or to be evaporated by heat." And it is said: "The ink made use of in this mode of writing consists of carbon, or any other coloring substance, and finely levigated in any kind of oil. * * * Or coloring matter, of any kind, and in any other medium or vehicle, may be used, provided that medium be such as will admit of the coloring matter being transferred to the duplicate and writing paper. Some coloring substances may likewise be used without any medium or vehicle."

In the English patent granted to Charles Swan and George Frederick Swan in February, 1856, a black coloring matter is described, applicable to the purposes of writing, dying, or staining; and it is said that the inventors employ an extract of logwood, treated with bichromate of potash or with perchloride of mercury, subcarbonate of potash, chlorate of potash, and spirits of ammonia; and, also, "the said coloring matter may be obtained in a liquid form by introducing the salts above mentioned into a liquid extract of logwood, and straining or otherwise purifying the fluid in any suitable manner, or the said coloring matter may be obtained in a solid form by combining the aforesaid salts with a solid preparation of extract of logwood, or by evaporation or distillation from the liquid coloring matter above described, and the solid coloring matter may be kept on hand till required, and reduced to a liquid form by dilution with any suitable proportion of water. And the coloring fluid obtained in any of the modes hereinbefore set forth, in the form of an ink, may be converted into a copying fluid by the addition of any saccharine or other thickening ingredients hitherto employed, or which may be found applicable. It may also be obtained from the solid coloring matter by any suitable process."

The United States patent granted to Charles Cowan May 4, 1869, for an improvement in the preparation of copying paper, says: "I first prepare a mixture of the following ingredients: Boiled linseed oil, two parts; spirits of turpentine, one part; copal varnish, one part. With this compound I smear the paper thinly and evenly on one side, and allow it to soak and dry for about half an hour. Then I apply the coloring matter, which I prepare as follows: For black, I take ivory black, four parts; pure black lead, four parts; Prussian blue, one part." He then gives sundry recipes for different colors, and says: "My copying paper is applicable to making copies of letters, designs, or characters of any desired description."

In Miller v. Brass Co., 104 U. S. 350, 352, it is said: "The claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he dedicates it to the public."

In Mahn v. Harwood, 112 U. S. 354, 360, 361, 5 Sup. Ct. Rep. 178, it is said: "The taking out of a patent which has (as the law requires it to have) a specific claim is notice to all the world, of the most public and solemn kind, that all those parts of the art, machine, or manufacture set out and described in the specification, and not embraced in such specific claim, are not claimed by the patentee,—at least, not claimed in and by that patent. * * * So far as that patent is concerned the claim actually made operates in law as a disclaimer of what is not claimed."

As No. 348,073 does not claim the composition of matter, although it describes it, that composition must be regarded as disclaimed, and as being public property, and there was no invention in applying it to paper, as claimed in the patent sued on.

Decree affirmed.

(149 U. S. 268)

SHAEFFER v. BLAIR.

(May 1, 1893.)

No. 178.

CONTRACTS—CONSTRUCTION—SALE OF LANDS—COMMISSION.

1. Defendant held contracts for the purchase of certain lands, and plaintiff advanced him money to complete the purchase under an agreement that legal title should be taken in defendant's name, and then conveyed to plaintiff by him; that defendant, after doing everything necessary to an advantageous sale of the lands, the expense of which was to be borne by plaintiff in the first instance, should sell them, and retain a commission, depositing the balance in bank to plaintiff's credit, until the latter should be reimbursed for his advances; that sales were to be made at prices mutually agreed on by plaintiff and defendant, and all contracts made by the latter should require approval by the former; and that, when all advances were repaid with interest, the remainder of the property should belong three fifths to plaintiff and two fifths to defendant. *Held*, that the conveyance of the legal title to plaintiff, and the deposit of proceeds of sale to his credit, were intended only as security for his advances, and defendant retains an equitable interest in two fifths of the property, subject to plaintiff's claim for reimbursement, which will not be divested by his fraud or

misconduct. 33 Fed. Rep. 218, reversed. Mr. Justice Brewer, dissenting.

2. But his fraudulent representations as to the value of the lands and the purchase price will defeat his right to the stipulated commission on the gross proceeds of sale, whether the contract constituted him a partner of plaintiff in the venture or only an agent.

Appeal from the circuit court of the United States for the western district of Missouri.

This was a suit in equity by John I. Blair against Samuel C. Shaeffer for specific performance of a contract. There was a decree for plaintiff in the court below, (33 Fed. Rep. 218,) and defendant appeals. Reversed.

Statement by Mr. Justice GRAY:

*249 *This was a bill in equity, filed December 8, 1885, by John I. Blair, a citizen of New Jersey, against Samuel C. Shaeffer, a citizen of Ohio, and other persons, citizens of other states, claiming under him, setting forth a contract in writing between the plaintiff and Shaeffer, dated February 4, 1884, *250 (which is copied in the margin,)[1] and praying that Shaeffer might be* ordered to convey to the plaintiff the lands described in that contract, and that it be adjudged that the defendants had no title or interest *251 therein, and for further relief.

*At the hearing in the circuit court, upon pleadings and proofs, the case appeared to be in substance as follows: In February, 1884, Shaeffer obtained and received from the plaintiff sums of money amounting to $92,882.70, upon fraudulent representations that they were needed to pay for the lands described in the contract; and, within a month after its date, procured conveyances of those lands to himself, by paying therefor sums amounting to $59,789.30 only, and paid $500 for taxes and other necessary expenses, leaving the sum of $32,593.40 due to the plaintiff; and afterwards refused, on *252 demand, to convey the lands to the plaintiff.

The three tracts of land described in the contract contained respectively about 36½ acres, about 138 acres, and 69 acres, near Kansas City, in the state of Missouri, and were worth more at the time of the contract than the sums paid by the plaintiff, and greatly increased in value afterwards.

In an action at law against Shaeffer, submitted to the circuit court without a jury at the same time with the present suit in equity, the plaintiff recovered judgment for the aforesaid sum of $32,593.40. Upon that judgment no writ of error was sued out.

In the present suit the circuit court held that the contract sued on created no partnership between the plaintiff and Shaeffer, and conferred on Shaeffer only the right of an agent to sell, with a share in the profits by way of compensation; and that Shaeffer, by his fraudulent conduct, had forfeited all his rights under the contract, including not only the 5 per cent. commission on sales, but the share of 40 per cent. in the net profits remaining after payment of the sums advanced by the plaintiff; and entered a decree for the plaintiff as prayed for. 33 Fed. Rep. 218. From this decree Shaeffer appealed to this court.

[1] Whereas, by virtue of a certain contract made by Samuel C. Shaeffer, of Lancaster, Ohio, with P. Cardenas, of New York city, for the purchase of thirty-six and 47-100 acres of land in Jackson county, Missouri, and known as "lot 7 of the partition of the estate of Thomas West, deceased, by the circuit court of Jackson county, Missouri, on October 18, 1880," as per contract dated November 1, 1883, for which said land the said Shaeffer was to pay the said Cardenas the sum of $21,882 on or before February 8, 1884: Now it is agreed, as said contract is made by said Shaeffer for said land, and for prudential purposes, that the same shall be conveyed by warranty deed to said Shaeffer; and that John I. Blair, of Blairstown, New Jersey, has paid for the same by giving to said Shaeffer a check on the National Park Bank of New York city for the sum of $21,882, signed by the president of the Belvidere National Bank of New Jersey, to enable him to pay for the said land.

And whereas, by another agreement made by said Shaeffer with Marion West, of Jackson county, Missouri, dated July 24, 1882, and October 21, 1882, whereby said Marion West sold the interests of Frank West, Thomas West and Joseph C. West, minor heirs of Thomas West, deceased, and known as "lots 5, 6, and 8 of the partition of the estate of said Thomas West, deceased, by the circuit court of Jackson county, Missouri, on October 18, 1880," for which said land, by said contract, said Shaeffer was to pay the sum of $44,559; $10,000 to be paid cash upon the delivery of deed, and the remainder, $34,559, to wit, $17,279.50 on or before February 8, 1885, and $17,279.50 on or before February 1, 1886, bearing eight per cent. interest from February 1, 1883, and secured by mortgage on said premises. The said John I. Blair has given to said Shaeffer a check, signed by the president of the Belvidere National Bank of New Jersey, on the National Park Bank of New York city, for $10,000, to enable said Shaffer to pay that much on account of said lands, and for prudential reasons to obtain a deed for the same in his own name. The said Blair is to pay the balance of the purchase money at maturity, amounting to $34,559, given by said Shaeffer, and secured by mortgage.

This makes at this time the cash payments on the above two contracts, $21,882 and $10,000, making $31,882, which is to bear eight per cent. interest until paid out of the sales of the land aforesaid, the interest to be added to the principal yearly, and bear eight per cent. interest until paid.

Within four months after said Shaeffer shall have obtained the title to said lands, or sooner, if desired by said Blair, said Shaeffer to make a warranty deed to said Blair for said lands.

Now, it is further agreed that, for the mutual interest of said Blair and Shaeffer, it may be deemed advisable to obtain certain releases for pretended claims made by the Anthony heirs to said property, the sum for said purpose to be mutually agreed upon, which sum said Blair agrees to furnish to said Shaeffer, upon telegraphic notice, to aid him in securing said releases; and said Shaeffer afterwards to deed by release deed said lands to said Blair. Said money to bear same rate of interest, and governed by same conditions, as hereinbefore stipulated; the same to be indorsed on this contract, or other written evidences given that said Blair paid the money.

It is deemed for the mutual interest of said Blair and Shaeffer that said Shaeffer purchase the sixty-nine acres of land from John S. West, adjoining the above-described lands, at a price not to exceed $400 per acre, amounting to $27,600, and to obtain a warranty deed therefor. Said John I. Blair has given said Shaeffer the president's check

Richard A. Harrison and C. D. Martin, for appellant. Chas. O. Tichenor, for appellee.

*255 *Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

The decision of this case turns upon the construction of the contract of February 4, 1884, by which the parties agreed to buy certain lands, and to sell them again for the joint benefit of both.

The provisions of that contract were, in substance, that those lands, in the greater part of which Shaeffer already had an equitable title under agreements of third persons to sell and convey them to him, should be purchased for the mutual interest of the parties; that the legal title in all the lands should be taken in Shaeffer's name, and be conveyed by him to Blair; that Blair should advance the sums required to enable Shaeffer to pay the purchase money of *256 the lands, as well as the necessary expenses of preparing them for sale and selling them, and should be repaid his advances, with interest, out of the net proceeds of sales; that Shaeffer should stake out the lands for sale, make the necessary improvements, sell them, retain a commission of 5 per cent. upon the gross amount of sales, and, until Blair should should have been reimbursed for his advances, deposit the rest of the proceeds in a bank to Blair's credit; that the expenses of improving and selling the lands, the time within which they must be prepared for sale, the price at which they might be sold, and the bank in which the proceeds should be deposited by Shaeffer, should be mutually agreed upon between him and Blair, and all contracts of sale by Shaeffer should be approved by Blair; and that, when Blair should have been reimbursed for all his advances, "then the remainder of the property shall belong 60 per cent. to said Blair and 40 per cent. to said Shaeffer," and be divided between them accordingly, either by Blair's conveying the title in two fifths of the lands to Shaeffer, or by Shaeffer's selling the lands and paying 60 per cent. of the proceeds to Blair.

The contract evidently contemplated that, while the sales to be made by Shaeffer should be subject to Blair's approval, no sales should be made by Blair without Shaeffer's consent. This clearly appears from several provisions of the contract. It is by Shaeffer, or, as said in the last clause of the contract, "by said Shaeffer or assigns," that the lands are to be staked out into lots and prepared for sale. "Said Shaeffer is to deduct and receive five per cent. commission upon gross sales of all lots sold at the agreed price or over made by said Blair and Shaeffer;" that is to say, "of all lots sold" by Shaeffer "at the agreed price or over," the price (not the sales) being "made by said Blair and Shaeffer." The provision that all contracts of sale shall be made in triplicate, and approved in writing by Blair, and one copy retained by Shaeffer, clearly implies that all contracts of sale shall be initiated by Shaeffer; and after Blair shall have been reimbursed his advances, then, if the lands are not them-

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of the Belvidere National Bank of New Jersey on the National Park Bank of New York city for $14,600 as part payment for said sixty-nine acres of land. If said property cannot be purchased for said $27,600, then said $14,600 check to be returned to said Blair unused. Said Blair agrees to assume and pay $13,000 mortgage on said property, which said Shaeffer will give to said West, payable in one or two years, and bearing eight per cent. interest, in case said purchase can be made; said Shaeffer, within four months after obtaining title to said land, to deed same to said Blair. All the money paid and furnished and assumed, to pay for said land, by said Blair, to bear eight per cent. interest, and be added to the principal each year until paid.

All moneys necessary to stake off lots, grade streets, advertising, office furniture, fixtures, rents, stationery, taxes, and such other expenses as may become necessary for the improvements and sale of said property, as may be mutually agreed upon from time to time by said Blair and Shaeffer, shall be furnished by said Blair.

Said Shaeffer is to deduct and receive five per cent. commission upon gross sales of all lots sold at the agreed price or over, made by said Blair and Shaeffer; and the remainder to be deposited in some bank in Kansas City that may be mutually agreed upon, to the credit of said John I. Blair, until all the money he has paid or advanced, with interest as aforesaid, shall have been returned to him. At the end of each month said Shaeffer is to report the amount to the credit of said Blair, the same to be subject to said Blair's draft on account of the money advanced or paid for the property and otherwise as aforesaid.

All contracts for the sale of said land or lots to be made in triplicate, and approved by said John I. Blair, or some one appointed by him; on the back of said contracts the word "Approved," or "Rejected" to be written, and signed by said John I. Blair, as aforesaid; one copy of said contract to be retained by said Shaeffer, and one by the purchaser. It shall be specified on the face of said contracts that they shall not be valid unless approved as specified; and all contracts to be made payable to said John I. Blair.

When said Blair shall have been paid in cash for all the money advanced and furnished by him for the purchase of said lands, and other moneys, and the interest thereon, as specified, then the remainder of the property shall belong, sixty per cent. to said Blair and forty per cent. to said Shaeffer; and then said Shaeffer shall not be required to deposit in the aforesaid bank, as aforesaid specified, to the credit of said Blair, more than sixty per cent. of the net proceeds of sales of said lands or lots.

If it is at this time desirable to divide said lots or land between said Blair and Shaeffer, said Blair to take sixty per cent., and said Blair to convey the title to forty per cent. of said property or lots by warranty deed to Shaeffer; or said Shaeffer to sell the lots or lands as aforesaid, and divide the net proceeds of sale, sixty per cent. to said Blair and forty per cent. to said Shaeffer.

It is understood that said property, or any portion thereof, to be staked out and prepared for sale within one year by said Shaeffer or assigns, after the Kansas City Belt Railway shall have been completed to said property, unless otherwise postponed in writing by said Blair and Shaeffer.

In witness whereof the parties hereto have hereunto set their hands and seals on this the 4th day of February, 1884, at Kansas City, Missouri.

Samuel C. Shaeffer. [Seal.]
John I. Blair. [Seal.]

selves divided between them, it is Shaeffer
*257 who is to sell them and divide the proceeds. *In short, Shaeffer was to contribute to the venture his equitable title in the greater part of the lands to be purchased, as well as his own services. Blair was to contribute all the money required to carry out the enterprise. The legal title was to be taken in Shaeffer's name, and conveyed by him to Blair. Shaeffer was to attend to preparing the lands for sale, and to sell them, subject to Blair's approval. Shaeffer was to receive a commission of 5 per cent. on the gross amount of sales. Out of the rest of the proceeds Blair was to be repaid his advances, and, after Blair had been reimbursed, the property was to belong three fifths to Blair and two fifths to Shaeffer, and to be divided between them accordingly, either in lands or in money.

Taking into consideration the whole scope of the contract, and the fact that before it was made Shaeffer had an equitable interest in the greater part of the lands, which was in fact, and was evidently considered by both parties to be, of greater value than the price which he had agreed to pay for them; that the title to all the lands was to be taken in Shaeffer's name in the first instance, and to be conveyed by him to Blair; and especially the express stipulation that, after Blair should have been fully reimbursed for his advances out of the proceeds of sales, "then the remainder of the property shall belong sixty per cent. to said Blair and forty per cent. to said Shaeffer," and should be divided between them accordingly,—the conclusion appears to us to be inevitable that the conveyance of the legal title by Shaeffer to Blair, like the deposit of proceeds of sales made by Shaeffer to Blair's credit, was intended as security only for Blair's advances; that Shaeffer was to have and retain an equitable title in two fifths of the land, subject to the claim of Blair for reimbursement; and that Shaeffer's fraudulent misconduct, while it might properly defeat any claim of his for commissions, did not divest him of his equitable title in the lands, as recognized and stipulated for in the contract.

There may doubtless be a partnership in the purchase and the resale of lands, as of any other property. But this contract contains no expression to indicate an intention
*258 of the *parties to become partners. It does not authorize either party, without the consent of the other, to sell any property or to contract any debts on behalf of both. If the enterprise proves unsuccessful, the contract does not provide or contemplate that Shaeffer shall share the loss; and the phrase, "said Shaeffer or assigns," in the last clause, (unless supposed to be inadvertently inserted,) is hardly consistent with the idea of a partnership. There is great difficulty, therefore, in the way of construing this contract as creating a partnership between Blair and Shaeffer. Thompson v. Bowman, 6 Wall. 316; Seymour v. Freer, 8 Wall. 202; Meehan v. Valentine, 145 U. S. 611, 623, 12 Sup. Ct. Rep. 972.

But it is unnecessary to express a decisive opinion upon that point, because, whether Shaeffer was acting as a partner or only as an agent in performing the duties required of him by the contract, the fraudulent misconduct proved against him deprived him of the right to the stipulated commissions, (Denver v. Roane, 99 U. S. 355; Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. Rep. 303;) and whether he was or was not a partner, that misconduct did not operate to forfeit his equitable title in the lands.

The result is that Blair is not entitled to the entire property, except as security for the sums advanced by him, and for any reasonable expenses, including the amount ascertained by the judgment at law between the parties, (so far as they remain unpaid,) with interest computed according to the contract; and that, after reimbursing him for such advances and expenses, the lands belong, in equity, three fifths to Blair and two fifths to Shaeffer.

The decree of the circuit court adjudging that Shaeffer has no title or interest in the lands is therefore erroneous, and must be reversed; and the case is to be remanded to that court, with directions to order that the lands, or so much thereof as may be necessary to pay and satisfy the sums due to the plaintiff for advances and expenses, be forthwith sold, and the proceeds applied to the payment of those sums; and that any lands or proceeds remaining after so reimbursing the plaintiff be divided between him and Shaeffer in the proportions aforesaid.

*Decree reversed, and case remanded to *259
the circuit court for further proceedings in accordance with the opinion of this court.

Mr. Justice BREWER dissented.

Mr. Justice FIELD was not present at the argument, and took no part in the decision.

(149 U. S. 194)

MEXICAN CENT. RY. CO., Limited, v. PINKNEY.

(May 1, 1893.)

No. 1,199.

CIRCUIT COURTS—JURISDICTION—CITIZENSHIP—APPEARANCE.

1. When the original petition contains the proper averments, as to the citizenship of the parties, to bring the case within the jurisdiction of the United States circuit court, it cannot be objected that "the record fails to show the residence and citizenship of the parties at the time of the institution of the suit" simply because the averments as to these matters in an amended petition on which the case was tried refer to the time of its filing, and not to the time when the action was brought.

2. Where, in such suit, the plaintiff gives

testimony which defendant claims tends to show that he is not a citizen of the district in which he sues, it is within the discretion of the court to refuse to allow defendant to file a plea to that effect, and to raise an issue as to the jurisdiction of the court on the ground of citizenship, and its action in this regard will not be reviewed by the supreme court.

3. Certain railroad companies, including defendant, a foreign corporation, erected and maintained a joint warehouse in Texas, on the Mexican frontier, for the storage of imported goods, and goods for export, until the customs laws were complied with. One half the expense of erecting and maintaining the warehouse was paid by defendant, and the balance by the other companies, one of which owned the land on which it was built. The agent in charge of this warehouse was appointed without any action or approval by defendant. He was on the pay roll of one of the other companies, and under bond to it for the faithful discharge of his duties. He had no authority to contract for defendant, received and disbursed no money on its account, and it had no control over, or power to discharge, him. *Held*, that he was not "a local agent" of defendant, on whom service of process could be made, under Sayles' Rev. Civil St. Tex. art. 1223a.

4. The provision of the Texas statutes that a special appearance for the purpose of objecting to the service of process becomes a general appearance to the next term of the court is not controlling upon the United States circuit court sitting in that state, whose jurisdiction is defined by acts of congress; and hence a party sued therein, who appears specially to object to the jurisdiction, and, when his objection is overruled, pleads to the merits, does not thereby submit himself to the jurisdiction of the court, or waive his right to a review of its action thereupon.

In error to the circuit court of the United States for the western district of Texas.

This was an action by Alexander Pinkney against the Mexican Central Railway Company, Limited, for damages for personal injuries. There was judgment for plaintiff in the court below, and defendant brings error. Reversed.

A. T. Britton, A. B. Browne, and J. Lewis Stackpole, for plaintiff in error. S. F. Phillips and F. D. McKenney, for defendant in error.

*195 *Mr Justice JACKSON delivered the opinion of the court.

This writ of error brings up for our consideration the general question whether the circuit court of the United States for the western district of Texas acquired, or rightfully exercised, jurisdiction in the present case. This jurisdictional question arises as follows: The defendant in error, Alexander Pinkney, brought an action in that court against the plaintiff in error, the Mexican Central Railway Company, Limited, to recover damages for personal injuries alleged to have been sustained while in the performance of his duties as a brakeman in the employ of the company.

In his original petition the plaintiff alleged that he was a resident, citizen, and inhabitant of the county of El Paso, in the western district of Texas; that the defend-
*196 ant was a *citizen of Massachusetts, being a corporation organized under the laws of that state, and having its principal office and place of business in Boston; and that it was owning, operating, and maintaining, or operating and maintaining, a line of railroad running from El Paso, in Texas, southwardly through the republic of Mexico, to the city of Mexico, and had an office in El Paso, and a local agent there, named Harry Lawton.

Upon the filing of this petition a citation or summons was issued, and was served upon Lawton by the marshal of the district, who made return thereon as follows: "Executed on the 23d day of September, 1891, by delivering to H. Lawton, local agent of the Mexican Central Railway Company at El Paso, Texas, in person, a true copy of this writ."

On the 30th of September, 1891, the defendant entered a special appearance for the purpose of excepting to the service of the citation, and filed a plea in abatement thereto, as follows:

"Now comes the defendant in the above styled and numbered cause, and, appearing only for the purpose of excepting to the service of the citation herein, and not appearing generally, or for any other purpose, says:

"(1) That Harry Lawton, upon whom the citation herein was served as the local agent of this defendant, is not the president, vice president, secretary, treasurer, general manager, or any officer, of this defendant; and neither said Lawton, nor any 'joint agent,' or agent at 'the joint warehouse' in the city of El Paso, Tex., has ever been designated by this defendant as its officer or agent upon whom citation might be served in this state and county, and is not authorized by this defendant to receive or accept citation on its behalf.

"(2) That before the establishment of what is known as the 'Joint Warehouse,' in the city of El Paso, Tex., over which said Lawton has control and management, importers of goods, their brokers and agents, were put to great trouble and inconvenience on account of the lack of the proper and necessary facilities for handling, examining, weighing, and classifying goods billed to and from points in the republic of Mexico upon their arrival at said city of El Paso over the various roads hereinafter mentioned, and on account of said deficiencies owners of goods destined to points in the republic of Mexico were frequently subjected to fines and penalties under the customs laws of Mexico on account of inaccuracies in the importation papers required therefor by said Mexican government; that in the interest and convenience of importers of American as well as of Mexican goods and merchandise, and in order thereby to increase the traffic of this defendant, and the other railroads hereinafter mentioned, there was established, and since maintained, said joint warehouse.

where goods, wares, and merchandise destined to points in said republic, upon their arrival at said El Paso are transferred, deposited, and held by the agent in charge thereof for examination, weighing, and classification, as aforesaid, prior to their entry into said republic, and where the import duties on goods coming from said republic over defendant's line may be conveniently paid, and such goods transferred and turned over to the proper roads by the agent in charge of said joint warehouse.

"(3) That, at the solicitation of the railroads then jointly interested therein, said warehouse was constructed and established in or about the year A. D. 1887, by the Atchison, Topeka & Santa Fe Railroad Company, on property owned by it then and since, until the same was duly passed by transfer to the Rio Grande & El Paso Railroad Company, which now and ever since said transfer has owned said warehouse, and the property upon which the same is located.

"(4) That this defendant pays one half of all the expense incurred in the maintenance and operation of said joint warehouse, while said Rio Grande & El Paso Railroad Company, the Texas & Pacific Railroad Company, the Galveston, Harrisburg & San Antonio Railroad Company, and the Southern Pacific Railroad Company bear the balance thereof, upon a tonnage basis.

"(5) That said Lawton and all joint agents are selected by said Rio Grande & El Paso Railroad Company, and, with the approval of the other companies last aforesaid and this defendant, are appointed by said R. G. & E. P. R. Co.* upon whose pay rolls the names of such joint agents, and the members of their force, appear as employes of said last-mentioned company, who pay the salaries and wages thereof.

"(6) That said Lawton, as joint agent, and his force, are under bond to said Rio Grande & El Paso Railroad Company, Texas & Pacific Railroad Company, Galveston, Harrisburg & San Antonio Railroad Company, and Southern Pacific Railroad Company, conditioned for the faithful performance of the duties required of them by said last-mentioned companies, to which reports are made, and of and for which money is collected and received by said Lawton.

"(7) That said Lawton, being unauthorized so to do, makes no contracts, and collects and handles no money, for or on behalf of this defendant; is under no bond to it; keeps no accounts of or for it; is not on its pay rolls; was not selected or appointed by it, and this defendant is without power to discharge him; all of which defendant is ready to verify. Wherefore, defendant says that said Lawton is not its local agent or other employe or agent, that the service of the citation herein is insufficient, and prays that the return thereon be quashed."

On the 6th of April, 1892, by leave of the court, the plaintiff filed an amended petition setting out with considerable detail the facts upon which he based his claim that Lawton was an agent of the defendant, upon whom service could be made, (which facts were not materially different from those set out in the plea and motion to quash the return to the citation,) and making substantially the same allegations as respects the personal injuries sustained by him as were contained in the original petition.

The plaintiff afterwards demurred to the plea in abatement, and motion to quash the return to the citation, and the demurrer having been sustained, and the service held to have been good, the defendant excepted. Thereafter the defendant filed an answer setting up (1) a general demurrer; (2) a general denial; and (3) a plea of contributory negligence; and the cause thereupon went to trial before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for the sum of $3,000.

On the trial of the case evidence was brought out on cross-examination of the plaintiff, who testified in his own behalf, which counsel for the defendant claimed tended to show that the plaintiff was not a citizen of the district in which the action was brought; and they thereupon moved the court to permit defendant to file a plea to the effect that plaintiff was not a resident or citizen of the state of Texas when the action was brought, and had never been a resident of that state, but was a deserter from the army of the United States, and was a resident and citizen of Arizona territory, where he had enlisted, and where his troop was stationed, so as to raise and present an issue as to the jurisdiction of the court on the ground of citizenship of the plaintiff. But the court ruled that no amendment to the pleadings would be permitted, and that the issue could not then be raised, but that defendant might ask plaintiff as to his residence and citizenship. To which ruling the defendant excepted.

The assignments of error are as follows:

"First. The court erred in assuming jurisdiction over this cause, for the reason that the record herein fails to show the residence and citizenship of the parties to this suit at the time of the institution of the same.

"Second. The court erred in sustaining plaintiff's demurrer to defendant's exception to the service of the citation and motion to quash the return thereof, and in holding that the service on one Harry Lawton, as defendant's agent, was good (1) for the reason that plaintiff's demurrer was insufficient in law; (2) for the reason that the return of said citation was defective and insufficient; and (3) for the reason that defendant's said exception and motion showed that said Lawton was not the local agent of defendant.

"Third. The court erred in refusing to permit issue to be joined and tried as to its jurisdiction, and in refusing to permit defendant to file its plea to the effect that plaintiff was

*200 not a resident and citizen of the state of Texas, as in his complaint averred, at the time his suit was filed, for the reason that it was the right of the defendant to show, and it was the duty of the court to hear, at any stage of the trial, that plaintiff had wrongfully misstated his residence and citizenship in the attempt to fraudulently confer jurisdiction upon the court, which had in fact no jurisdiction, plaintiff being a resident and citizen of the territory of Arizona and the defendant, as shown by the record herein, being a corporation created and existing under the laws of the state of Massachusetts, and therefore a resident and citizen of that state."

With respect to the first assignment of error, the point is made that the averment of citizenship of the plaintiff was not sufficiently set out in the amended petition; it being simply alleged therein that the "plaintiff is a resident, citizen, and inhabitant of El Paso county, Tex.," which averment referred to the date of the filing of that petition, and not to the date of the commencement of the action. But the original petition, which was the first pleading filed in the case, made the proper averments, as respects the citizenship of the parties, to bring the case within the jurisdiction of the circuit court, and in our opinion that was sufficient. The rule is that, to give the circuit courts of the United States jurisdiction on the ground of the diverse citizenship of the parties, the facts showing the requisite diverse citizenship must appear in such papers as properly constitute the record of the case. The original petition is properly a part of the record, and, as that made the proper averments as to the citizenship of the parties, the point raised by the first assignment of error is not well taken.

The third assignment of error relates to matters purely within the discretion of the trial court, and is therefore of no avail. The proposition is not controverted that if it appears in the course of the trial that the controversy is not one of which the court could take cognizance, by reason of the citizenship of the parties to it, the circuit court has the right, and it is its duty, to dismiss the cause for the want of jurisdiction. But that is not this case. The question presented by this assignment of error is that the court erred in refusing leave to *201 file a plea during the progress of the trial on the question of the plaintiff's citizenship, and in refusing to permit issue to be joined thereon. It is well settled that mere matters of procedure, such as the granting or refusing of motions for new trials, and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court, and unless there has been gross abuse of that discretion they are not reviewable in this court on writ of error. And even if such questions were reviewable here generally, on writ of error, they are not reviewable in this proceeding, because they do not go to the question of jurisdiction in the court below, which is the only question we can consider upon the present writ of error.

This brings us to the consideration of the questions presented by the second assignment of error, which are (1) as to whether, upon the record, as made by the plea in abatement and motion to quash the return to the citation, and the demurrer thereto, Lawton was a local agent of the defendant, upon whom service could be made, within the general meaning of that term, and under the statutes of Texas relating to the method of obtaining service upon foreign corporations doing business in that state; and (2) as to whether, even if the service was bad, the special appearance of the defendant for the sole purpose of excepting to it, and, after its plea and motion were overruled, its filing a general answer, can be deemed in any sense a general appearance, within the meaning of the statutes of Texas relating to such matters of practice, such as operated to confer jurisdiction on the circuit court of the United States.

The statute of Texas relating to service of process on foreign corporations is as follows:

"In any suit against a foreign, private, or public corporation, joint-stock company or association, or acting corporation or association, citation or other process may be served on the president, vice president, secretary, or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint-stock company, or association, or acting corporation or association." Sayles' Rev. Civil St. Tex. art. 1223a.

*Under the allegations of the plea in abatement or motion to quash the return to the citation, and admitted by the demurrer, was Lawton a "local agent" of the defendant company, within the meaning of this statute? We think not. The joint warehouse in which Lawton was employed, and the ground on which it is located, was the property of the Rio Grande & El Paso Railroad Company. The whole force of employes and agents in that warehouse were selected by that railroad company, with the approval of certain other named companies, not including the defendant. They were on the pay rolls of that company, and were bonded to it and the other companies; and Lawton made his reports of the moneys collected and received by him to those companies. The seventh paragraph of the plea in abatement makes this terse and comprehensive statement: "Lawton, being unauthorized so to do, makes no contracts, and collects and handles no money, for or on behalf of this defendant; is under no bond to it; keeps no accounts of or for it; is not on its pay rolls; was not selected or appointed by it, and this defendant is without power to discharge him." The only

ground upon which it could possibly be contended that Lawton was a local agent of the defendant company, within the meaning of this statute, is that the company paid one half of the expense incurred in the maintenance and operation of the joint warehouse. But surely this fact alone would not create the relation of principal and agent between Lawton and the defendant. While it may be somewhat difficult to define the line between those who represent a foreign corporation and those who do not, within the meaning of the Texas statute quoted, it is perfectly clear to our minds that the relation between Lawton and the defendant was not such as to render him a "local agent," upon whom process against the company could be served; for in no proper sense was he the direct representative of the company, any more than a general ticket agent, employed by one of the great trunk lines running out of New York to the west, who sells a through ticket to the city of Mexico, which would entitle the holder of it to transportation to the city
203 of Mexico over the road of the plaintiff in error, would be its agent, although it might bear some proportion of the expense of the general office in New York.

The contention on the part of the defendant in error, however, is that, even admitting that the service in this case was not sufficient to bring the railway company into court, still, under the laws of Texas, as construed by the highest court of the state, the special appearance of the company for the purpose of objecting to the jurisdiction of the court in the premises, and its subsequent answer on the merits, after its motion to quash the return to the citation had been overruled, amounted to, or was, in effect, a general appearance in the case, and gave the circuit court jurisdiction. In other words the point is made that, as the state laws regulating the procedure and practice of the state courts in actions at law furnish the rules for procedure in like cases in the circuit courts of the United States, under section 914 of the Revised Statutes, and as, under the statutes of Texas, a special appearance of a defendant to question or object to the jurisdiction of the court for want of personal or proper service of process, even if his objection is sustained, becomes a general appearance to the next term of the court, therefore the court below in this case, by reason of the special appearance of the defendant, acquired jurisdiction of its person, notwithstanding the fact that the original service may have been insufficient and bad.

These statutes regulating the procedure in the state courts of Texas have been before this court for consideration in several recent cases. In York v. Texas, 137 U. S. 15, 11 Sup. Ct. Rep. 9, the question was whether this state legislation (articles 1240–1245, Rev. St. Tex.) providing that a defendant who appears only to obtain the judgment of the court upon the sufficiency of the service of the process upon him is thereafter subject to the jurisdiction of the court, although the process against him is adjudged to have been insufficient to bring him into court for any purpose, was "due process of law," within the meaning of the fourteenth amendment to the federal constitution, and this court held that it was. A like decision was rendered in the subsequent case of Kauffman v. Wootters, 138 U. S. 285, 11 Sup. Ct. Rep. 298, and the ruling in York v. Texas was reaffirmed. Those were cases arising in the state courts, and were brought here on writs of error to the supreme court of the state; and it was therefore properly said in the opinion in York v. Texas, page 20, 137 U. S., and page 10, 11 Sup. Ct. Rep., that "the state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants." citing Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. Rep. 91.

In the case of Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44, (decided at this term of the court,) questions somewhat similar to those in this case were brought before us. In that case an action had been brought in the circuit court of the United States for the western district of Texas, by a citizen of the eastern district of that state, against a corporation organized under the laws of Kentucky, and therefore a citizen of that state, and which was doing business in said western district. The defendant demurred to the action on the ground that under the first section of the act of congress, approved March 3, 1887, (24 St. p. 552,) as corrected by the act of August 13, 1888, (25 St. p. 434,) it could not be sued in the western district of Texas, but, if suable at all in the federal courts of that state, it must be sued in the eastern district of the state, of which district the plaintiff was a citizen. The demurrrer was overruled, and exceptions saved by the defendant, after which it filed an answer, and went to trial upon the merits of the case, the trial resulting in a verdict and judgment in favor of the plaintiff for the sum of $4,515. The defendant thereupon sued out a writ of error from this court on the question of jurisdiction, under the act of congress approved February 25, 1889, (25 St. p. 693,) and the case was decided here on a motion to dismiss that writ of error. The motion was overruled, and the judgment of the circuit court reversed, and the cause remanded, with directions to render judgment for the defendant upon its demurrer.

It was held by the court that under the act of congress approved March 3, 1887, as corrected by the act of August 13, 1888, 205 above referred to, the defendant was not suable in the western district of Texas, be-

cause neither it nor the plaintiff was a citizen of that district. In that case the appearance of the defendant to question the jurisdiction of the circuit court was relied on, under the Texas statutes, and the authority of the Texas decisions and the decisions of this court in York v. Texas and Kauffman v. Wootters, above cited, to save the jurisdiction; but this court, speaking by Mr. Justice Gray, in reply to this contention, said, (page 208, 146 U. S., and page 46, 13 Sup. Ct. Rep.:)

"It is further contended on behalf of the defendant in error that the case is controlled by those provisions of the statutes of Texas which make an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of nonresidence, and which have been held by this court not to violate the fourteenth amendment of the constitution of the United States, forbidding any state to deprive any person of life, liberty, or property without due process of law. Rev. St. Tex. 1879, arts. 1241–1244; York v. State, 73 Tex. 651, 11 S. W. Rep. 869, nom. York v. Texas, 137 U. S. 15, 11 Sup. Ct. Rep. 9; Kauffman v. Wootters, 138 U. S. 285, 11 Sup. Ct. Rep. 298; Railway Co. v. Whitley, 77 Tex. 126, 13 S. W. Rep. 853; Insurance Co. v. Hanna, 81 Tex. 487, 17 S. W. Rep. 35.

"But the question in this case is not of the validity of those provisions as applied to actions in the courts of the state, but whether they can be held applicable to actions in the courts of the United States. This depends on the true construction of the act of congress, by which 'the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held.' Rev. St. § 914; Act June 1, 1872, c. 255, § 5; 17 St. p. 197.

"In one of the earliest cases that arose under this act, this court said: 'The conformity is required to be as near as may be, not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose. It devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals.' Railroad Co. v. Horst, 93 U. S. 291, 300, 301.

"Under this act the circuit courts of the United States follow the practice of the courts of the state in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defenses on the merits shall be pleaded successively or together. Delaware County Com'rs v. Diebold Safe Co., 133 U. S. 473, 488, 10 Sup. Ct. Rep. 399; Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. Rep. 781. But the jurisdiction of the circuit courts of the United States has been defined and limited by the acts of congress, and can be neither restricted nor enlarged by the statutes of a state. Toland v. Sprague, 12 Pet. 300, 328; Cowles v. Mercer Co., 7 Wall. 118; Railway Co. v. Whitton, 13 Wall. 270, 286; Phelps v. Oaks, 117 U. S. 236, 239, 6 Sup. Ct. Rep. 714. And whenever congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter. Ex parte Fisk, 113 U. S. 713, 721, 5 Sup. Ct. Rep. 724; Whitford v. Clark Co., 119 U. S. 522, 7 Sup. Ct. Rep. 306.

"The acts of congress prescribing in what districts suits between citizens or corporations of different states shall be brought manifest the intention of congress that such suits shall be brought and tried in such a district only, and that no person or corporation shall be compelled to answer to such a suit in any other district. Congress cannot have intended that it should be within the power of a state by its statutes to prevent a defendant sued in a circuit court of the United States, in a district in which congress has said that he shall not be compelled to answer, from obtaining a determination of that matter by that court in the first instance, and by this court on writ of error. To conform to such statutes of a state would 'unwisely incumber the administration of the law,' as well as 'tend to defeat the ends of justice,' in the national tribunals. The necessary conclusion is that the provisions referred to in the practice act of the state of Texas have no application to actions in the courts of the United States."

While the decision in the Denton Case does not fully cover the case at bar, still the reasoning on which the court reached its conclusion therein has a bearing upon the question under consideration, which occupies rather a middle ground between the question presented in York v. Texas, above cited, and that presented in the Denton Case, and is not directly or authoritatively controlled by either of those decisions. In the present case the precise question is whether the provisions of the Texas statutes which give to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of a defendant, are binding upon

the federal courts sitting in that state, under the rule of procedure prescribed by the fifth section of the act of June 1, 1872, as reproduced in section 914 of the Revised Statutes.

The words of this section, "as near as may be," were intended to qualify what would otherwise have been a mandatory provision, and have the effect to leave the federal courts some degree of discretion in conforming entirely to the state procedure. These words imply that in certain cases it would not be practicable, without injustice or inconvenience, to conform literally to the entire practice prescribed for its own courts by a state in which federal courts might be sitting. This qualification is indicated in Railroad Co. v. Horst, 93 U. S. 291, 300, 301.

But, aside from this view, there are other provisions of the statutes which clearly manifest an intention on the part of congress not to leave the jurisdiction of the inferior federal courts to the regulation and control of state legislation. Thus, by section 1011, Rev. St., as corrected by the act of February 18, 1875, c. 80, it is provided that "there shall be no reversal in the supreme court, or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." 18 St. p. 318. * This entirely preserves to this court the right and duty to pass upon the jurisdiction of the lower court.

So, too, by the act of February 25, 1889, (25 St. p. 693,) it is provided that "in all cases where a final judgment or decree shall be rendered in a circuit court of the United States, in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the supreme court of the United States to review such judgment or decree, without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the supreme court shall not review any question raised upon the record, except such question of jurisdiction;" and it is further provided that "such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals."

By the first clause of section 5 of the act of March 3, 1891, (26 St. pp. 826, 827,) it is provided that "appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct to the supreme court, * * * in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

These provisions of the federal statutes which confer upon litigants in the federal courts the right to have the jurisdiction of such courts reviewed by this court by appeal or writ of error would be practically destroyed, or rendered inoperative and of no effect, if state statutes, such as those of Texas, could make an appearance to question the jurisdiction of a federal court a general appearance, so as to bind the person of the defendant. It would be an idle ceremony to bring to this court for review the question of the circuit court's jurisdiction, arising out of a failure to serve the defendant with process, if the defendant's special appearance before the lower court to challenge its jurisdiction should, under state laws, amount to a general appearance, which conferred such jurisdiction. The effect of the statutes of a state giving such an operation to an appearance for the sole purpose of objecting to the jurisdiction of the court would be practically to defeat the provisions of the federal statutes which entitle a party to the right to have this court review the question of the jurisdiction of the circuit court. Under well-settled principles, this could not and should not be permitted; for wherever congress has legislated on, or in reference to, a particular subject, involving practice or procedure, the state statutes are never held to be controlling. In Harkness v. Hyde, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside, nor after such motion is denied by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits. We are of opinion that under the statutes of the United States the jurisdiction of the federal courts sitting in Texas is not to be controlled by the statutes of that state above referred to. Jurisdiction is acquired as against the person by service of process, but, as against property within the jurisdiction of the court, personal service is not required. Boswell v. Otis, 9 How. 336; Pennoyer v. Neff, 95 U. S. 714. But it is well settled that no court can exercise, at common law, jurisdiction over a party, unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears. Kendall v. U. S., 12 Pet. 524; Harris v. Hardeman, 14 How. 334.

In the present case, when it was established by the facts stated in the plea in abatement, and admitted by the demurrer thereto, that the plaintiff in error was never brought before the court by any proper or legal process, the circuit court was without jurisdiction to proceed in the case; and in so doing, and in assuming jurisdiction and proceeding to trial on the merits, its action was erroneous.

Our conclusion, therefore, is that the judgment of the lower court be reversed; that the cause be remanded to the circuit court for the western district of Texas, with direc-

tions to set aside the verdict and judgment, and to overrule the demurrer to the plea in abatement; and it is accordingly so ordered.

(149 U. S. 411)

PATRICK v. BOWMAN.

(April 24, 1893.)

No. 157.

PARTNERSHIP — SALE BETWEEN PARTNERS — DISCLOSURE—EVIDENCE—UNDISCLOSED PRINCIPAL.

1. The willingness of one of two partners in a mining venture to sell his interest to the other at a stated price does not release the other, who knows of such willingness, from the obligation to disclose the actual condition of the mine; and, where such sale is made without disclosure, the consideration being inadequate, the seller may rescind. Per Mr. Chief Justice Fuller and Mr. Justice Brewer, dissenting. Brooks v. Martin, 2 Wall. 70, followed.

2. An absent partner in a mining venture offered to sell his interest to the managing partner for a stated consideration, in the belief that the property was not valuable, and that there were no promising indications of paying ore. The managing partner had before this stated, in a letter to his brother, that the indications were very promising, and, shortly after, a local paper announced that a small quantity of ore had been, and more was expected to be, found. The same paper afterwards announced that the expectation had been realized. Thereafter a contract was signed by the managing partner, reciting that a "lode or vein is now by all believed to have been struck," and the managing partner cautioned his family by letter not to inform the absent partner of the discovery. *Held*, that it was the duty of the managing partner to disclose the true condition of the mine, and that a sale on the terms offered by the absent partner, who continued ignorant of the discovery, could be rescinded by him by a bill in equity. Per Mr. Chief Justice Fuller and Mr. Justice Brewer, dissenting. Brooks v. Martin, 2 Wall. 70, followed.

3. A managing partner in a mining venture wrote to an absent partner: "In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, ($288.69,) and take your interest off your hands. * * * If you are willing to let it go on these terms, * * * please telegraph me immediately, and I will try and make the arrangement." *Held*, that the offer was not one from an undisclosed principal, so as to be binding upon the managing partner as agent. Per Mr. Chief Justice Fuller and Mr. Justice Brewer, dissenting.

4. The letter was written June 22d, addressed to St. Louis, although the writer knew that the absent partner's summer address would be Bayfield, Wis., where the letter was in fact received July 13th, and an acceptance immediately wired. *Held*, that the directing to St. Louis, and calling for an immediate telegraphic answer, was a notification that the offer must be received and acted on immediately, and the writer might reject the acceptance. Per Mr. Chief Justice Fuller and Mr. Justice Brewer, dissenting.

Dissenting opinion. For opinion of the court, see 13 Sup. Ct. Rep. 811.

*426 *427 *Mr. Justice BREWER, dissenting.

I am unable to concur in the foregoing opinion. Accepting the rule laid down in *Brooks v. Martin, 2 Wall. 70, as controlling, it is undisputed that no conveyance was made by Bowman to Patrick until October 19, 1892. It is undisputed that, long before that, Patrick knew of a large body of valuable mineral in the shaft, and that he did not communicate the fact of this discovery to Bowman. It is also not open to question that the property then conveyed was worth very much more than Bowman received. But it said that prior thereto there was a completed understanding that Patrick was to purchase Bowman's interest. What is meant by the term "completed understanding" is doubtful. If by it is meant that a binding contract had been entered into before October 19th, I deny the fact. If only that Patrick knew the terms upon which Bowman was willing to sell, I deny that the law is that knowledge of such fact relieved Patrick from the obligation to make full disclosure up to the time of the actual purchase. It may be conceded that Bowman was willing to sell in consideration of the surrender of his note, and Patrick knew of this willingness; but can it be that knowledge by a resident partner that the nonresident partner is willing to sell at a fixed price releases him from the obligation of full disclosure, enables him to continue his explorations to discover the value of the property, and, when ore of large value is finally discovered, complete the purchase without disclosing that fact? I do not so understand the law. Until a definite contract has been entered into between the parties, binding alike on vendor and purchaser, and understood to be binding alike on both, the rule laid down in Brooks v. Martin compels the resident partner to make full disclosure. The question is not whether Bowman acted badly, but whether Patrick fully discharged the duties resting upon him as resident partner. If he says that, before the purchase was actually made, there was a completed contract which relieved him from his obligations of disclosure, must he not make it clear that such completed contract was in fact made? It is true, Bowman was willing to sell during June and July, providing he could get his note back; but this willingness to sell was based upon the facts as they then existed, or at least as known to him. The shaft had been sunk many feet; no mineral had been discovered; no indications of mineral disclosed. He might well have said, "I am ready to abandon this if you will only give me back my note;" but can it be that this willingness to sell, communicated as it was to Patrick, will sustain a purchase in the succeeding October, after mineral had been discovered, the value of the property largely advanced, and without any disclosure of those facts to Bowman?

As the transactions between Patrick and Bowman, intermediate June 19th and October 19th, were all by letter or telegram, there can be no dispute as to what took place. It appears that Patrick wrote three letters after the interview of June 19th,—one June 22d, another June 27th, and a third

June 28th. The first says this: "In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, ($288.69,) and take your interest off your hands. * * * If you are willing to let it go on these terms, * * * please telegraph me immediately, and I will try and make the arrangement." This letter did not reach Bowman until the 13th of July, when he telegraphed: "Yours of June 22d received yesterday; proposition accepted; send note,"—to which Patrick replied, on July 15th: "Acceptance too late; proposition was dependent upon an immediate acceptance in St. Louis. See my letter of 5th."

How, out of this, a contract can be deduced, I do not understand. Patrick does not offer to purchase, does not say that he knows any one who will purchase, but simply asks Bowman if he is willing to sell at such a price, and promises, if so, to try and find a purchaser. It was this letter only which Bowman had received at the time of his telegram, and only the proposition or suggestion contained in it which he by that telegram accepted. It seems to me that it would puzzle a pleader to so frame a declaration as to show that that letter and acceptance created any contract between the parties.

Something is suggested as to an undisclosed principal, and it is said that the agent is bound when the principal is not. I do not appreciate the pertinency of that suggestion, for there is in this letter no assertion of an undisclosed principal for whom the agent makes the proposition. All that Patrick *420 says is that, if Bowman will consent to sell upon the terms named, he thinks he knows of some one who will buy, and will try to make the arrangement. It is true that, on June 27th, Patrick does say that there is a party who will take the property on those terms, and it may be said that here is an allegation of an undisclosed principal. But that letter had not then been received by Bowman, and nothing in it was covered by his acceptance of July 13th. The acceptance specifically referred to the letter of June 22d, which contained the only proposition or suggestion which Bowman then knew. Out of that I can torture no binding contract,—no "completed understanding." On the 15th, two days after this telegram from Bowman, Patrick telegraphed: "Acceptance too late; proposition was dependent upon an immediate acceptance in St. Louis." In the face of this, can it be said that there was a binding contract or a completed understanding? Did Patrick, when he sent this telegram, understand that he had bought Bowman's interest, or was bound by any contract of purchase? I do not understand the force of the English language if it can fairly be said, in the face of such a telegram from the subsequent purchaser, that there was a completed understanding between the parties in respect to the sale. Patrick's declaration that the acceptance was too late was justifiable if he had been theretofore acting in good faith. His three letters in June were all directed to Bowman at St. Louis, although he knew that Bowman was going to spend the summer in Wisconsin, and had given his address, "Bayfield, Wisconsin." Directing to St. Louis, and calling for a telegram immediately, was a notification that that was not a continuing proposition, but one which must be received and acted on immediately. If it was not a proposition requiring haste, he would naturally have addressed these letters to Bayfield, Wis., the address given by Bowman, and in the vicinity of his summer outing in the woods. Sending to St. Louis was because he thought he might possibly reach him before he left for the summer, and thus have the question settled promptly, and so, when he telegraphed on the 15th of July, he could properly say: "Acceptance too late; proposition was dependent upon an immediate acceptance in St. Louis." It is unnecessary to refer to the *430 letter which Patrick claims to have written on July 5th, as it is conceded that that letter was never received by Bowman. It is significant, only, as indicating Patrick's state of mind, by these closing words: "I withdraw my offer to return your note of $288.70, dated June 19th, 1882, in case you assign your interest in the contract to me."

Reliance is placed on Bowman's letter, in which he used the words "your proposition," but this it seems to me is trivial. The proposition or suggestion was one which did come in a letter from Patrick; and though Bowman does not write out in detail the full description of that proposition, but refers to it in the brief way he does, that cannot enlarge the scope, or change the character, of the proposition as it was sent in the letter by Patrick. That meant only that which it said, and, when Bowman telegraphed an acceptance of that specific proposition, neither party was bound beyond the terms expressed. That made no binding contract of sale, and when Patrick, two days after Bowman's telegram, replied that the acceptance was too late, there was nothing concluded between the parties. That Patrick understood that there was nothing binding is further evidenced by the fact that before Bowman's telegram of July 13th, and on July 5th, he had received advice from his counsel that Bowman's interest could be obtained in another way, and without paying anything; and so, in attempting to carry out the plan suggested by counsel, he sent a letter to Bowman at the Merchants' Hotel in St. Paul, and drew a draft upon him at St. Paul for his supposed share of the expenses to date. To say that, while he was trying to obtain possession of Bowman's interest by proceedings of this character, there was a completed understanding between the parties for the purchase of that interest, is something I cannot understand. Evidently Patrick did not have the utmost

reliance upon this plan suggested by his counsel, and although that draft was returned unpaid, yet, as the indications of approaching mineral became clearer, his desire to purchase from Bowman became stronger, and he concluded that the better way was to come back to the original proposition of purchase, and so, on August 2d, he sent a proposed contract. Still, as, at the date at which that contract was sent, it was not absolutely sure that mineral in paying quantities would be found in the mine, the contract which he sent to Bowman for his signature was simply a contract binding Bowman to sell, and not binding himself to buy. Obviously he was not then sure that he would purchase. He wanted to get an option from Bowman, something that would bind him to sell, and then sink the shaft a little further, and make some more developments, before he bound himself to purchase; and yet it is said that before this there was a completed understanding—a binding contract—between these parties for the purchase of Bowman's interest. Bowman, knowing nothing of the disclosures made by the sinking of the shaft, and not knowing that the indications of approaching mineral were stronger and clearer, was still willing to sell on the terms named, but was not willing to give an option to buy; and so on August 28th he prepared a contract binding both parties, and inclosed it in a letter to Patrick at Leadville, but, before it had reached there, Patrick had gone east. Nothing further took place until the day of the conveyance, October 19th.

It is suggested that Bowman evidently regarded the matter as settled, leaving only the details to be arranged. It seems to me the important question is not how Bowman, but how Patrick, regarded it. Did he understand that the thing was settled between them? Certainly not, when he telegraphed that the acceptance was too late; certainly not, when he sent a contract not for a purchase, but giving him an option to purchase, binding Bowman and not himself.

And, in this respect, Patrick's testimony as to his understanding of the matter is significant. On his direct examination he testified that the party he had in mind when he wrote the letter of June 22d was his own attorney in Leadville, Col. J. B. Bissell. His testimony was in these words:

"It was Col. J. B. Bissell, and when I came up to Leadville I spoke to him in regard to it, and he declined to take it, and declined to take the interest and pay that note, and, as I told Bowman, I was carrying all I could; so between the 22d of June and that time I changed my mind,—that is, between the 22d of June and July 5th,—in regard to it."

In reference to the advice given him by Col. Bissell, he testified:

"He said it was no use of paying that note, or having anybody else buy it; when another assessment was due to draw on Bowman, and, if he does not pay your draft promptly, just apply to the owners of the Col. Sellers, that is, to Stebbins, Robinson, and others, for a new contract in your own name, leaving Bowman out; and when I wrote the letter of July 5th it was my intention to do that, and when I received Bowman's telegram of the 15th of July I so notified him in that telegram."

Further on in his deposition appears the following, also on direct examination:

"Question. When was your partnership with the plaintiff in the working of the Col. Sellers and Accident mining claims under the contract (defendant's Exhibit A) terminated?

"Answer. It was terminated, as I regarded it, on the receipt of the plaintiff's letter of July 16th, and by my acceptance of the proposition contained therein, and the forwarding of the contract which was prepared by C. C. Parsons."

And on cross-examination this appears:

"Q. You recognized it to be your duty as a partner, when you wrote a letter accepting what you call Bowman's proposition of July 16, 1882, to tell him what occurred before you wrote that letter, didn't you?

"A. I did not regard him as my partner after I received that letter of July 16th; he had not paid.

"Q. Didn't you regard him as your partner up to the time that you mailed an answer to that letter?

"A. Yes, but I accepted his proposition, and I thought that ended the partnership.

"Q. In your view, when did your partnership with Bowman end,—when you received his letter of July 16, 1882, or when you mailed your answer to it?

"A. Take the two together.

"Q. It can't be both. When did you conclude that Bowman was not your partner, and was not entitled to the information?

"A. When I accepted his proposition of July 16th."

According, therefore, to his own testimony, Patrick understood that the partnership relation, with the obligations of disclosure, continued until he had accepted the proposition in Bowman's letter of the 16th of July. When he mentally accepted that proposition, he alone knows or can tell. What he did after that was, on the 2d day of August, to send to Bowman, for signature, an agreement giving him an option to purchase, which never was signed. The contract which Bowman did prepare—a contract binding both parties, and which Bowman signed and forwarded on August 28th—was not signed and forwarded until after mineral had been in fact discovered, and was so signed and forwarded by Bowman in ignorance of that fact.

Were not the discoveries in the mine such as should have been disclosed? Let us see

what there is in this record that does not depend upon the recollections of witnesses. On July 5th, Patrick writes to his brother, saying: "The shaft in the Col. Sellers is looking very promising: For several feet the porphyry has been heavy iron-stained, and I have good reasons for thinking that we are near the contact. Acting on Col. Bissell's advice, I to-day write to Bowman telling him that, if he did not pay up, I would apply to the owners of the ground for a new contract in my own name, and leave him out. I don't suppose he will pay, but I will let you in on the new one on the same terms you are in the old." On July 30th this appeared in the Leadville Herald: "The Col. Sellers shaft, on Iron Hill, is now down about 215 feet. Some small streaks of ore have already been cut, one of them assaying nineteen ounces in silver. The sinking of the shaft is progressing rapidly, with the prospects that expected ore bodies will soon be cut." And Patrick was in Leadville at that time. On August 10th, in the same paper, appeared this statement: "Late Tuesday night [which would be August 8, 1882] ore was *434 encountered in the shaft of the Col. Sellers on Iron Hill, appearing first in one corner of the shaft. The ore is pyrites in character, and is pronounced to be identical with that which was first cut in the A. Y. mine, which it adjoins. It is probable that it will be necessary to pass through several feet of it before the same class of ore which has enabled the A. Y. to make such shipments will be reached. The property is owned by W. F. Patrick, Charles Stebbins, George Simmons, John Livezey, and others."

But we need not stop with this. On August 16th a contract was signed by Patrick and the original owners of the mine, in which it was recited that "a lode or vein is now by all believed to have been struck," and which provided for the delivery of the deed called for by the original contract, which deed was, in fact, delivered on August 31st. We need not resort to the parol testimony of which there is an abundance, but may rest upon this written contract to prove that, within 32 days after Patrick had telegraphed that Bowman's acceptance was too late, a vein of mineral had been discovered in this shaft, and that this discovery, known to Patrick, was made two months and three days at least before the deed was acquired from Bowman. Parol testimony tends to show that the discovery was made at a much earlier date. Did Patrick at this time understand that a purchase had been made? We have seen that this correspondence with Bowman does not show a binding contract, and we have noted his own version of the matter, but there is still other testimony very significant. A letter from his wife to his brother—the brother whose interest in the mine Bowman was carrying for a year—was produced, which is as follows:

"Knoxville, August 21, 1882.

"Dear Jemmie: I have just received a letter from Will, in which he tells me I was mistaken about his securing B.'s interest in the Col. Sellers. He only had the written promise of it. The deed has not been delivered to him. In my letter to-day he tells me to caution all of our home folk not to mention the success of the prospect, and adds: 'If you have said anything to home folk about the Col. S., caution them not to mention it, whatever they do, for if it should *435 get to St. L., and to B.'s ears, it might cause me considerable trouble and expense to get him out of the contract. Please caution the family not to mention it until I get a deed from B.'

"I am sorry I have said anything about it, but, as I have, for pity's sake do not tell it, or if, like myself, you have said anything to Fannie or Mr. McM., do write immediately and ask them to keep it secret, so much depends upon a rigid silence. As Will said, if Mr. Bowman hears it, he can cause him a great deal of trouble, to say nothing of the expense. I feel dreadfully, and I shall never again put myself in this position. I am going to the 'Quarry' early to-morrow to caution mother and father. Do help me to keep this business as quiet as possible. You see at a glance how much depends upon it. My sister is not so well to-day, although she is better than when I first came. With love and an earnest request that you will burn this as soon as received, I am, hastily and truly,

"Annie."

And a letter of date August 28th, from this same brother, James M. Patrick, to his wife, in which he says: "Willie has written to Annie (and she to me) telling her that there was an interest in the Col. Sellers which he wished to buy before the news of the strike got out, and wanted her and I to keep the matter quiet for a few weeks, until he could get the deed." These letters show that it was known in the family that mineral had been discovered, and discovered long enough before August 21st for two or three letters to have passed between Knoxville and Leadville. Patrick had not, as shown by these letters, secured Bowman's interest. He had, it is true, received a letter from Bowman of July 16th, in which the latter expressed his willingness to sell, said that he would not stand in his (Patrick's) way, and that, if he (Patrick) wished any papers signed, to send them to him. In other words, he knew that Bowman was willing to sell, and had so expressed himself; he had not bought, and wanted the matter kept secret until the purchase was consummated.

Taking these letters in connection with the correspondence which passed between these

*436 parties and Patrick's own testimony, it seems to me strange to say that there was a "completed understanding." It will not do to hold that, because Patrick had received Bowman's declaration of his willingness to sell,—a declaration made in ignorance of any discovery of mineral,—he (Patrick) could mentally accept Bowman's offer, and, without disclosing the fact that mineral had been discovered, proceed to secure a conveyance.

For these reasons I dissent from the opinion of the court, and I am authorized to say that the CHIEF JUSTICE concurs in this dissent.

(149 U. S. 364)

MINNEAPOLIS & ST. L. RY. CO. v. EMMONS.

(May 10, 1893.)

No. 240.

CONSTITUTIONAL LAW—POLICE POWER — FENCING OF RAILROADS—DAMAGES.

1. A state statute, which, as construed by the courts of the state, gives damages to a landowner for the expense and inconveniences of watching cattle to keep them from going upon a railroad track running through his land, which the company has failed to fence, (Gen. Laws Minn. 1877, c. 73,) is within the police power of the state, and is not subject to the inhibition of the fourteenth amendment to the federal constitution, against depriving any person of the equal protection of the laws, even though, by the general law of the state, penalties and damages are given only for direct injuries sought to be prevented, and do not extend to consequential and possible resulting injuries.

2. The allowance of damages for the diminution of value in the farm, resulting from the failure of the company to fence its roads and construct proper cattle guards, is not a taking of the railroad company's property without due process of law.

3. A state statute requiring railroad companies to fence their right of way through the lands of private persons is not in violation of the company's chartered right to buy and hold lands for specified purposes.

In error to the supreme court of the state of Minnesota.

Action brought in a state court of Minnesota by Henry G. Emmons against the Minneapolis & St. Louis Railway Company to recover damages resulting from defendant's failure to fence its tracks through plaintiff's lands. There was a verdict and judgment for plaintiff, and the judgment was affirmed in the supreme court of the state. 42 N. W. Rep. 789. Defendant brings error. Affirmed.

The cause was twice before the supreme court of the state before the entry of the judgment now sought to be reviewed. See 29 N. W. Rep. 202, and 36 N. W. Rep. 340.

Albert E. Clarke, for plaintiff in error.
Edward J. Hill, for defendant in error.

Mr. Justice FIELD delivered the opinion of the court.

The plaintiff below (the defendant in error here) is a citizen of Minnesota, and for some years previously and at the commencement of this action was the owner of a farm in that state of 160 acres, which he occupied with his family as a homestead. He inclosed the farm with a suitable fence, cultivated it, and kept stock upon it. In October, 1879, he sold and conveyed to the defendant, a railway corporation organized under the laws of the state, a right of way for a railroad across the farm, 50 feet wide on each side of the road. Soon afterwards the company constructed the road on the right of way purchased, but neglected to build and maintain any fences on either side of it, or cattle guards where the road enters and leaves the land purchased, as required by the statute of the state; and to recover damages for such failure the present action was brought.

The statute which was passed by the legislature in 1876 provided that all railroad companies in the state should, within six months after its passage, "build, or cause to be built, good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side" of their roads, and declared that they should be liable for domestic animals killed or injured by their negligence, and that a failure to build and maintain cattle guards and fences as above provided should be deemed an "act of negligence on the part of such companies;" and, by its fourth section, that any company or corporation owning and operating a line of railroad within the state, which had failed and neglected to fence its roads, and to erect crossings and maintain cattle guards, as required by the terms of its charter and the amendments thereof, should thereafter "be liable, in case of litigation, for treble the amount of damages suffered by any person in consequence of such neglect, to be recovered in a civil action, or actual damages, if paid within ten days after notice of such damages." Gen. Laws Minn. 1876, c. 24.

In 1877 this last section was amended so as to declare that any company or corporation guilty of the failure or neglect mentioned should be "liable for all damages sustained by any person in consequence of such failure or neglect." Chapter 73, Gen. Laws Minn. 1877; Gen. St. Minn. 1878, c. 34, § 57.

On the trial it appeared in evidence that the defendant had operated its road, and run daily trains through the farm, without building the required fences on each side of its track, or constructing cattle guards at the wagon crossings, and the plaintiff, who kept cattle upon his land, was in consequence obliged, at much expense, to watch his cattle, for some years before the commencement of this action, to keep them from being killed by passing trains, which subjected him to great inconvenience, loss of time, and expenditure of money, and deprived him of the free and beneficial use and enjoyment of his land, and lessened its value. He recovered a verdict of $1,000 for the damages sustained, upon which, and

for costs, judgment was entered in his favor.

This case had, on a previous occasion, been before the supreme court of the state on appeal. The court below had held that the complaint did not state facts sufficient to constitute a cause of action, and dismissed it, and refused a motion for a new trial. On appeal from the order denying the motion, the ruling below was reversed, and a new trial granted. In giving its decision the supreme court, among other things, held that to regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad, so that it shall do the least possible injury to such property, was as much within the police power of the state as regulating it with a view to protect life from its dangers; and that the state might, under that power, require railroads to be so constructed, maintained, and operated, and so protected and inclosed, that they would injure as little as possible the farms or lands through or alongside of which they run; and that the legislation of the state having this object in view was valid.

It was objected below that the statute, as thus interpreted, denied to the railroad companies the equal protection of the laws of the state, as required by the first section of the fourteenth amendment. The point of the objection, as indicated in the opinion of the supreme court, so far as we can understand it, was this: That the statute, in requiring railway companies to fence their roads, was a police regulation, having for its object to prevent animals from getting on the tracks, and the consequent danger of injury to the animals themselves and to railway passengers and employes; and, therefore, to impose penalties and authorize a recovery of damages for noncompliance with the law for other than the resultant injuries to animals and railway passengers and employes was in excess of the police power of the state, and a departure from its general law, which imposed penalties and damages only for the direct injuries sought to be prevented, and did not extend them so as to cover consequential and possible resulting injuries.

*The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. The operating of railroads without fences and cattle guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying of cattle, running at large, upon the tracks can be prevented, and security had against accidents from that source; and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards. It was entirely competent for the legislature to subject the company to any incidental or consequential damages, such as the loss of rent, the expenses of keeping watch to guard cattle from straying upon the tracks, or any other expenditure to which the adjoining owner was subjected in consequence of failure of the company to construct the required fences and cattle guards. No discrimination is made against any particular railroad companies or corporations. All are treated alike, and required to perform the same duty; and therefore no invasion was attempted of the equality of protection ordained by the fourteenth amendment.

It was also objected that the statutes of Minnesota, in requiring the defendant to build partition fences for the benefit of adjoining landowners, or to pay damages for not building them, imposes upon the company a duty not required by contract, common law, or its charter, and is therefore a violation of the right conferred by the charter to buy and hold lands for specified purposes, the same as any other landowner.

To this position we answer that the extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employes, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the states. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect. *368

The objection that by allowing damages for the diminution of value in the adjoining farm, caused by the failure of the company to fence its roads and to construct proper cattle guards, is taking property of the defendant without due process of law, falls with the supposed invalidity of such consequential damages, which we hold to be within the discretion of the legislature to impose.

Judgment affirmed.

(149 U. S. 368)

MINNEAPOLIS & ST. L. RY. CO. v. NELSON.

(May 10, 1893.)

No. 241.

In error to the supreme court of the state of Minnesota.

Action brought in a state court of Minnesota by Ole Nelson against the Minneapolis & St. Louis Railway Company to recover damages resulting from defendant's failure to fence its road through plaintiff's farm. There was a verdict and judgment for plaintiff, and the judgment was affirmed in the state supreme court. 42 N. W. Rep. 788. Defendant brings error. Affirmed.

Albert E. Clarke, for plaintiff in error. Edward J. Hill, for defendant in error.

Mr. Justice FIELD delivered the opinion of the court.

The facts in this case are similar to those in the case just decided, (Railway Co. v. Emmons, 13 Sup. Ct. Rep. 870,) and by stipulation is to be disposed of in the same way.

Judgment is accordingly affirmed.

(149 U. S. 278)

UNITED STATES v. DUMAS et al.

(May 1, 1893.)

No. 230.

POST OFFICE — FALSE RETURNS BY POSTMASTER — ORDER WITHHOLDING COMMISSIONS — EVIDENCE.

The act of June 17, 1878, (1 Supp. Rev. St. p. 186, c. 259, § 1,) provides that the postmaster general, if satisfied that a postmaster has made false returns of his business, may, in his discretion, withhold commissions on such returns, and allow any compensation that under the circumstances he may deem reasonable. *Held*, that an order of the postmaster general, reciting that he is satisfied that a certain postmaster has made false returns, and fixing a compensation which he deems reasonable, is not conclusive upon the postmaster and his sureties in an action on his official bond to recover moneys alleged to have been illegally withheld according to such false returns, but such order is only prima facie evidence, which defendants may contradict by other evidence.

In error to the circuit court of the United States for the eastern district of Louisiana. Affirmed.

Asst. Atty. Gen. Maury, for the United States.

Mr. Justice JACKSON delivered the opinion of the court.

This was an action brought by the United States to recover from Anna M. Dumas and the sureties on her official bond money alleged to have been illegally retained by her while postmaster at Covington, St. Tammany parish, La.

It appears from the record that Anna M. Dumas was postmaster at the above-named place from January 1, 1881, to August 3, 1885, and that on October 1, 1883, a bond, in lieu of a former one, was executed. This bond was in the usual form, and was given to insure the faithful performance of her duties as postmaster. The accounts rendered by her as postmaster at the end of each quarter were examined September 1, 1886, by the auditor of the treasury for the post-office department. This examination resulted in a claim that she had made false returns of the business done at the post office at Covington, whereby she is alleged to have illegally retained from the government the sum of $709.89 in excess of her commissions for the period from October 1, 1883, to August 3, 1885, the time covered by the conditions of the bond last executed. A statement of accounts, certified to by the auditor, to which is appended copies of papers pertaining to the accounts, is made a part of the record. A demand was made on June 8, 1887, upon her and the sureties on her bond to make good the deficit. Payment was not made, and the postmaster general issued the following order:

"Order No. 161.

"Post-Office Department,
"Office of the Postmaster General.
"Washington, D. C., August 11th, 1888.

"Being satisfied that A. M. Dumas, late P. M., Covington, St. Tammany Co., La., has made false returns of business at the post office at said place during the period from Jan. 1, 1881, to Aug. 3, 1885, thereby increasing her compensation beyond the amount [s]he would justly have been entitled to have by law: Now, in the exercise of the discretion conferred by the act of congress entitled 'An act making appropriations for the service of the post-office department for the fiscal year ended June 30, 1879, and for other purposes,' approved June 17, 1878, (section 1, chapter 259, Supplement to Revised Statutes,) I hereby withhold commissions on the returns aforesaid, and allow as compensation, (in place of such commissions and in addition to box rents,) deemed by me, under the circumstances, to be reasonable during the period aforesaid, the rate of $72.50 per quarter from Jan. 1, 1881, to March 31, 1883, and $95 per quarter from April 1, 1883, to August 3, 1885, and the auditor is requested to adjust her accounts accordingly.

[Signed] "Wm. F. Vilas,
"Postmaster General."

*At the trial of the cause in the court below the issue before the jury was whether Anna M. Dumas, as postmaster, did collect and receive in her official capacity from October 1, 1883, to August 3, 1885, in excess of the compensation fixed and allowed her in the order of the postmaster general, and above all proper expenditures, the sum of $709.89. On this issue the plaintiffs in error requested the court to give the following instruction to the jury:

"If the jury are satisfied that plaintiffs have proven that the postmaster general of the United States, being satisfied that Anna M. Dumas, late postmaster at Covington, Louisiana, had made false returns of business in said post office, withheld the commissions of said Anna M. Dumas as such postmaster, and allowed her such compensation, in lieu of said commission, as he, the said postmaster general, deemed reasonable; and if the jury further find that the amount sued for by plaintiffs in the cause is arrived at by reason of such withholding of said

commissions and by the allowance to her of such compensation by said postmaster general,—then the jury must find for the United States."

This instruction the court refused to give, and charged the jury in regard to the order (No. 161) of the postmaster general as follows: "This order was in its nature provisional. The adjustment is only prima facie evidence that the account is as stated therein."

The jury found a verdict for the defendants, and judgment was entered accordingly. The bill of exceptions does not show the character of the evidence admitted or refused to be admitted. The plaintiffs sued out a writ of error, and assign as errors that the court below erred in refusing to instruct the jury as requested by the attorney of the United States, and in charging the jury as to the force and effect of the order of the postmaster general, and the accounts of the postmaster as certified by the auditor.

*283 *It is insisted for the government that the order of the postmaster general and the certified transcript of the accounts, which state the amount of the liability of Anna M. Dumas at $709.89, are final and conclusive. If this proposition is correct, and the order and the transcript constitute conclusive, rather than prima facie, evidence of the balance due the United States, then the instruction given was erroneous, and that requested should have been given.

The order of the postmaster general was made, as it recites, in the exercise of the discretion conferred by the first section of the act of congress approved June 17, 1878, which provides "that in any case where the postmaster general shall be satisfied that a postmaster has made a false return of business, it shall be within his discretion to withhold commissions on such returns, and to allow any compensation that under the circumstances he may deem reasonable." Now, an order made in pursuance of this provision is certainly not conclusive upon a postmaster that his returns of business are actually false in fact, when by the same section of the act it is made a misdemeanor, punishable by fine or imprisonment or both, to make a false return to the auditor for the purpose of fraudulently increasing his compensation. Neither can it be properly held that, when the postmaster general is satisfied that a postmaster has made a false return of business, and exercises his discretion "to withhold commissions on such returns," his order in the matter is a final and conclusive determination that the postmaster is not entitled to any commissions as such, or that his compensation shall be absolutely fixed and limited by the allowance made. In a suit for his commissions or compensation such an order, withholding the one, and making a discretionary allowance as to the other, would certainly not conclude the postmaster. It was not the intention of congress by this provision of the statute to confer upon the postmaster general the discretion to deprive a postmaster of his commissions, or to vest him with authority to deny all commissions, and allow only such compensation as he might deem proper as a final settlement and adjudication of the postmaster's rights in the premises.

*284 *By a preceding clause of the same section it is provided "that when the compensation of any postmaster of this class [4th] shall reach $1,000 per annum, exclusive of commissions on money-order business, and when the returns to the auditor for four quarters shall show him to be entitled to a compensation in excess of that amount under section 7 of the act of July 12, 1876, the auditor shall report such fact to the postmaster general, who shall assign him to his proper class, and fix his salary as provided by said section." A similar provision in the act of March 3, 1883, was before this court in the case of U. S. v. Wilson, 144 U. S. 24, 12 Sup. Ct. Rep. 539, and it was held that a postmaster who is assigned by the postmaster general to a particular class at a designated salary from a designated date was entitled to compensation at the rate thus fixed from such date, without regard to his appointment by the president and confirmation by the senate. The action of the postmaster general in assigning a postmaster to his proper class and fixing his salary accordingly, under such provisions of the statute, is essentially different from the exercise of the discretion conferred of withholding commissions on such returns as the postmaster general may be satisfied are false. "To withhold" commissions seems fairly to imply a temporary suspension, rather than a total and final denial or rejection of the same. If such withholding is not conclusive upon the postmaster, how can the allowance made, while the commissions are being withheld, be treated or regarded as a final and conclusive adjudication as to the compensation the postmaster is, or shall be, entitled to receive? The court below regarded the order in question as provisional in its character, and accordingly held, in substance, that it did not so conclusively fix and determine the commissions and compensation of the postmaster as to make the statement of her accounts based thereon conclusive against her and her sureties.

The contrary proposition urged on behalf of the United States involves the assertion that the falsity of the postmaster's returns is actually and finally established by the order of the postmaster general, and that the accounts adjusted in accordance therewith amount to more than prima facie evidence of the correctness of the balance claimed to be due from the defendants.

*285

We think this contention of the government cannot be sustained, and that the ruling of the circuit court on the question was correct.

As to the competency, merely, of this evidence there can be no question, for it is provided by section 889, Rev. St., that "in any civil suit in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."

The force and effect of such testimony has been several times considered by this court. Thus in U. S. v. Eckford's Ex'rs, 1 How. 250, a statement of account by the officers of the treasury was held not to be conclusive, but only prima facie, evidence. So in U. S. v. Hodge, 13 How. 478, a treasury transcript offered in evidence was held to be competent, but not conclusive. In Watkins v. U. S., 9 Wall. 759, nothing more appeared in the shape of evidence than the certified transcript of accounts, and, being held to be prima facie evidence, it warranted judgment for the government for the amount therein shown to be due, in the absence of any testimony explaining or contradicting it. But that case does not hold that certified transcripts of accounts are conclusive upon the officer. So in Soule v. U. S., 100 U. S. 8, it was held that "treasury settlements of the kind are only prima facie evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account."

*263 In the same line it has been held by this court that the adjustment of accounts made by the auditor is prima facie evidence, not only of the fact and the amount of the indebtedness, but also of the time when and the manner in which it arose; and that an objection to the statement does not lie to its competency, but to its effect. U. S. v. Stone, 106 U. S. 525, 1 Sup. Ct. Rep. 287.

It would be manifestly unjust to compel the principal and sureties of a bond to pay an alleged indebtedness based upon a statement of account, when there are palpable errors upon the face of the statement, or when the defendants are prepared to show by affirmative evidence that there are in fact errors in the accounts. As already stated, the bill of exceptions contains nothing to show the character of the evidence introduced, by way of explanation or contradiction of the certified transcript of accounts presented by the government. The single question raised and presented by plaintiffs in error was whether the order of the postmaster general, in connection with the certified statement of account, was final and conclusive on the defendants in error. We hold that it was merely evidence which, unexplained or uncontradicted, would have warranted a judgment in favor of the plaintiffs in error for the balance shown thereby to be due. But this evidence did not conclude the defendants, and, for aught that appears from the record, they may have explained or contradicted the statement, or shown it to be incorrect; and, as it does not appear what the evidence was on this subject, we are unable to say that the judgment was wrong, there being no error in the charge of the court.

Nor is there anything said or decided in U. S. v. Barlow, 132 U. S. 271, 280, 10 Sup. Ct. Rep. 77, cited and relied on by plaintiffs in error, in conflict with this conclusion. In that case Mr. Justice Field, speaking for the court, said: "We admit that, where matters appertaining to the postal service are left to the discretion and judgment of the postmaster general, the exercise of that judgment and discretion cannot in general be interfered with, and the results following defeated. But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed by him. He is not at liberty, any more than a private agent, to act upon mere guesses and surmises, without information or knowledge on the subject." This ruling of the court falls far short of holding that the transcript of accounts is conclusive upon the officer.

Our conclusion is that the order of the postmaster general and the certified accounts produced by the government in the present case were only prima facie evidence of the balance claimed against the defendants in error, and that there was no error in the court below in so holding; and the judgment is accordingly affirmed.

(149 U. S. 257)

UNITED STATES v. DUMAS et al.

(May 1, 1893.)

No. 231.

In error to the circuit court of the United States for the eastern district of Louisiana. Affirmed.

Asst. Atty. Gen. Maury, for the United States.

Mr. Justice JACKSON delivered the opinion of the court.

This case, in all essential respects, is similar to that of U. S. v. Dumas, 13 Sup. Ct. Rep. 872, (No. 230, just decided,) the only difference being that this suit is based upon a bond for a different period, and against a different set of sureties; but it involves the same questions, and is on the same state of facts as presented in the former case. For the reasons given in the opinion in the former case the judgment below in this case is affirmed.

(149 U. S. 350)

CADWALADER, Collector of Customs, v. JESSUP & MOORE PAPER CO.

(May 10, 1893.)

No. 276.

CUSTOMS DUTIES — CLASSIFICATION — OLD INDIA RUBBER SHOES.

Old India rubber shoes, purchased and imported for the same purposes as crude rubber, the commercial value of which is due solely to the rubber which they contain, and not the preparation or manufacture which they have undergone, were exempt from duty under the act of March 3, 1883, (22 Stat. p. 491, § 2499,) as "similar in material and quality" to crude rubber. 43 Fed. Rep. 288, affirmed.

In error to the circuit court of the United States for the eastern district of Pennsylvania. Affirmed.

Asst. Atty. Gen. Parker, for plaintiff in error. E. L. Perkins, for defendant in error.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the court of common pleas, No. 3, for the county of Philadelphia, in the state of Pennsylvania, by the Jessup & Moore Paper Company against John Cadwalader, collector of customs for the district of Philadelphia, to recover an alleged excess of customs duties, paid by the plaintiff under protest. The case was removed by the defendant by certiorari into the circuit court of the United States for the eastern district of Pennsylvania. The amount claimed was $236.25. The invoice in the case was of 22 bales of old "rubber scrap." They were entered as "scrap rubber," and 25 per cent. ad valorem was charged on the merchandise, under the provision of Schedule N of section 2502 of the act of March 3, 1883, c. 121, (22 Stat. 513,) which imposed a duty of 25 per centum ad valorem on "articles composed of India rubber, not specially enumerated or provided for in this act."

Under the free list, (section 2503 of the same act,) under the head "Sundries," the following articles, when imported, were made exempt from duty: "India rubber, crude, and milk of." Section 2499 of title 33 of the Revised Statutes was made, by section 6 of the same act, (22 Stat. 491,) to read, after July 1, 1883, as follows: "There shall be levied, collected, and paid on each and every nonenumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article it most resembles in any of the particulars before mentioned; and, if any nonenumerated article equally resembles two or more enumerated articles, on which different rates are chargeable, there shall be levied, collected, and paid on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates: provided, that nonenumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

The articles imported were old India rubber shoes, purchased by manufacturers of India rubber articles, to be ground into a powder, subjected to a blowing process to extract fibers of the lining, or to a high temperature to eliminate as much of the sulphur as possible, and then sheeted out, and manipulated in the same manner and for the same purposes as crude rubber, the material being only equal in value to a medium grade of crude rubber.

It was contended by the importer that these old shoes, invoiced as "rubber scrap," and entered as "scrap rubber," were free, as being substantially crude rubber, on the ground that the evidence showed that they were nonenumerated articles, and were similar in material and quality and texture, and the use to which they were applied, within the meaning of section 2499, to crude rubber, and were, therefore, exempt from duty. The importer duly filed a protest against the exaction of the duty, and appealed to the secretary of the treasury, who affirmed the decision of the collector.

The case was tried before the circuit court and a jury, and evidence was given on both sides. At the close of the testimony, the plaintiff requested the court to charge the jury as follows: "(1) Articles composed of India rubber, within the meaning of the existing tariff laws, (section 2502, Schedule N,) are articles prepared or manufactured from India rubber, of which the preparation or manufacture constitutes some portion of their commercial value. If, therefore, you find that the commercial value possessed by the old rubber shoes upon which the plaintiffs in this case allege that the duty in this instance was improperly imposed was due solely to the rubber they contained, and not to the preparation or manufacture which they had undergone, they were not 'articles composed of rubber,' within the meaning of the tariff laws as at present in force." The court affirmed that proposition, and the defendant excepted.

The plaintiff also requested the court to charge the jury as follows: "(2) If you find that the 'old rubber shoes' in question in this suit were not composed of India rubber within the meaning of the tariff law, and if you find that said 'old rubber shoes' were similar in material, quality, texture, and the use to which they can be applied to

crude rubber, your verdict must be for the plaintiffs." The court affirmed that proposition, and the defendant excepted.

The plaintiff also requested the court to charge the jury as follows: "(3) Under all the evidence, your verdict must be for the plaintiffs." The court affirmed that proposition, and the defendant excepted.

The defendant requested the court to charge the jury as follows: "(1) If you believe that the importation in suit is composed of India rubber not specially enumerated or provided for in the act of March 3, 1883, your verdict should be for the defendant. (2) If you believe that the importation in suit bears a similitude in material, quality, texture, or the use to which it may be applied, to an article composed of India rubber, then your verdict should be for the defendant. (3) Even if the importation in suit be used for the purpose of reclaiming, by chemical process, the rubber contained therein, yet, if the product is inferior in material, quality, and texture to crude rubber, then it is not such a similitude to crude rubber as it is necessary under section 2499 for the plaintiff to prove to entitle him to recover, and your verdict should be for the defendant. (4) Your verdict in this case should be for the defendant." The court refused each request, and the defendant excepted to each refusal.

The court said to the jury that, if the plaintiff's first point was sound, the plaintiff was entitled to recover; that the court would instruct the jury pro forma, for the purpose of enabling them to find a verdict; that the law was correct as stated in the plaintiff's first point, and the plaintiff was entitled to recover, but that the court reserved the right to enter a verdict for the defendant, if it should be found that the law was not correctly stated in the plaintiff's first point. The court further said to the jury: "This action turns altogether upon a question of law on the constructions which are given to the act of congress; and as we wish to give further time to the consideration of this question, and to have argument before the full bench upon the subject, I instruct you that the law, as stated in plaintiff's first point, is a correct statement of the law, and in that view, under the facts here, the plaintiff is entitled to a verdict for the amount of duty exacted in excess of what should have been charged. This will be subject to consideration by the court hereafter, and the court reserves the right to enter a verdict for the defendant in case it should be satisfied that the law is not as stated in this point." The jury rendered a verdict in favor of the plaintiff for $255.72.

Subsequently the defendant moved the court to grant judgment in his favor non obstante veredicto. The case was argued, the motion was denied, and judgment was entered in favor of the plaintiff for the amount of the verdict. The defendant has brought a writ of error, but we are not furnished with any brief in its support.

The uncontradicted testimony is to the effect that the only commercial use or value of the old India rubber shoes, or scrap rubber, or rubber scrap in question is by reason of the India rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the India rubber they contained, as a substitute for crude rubber, and not by reason of any preparation or manufacture which they had undergone; that they could not fairly be called "articles composed of India rubber," and as such dutiable at 25 per centum ad valorem; and that, although the shoes may have been originally manufactured articles composed of India rubber, they had lost their commercial value as such articles, and substantially were merely the material called "crude rubber." They were not India rubber fabrics, or India rubber shoes, because they had lost substantially their commercial value as such. Meyer v. Arthur, 91 U. S. 570; Worthington v. Robbins, 139 U. S. 337, 341, 11 Sup. Ct. Rep. 581; Twine Co. v. Worthington, 141 U. S. 468, 12 Sup. Ct. Rep. 55; Junge v. Hedden, 146 U. S. 233, 237, 13 Sup. Ct. Rep. 88.

Under the act of October 1, 1890, c. 1244, (26 Stat. 607,) paragraph 613, the following articles are made exempt from duty: "India rubber, crude and milk of, and old scrap or refuse India rubber, which has been worn out by use, and is fit only for remanufacture." The proper description of the importation in question in this case is that it is "old scrap or refuse India rubber, which has been worn out by use, and is fit only for remanufacture."

The decision below was correct, and the judgment is affirmed.

(149 U. S. 308)

PEOPLE OF THE STATE OF CALIFORNIA v. SAN PABLO & T. R. CO.

(May 10, 1893.)

No. 257.

APPEAL—DISMISSAL—SUPREME COURT.

While an action brought by the state of California against a railroad company to recover taxes was pending in the United States supreme court on writ of error, the railroad company tendered to the state the amount of the taxes, with penalties, interest, and attorney's fee, and costs of suit. This tender was not accepted, but the company deposited the money in bank, in accordance with Civil Code Cal. § 1500, which declares that an obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited, in the name of the creditor, with some bank of deposit within the state of good repute, and notice thereof is given to the creditor. *Held*, that the supreme court must dismiss the writ of error when these facts appeared by admission of counsel in open court, as there was no longer any real controversy between the parties.

In error to the circuit court of the United States for the northern district of California. Dismissed.

Statement by Mr. Justice GRAY:

This was action, brought March 10, 1886, by the state of California against the San Pablo & Tulare Railroad Company, a corporation of California, in the superior court of the city and county of San Francisco, (and thence removed by the defendant into the circuit court of the United States, upon the ground that it was a suit arising under the constitution and laws of the United States,) to recover taxes assessed by the state board of equalization, under sections 4 and 10 of article 13 of the constitution of California, (which are copied in the margin,[1]) as state and county taxes for the *308 year July 1,* 1885–June 30, 1886, upon the defendant's franchise, roadway, roadbed, rails, and rolling stock in the counties of Alameda, Contra Costa, and San Joaquin.

The defendant, in its answer, filed March 19, 1886, and averring the facts necessary to present the question, set up the following defense: "The provision of section 4 of article 13 of the constitution of the state of California, providing for the assessment of the property of railroad and other quasi public corporations, is in contravention of the provisions of the fourteenth amendment of the constitution of the United States, in that it discriminates against such corporations, in this: That whereas, under said section 4 of said article 13 of the constitution of the state of California, if the property of natural persons, or corporations not quasi public, has a mortgage, lien, or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage lien or incumbrance, whereas, in the case of the property of railroad and other quasi public corporations, no such allowance or deduction is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property; and also in this: that while section 10 of article 13 of the constitution of the state of California provides the same mode for the assessment of the franchises, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county, whether such property be owned by *railroad or other* 318 quasi public corporations or by private corporations or by natural persons, yet section 4 of article 13 of said constitution permits or allows indebtedness secured by mortgage, trust deed, or otherwise, to be deducted from the value of such property only when it is owned by natural persons or corporations not quasi public, and denies such deduction when the property is owned by railroad or other quasi public corporations."

On July 14, 1886, the attorneys for the parties filed in this and three similar cases the following stipulation in writing:

"It is hereby stipulated that jury trials in the above-entitled actions are hereby waived, and that said causes may be submitted to the court upon the testimony referred to in the stipulation this day made and filed in the case of The People of the State of California v. The Central Pacific Railroad Company, subject to the same terms and conditions. It is hereby further stipulated that special findings of facts in all of the above-entitled actions are waived. It is hereby further stipulated and agreed that the said case of The People of the State of California v. The Central Pacific Railroad Company shall by the losing party be taken to the supreme court of the United States, and that the decision of said court in said case shall be applicable to, and be treated by each party as the decision of said court in, the above-entitled actions, it being the intention and desire of the parties hereto to save the expense of separate writs of error, and that all the above-entitled actions shall abide the final decision of said supreme court of the United States in the said case of The People of the State of California v. The Central Pacific Railroad Company, provided the said decision shall be made upon points involved therein; and, if not so made, then the judg-

[1] Sec. 4. A mortgage, deed of trust, contract, or other obligation, by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property; and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

Sec. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value; and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

ments in any of the above cases in which the point is not involved shall be set aside, and findings of fact therein shall be made."

On July 15, 1886, the circuit court gave judgment for the defendant in the present case.

In the case of California v. Central Pac. R. Co., referred to in that stipulation, this court did not decide the question now presented, but on April 30, 1888, reversed the judgment of the circuit court on other grounds. 127 U. S. 1, 45, 8 Sup. Ct. Rep. 1073.

On March 6, 1889, the parties, by another stipulation in writing, agreed that the previous judgment of the circuit court in the present case be set aside, and the case submitted to the circuit court upon an agreed statement of facts, "on which findings shall be made and conclusions of law drawn by the court."

On September 6, 1889, the circuit court, pursuant to this stipulation, ordered its former judgment to be set aside, and made and filed findings of fact in accordance with the agreed statement.

By these findings of facts it appeared that, before and at the time of the assessment of these taxes, the defendant owed a debt secured by mortgage of its railroad, its franchise, and its rolling stock and appurtenances, to the amount of more than $3,000 a mile; that the state board of equalization valued and assessed the defendant's franchise, roadway, roadbed, rails, and rolling stock, not separately, but together, (and not including any other kind of property,) at their full value, without deducting the value of the mortgage or any part thereof, although knowing of its existence, and did not deem or treat the mortgage as an interest in the property, and assessed the whole value of the property to the defendant as if there had been no mortgage thereon, but made the assessment upon the same basis for valuation as all other property in the state was valued for the purpose of taxation; and that there were at that time divers railroads in the state owned and operated by corporations other than railroad corporations, and by individuals and partnerships.

Upon the facts found, the circuit court concluded, as matter of law, that the defendant was entitled to judgment. Judgment was entered accordingly, and the state of California sued out this writ of error.

The attorney general of the state admitted in his brief, and, when this case was called for argument, stated in open court, the following fact:

"In the year 1893 the defendant offered and tendered to the plaintiff a sum of money equal to the taxes, penalties, interest, and attorney's fee, to recover which this action was brought, and costs of suit, which offer and tender have not been accepted: but the money has been deposited by the defendant in bank, in accordance with the provisions of section 1500 of the Civil Code of California, which reads as follows: 'An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited, in the name of the creditor, with some bank of deposit within this state of good repute, and notice thereof is given to the creditor.'"

W. H. H. Hart, Atty. Gen. Cal., for the People. Harvey S. Brown, for defendant in error.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

Upon the fact most properly and frankly admitted in open court by the attorney general of the state of California, there can be no doubt that this writ of error must be dismissed, because the cause of action has ceased to exist. Any obligation of the defendant to pay to the state the sums sued for in this case, together with interest, penalties, and costs, has been extinguished by the offer to pay all these sums, and the deposit of the money in a bank, which by a statute of the state have the same effect as actual payment and receipt of the money; and the state has obtained everything that it could recover in this case by a judgment of this court in its favor. The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

The case at bar cannot be distinguished in principle from previous cases in which writs of error have been dismissed by this court under similar or analogous circumstances. Lord v. Veazie, 8 How. 251, 255; Cleveland v. Chamberlain, 1 Black, 419; Paper Co. v. Heft, 8 Wall. 333; San Mateo Co. v. Southern Pac. R. Co., 116 U. S. 138, 6 Sup. Ct. Rep. 317; Little v. Bowers, 134 U. S. 547, 10 Sup. Ct. Rep. 620; Manufacturing Co. v. Wright, 141 U. S. 696, 12 Sup. Ct. Rep. 103. See, also, Elgin v. Marshall, 106 U. S. 578, 1 Sup. Ct. Rep. 484.

Writ of error dismissed.

(149 U. S. 355)

HOBBIE et al. v. JENNISON.

(May 10, 1893.)

No. 270.

PATENTS FOR INVENTIONS — INFRINGEMENT — VIOLATION OF TERRITORIAL RIGHTS.

The sale of a patented article by an assignee within his territory carries the right to use it everywhere, notwithstanding the knowledge of both parties that a use in the territory of another assignee is intended. Adams v. Burke, 17 Wall. 453, followed. 40 Fed. Rep. 887, affirmed.

In error to the circuit court of the United States for the eastern district of Michigan. Affirmed.

James A. Allen, for plaintiffs in error. George H. Lothrop, for defendant in error.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action at law brought in the circuit court of the United States for the eastern district of Michigan in August, 1886, by Isaac S. Hobbie and John A. Hobbie. The original defendants were Charles E. Jennison and Isaac H. Hill. The defendant Hill appeared, and then withdrew his appearance, and the suit was discontinued as to him, and proceeded as against Jennison. The action was brought for the infringement of letters patent of the United States, No. 45,201, granted to Arcalous Wyckoff, November 22, 1864, for an improvement in pipes for gas, water, etc., for 17 years from that day. The plaintiffs had become, from May 31, 1876, the owners of the patent for the states of Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and West Virginia, and the District of Columbia. The declaration alleges that Jennison, on June 12, 1880, and on divers days between that day and November 22, 1881, at Hartford, Conn., and elsewhere in the plaintiffs' territory, and without their license or consent, made and used, and vended to others to be used, the patented invention, and within those dates did ship from Bay City, Mich., to the Hartford Steam Company, of Hartford, Conn., large quantities of wooden pipe embodying the patented invention, with intent that the same should be laid and used at Hartford, and thus infringed the right of the plaintiffs under the patent, to their damage, $5,000.

The defendant joined issue, a trial by jury was duly waived, and the case was tried before Judge Brown, the district judge, now a member of this court. He found in favor of the defendant, and a judgment in his favor for costs was entered. The opinion of Judge Brown is reported in 40 Fed. Rep. 887. The circuit court found the following facts:

"(1) That during all the times hereinafter mentioned the plaintiffs in the action were assignees and owners of letters patent No. 45,201, dated November 22, 1864, granted to Arcalous Wyckoff, for an improved pipe for gas, water, etc., for New York, New England, and all the eastern states north of the Carolinas, and carried on business as manufacturers of the patented pipe at Tonawanda, in the state of New York, with sufficient facilities to supply the market in all the territory owned by them, and that, at the time of the sale of the pipe or casings hereinafter mentioned, defendant's firm was aware of the plaintiffs' title to said patent for the state of Connecticut.

"(2) That the firm of Ayrault, Jennison & Co., which was composed of the defendant, Susan Hill, and one Miles Ayrault, was the assignee and owner of the same patent for the state of Michigan, and during the greater part of the year 1880 manufactured and sold the patented pipe at Bay City, in the state of Michigan, to various persons.

"(3) That in the year 1880 the firm of Andrew Harvey & Son did business in Detroit, Mich., as machinists and manufacturers of valve fittings and other supplies.

"(4) That in the fore part of 1880 the Hartford Steam Company, a corporation organized, existing, and doing business under the laws of the state of Connecticut, at Hartford, in said state, undertook the project of laying down lines of steam-pipe apparatus for heating purposes in the streets of said Hartford, and that they had considerable correspondence with said Harvey & Son as to the best prices they could get for pipe castings and iron pipes, and also as to the best terms for freight from Bay City, Mich., and elsewhere, to Hartford, Conn.; that on the 5th day of May, 1880, said Hartford Steam Company, which had been negotiating for several weeks with Harvey & Son concerning the said project, completed a contract with them to lay down in Hartford the said steam-supply apparatus.

"(5) That said Harvey & Son entered upon the performance of said job at Hartford as the agents, and under the directions, of the said Hartford Company; that they were also employed and acted as the agents of said Hartford Steam Supply Company in obtaining for them the best prices they could in the purchase of iron and wooden pipes, and in obtaining the best rates they could for freight from Michigan or elsewhere, and in obtaining rebates in freight when necessary; and that said steam company relied upon their judgment in said matters; and that in all their negotiations and dealings with Ayrault, Jennison & Co. they acted on behalf of, and as the agents, merely, of, said Hartford Steam Company.

"(6) That after said Hartford Company had perfected said contract with said Harvey & Son, they sent various written orders, during the year 1880, by mail, to the address of said defendants, at Bay City, Mich., to ship to them at Hartford, Conn., certain quantities

of wooden piping; that said defendants accepted the same, and manufactured said piping at their factory under said patents, and in conformity with the description, and covered by the claim, of said Wyckoff patent, and sold and delivered the same to the said Hartford Company on board the cars at Bay City, Mich., addressed to them, and that they had nothing to do with said piping after the delivery of the same on the cars at Bay City; that said Hartford Company paid the freight thereon from Bay City to Hartford, and sent drafts for the payment of said piping to defendants at Bay City; that none of the wooden pipes used in the laying of said steam-supply apparatus at Hartford were sold to said Harvey & Son, but were all sold to said Hartford Steam Company; and that any orders made by Harvey & Son were made merely as the agents of the Hartford Steam Company.

"(7) That said piping so purchased was laid down in Hartford during the term of said patent, and that, during the negotiations connected with the sales and shipment of said pipe or casing, defendant's firm knew that it was for use in the construction of steam-heating works in the city of Hartford, state of Connecticut, and that said Harvey & Son were to lay said pipe in Hartford.

"(8) That the accounts for said sales to said Hartford Company were kept on the books of said Ayrault, Jennison & Co. in the name of the Hartford Steam Company, and that a statement of the entire account from their books of said sales were sent to them at the close of the year.

"(9) That said pipe or casing was laid down as a part of said works during the life of said patent, in the summer and fall of 1880, under said Harvey's directions, in the streets of Hartford.

"(10) That by the acts and doings of defendant's firm in the premises, as above stated, the plaintiffs sustained damage, and, if any recovery were permissible under the rules of law, they would be entitled to an inquiry to ascertain the amount of such damage, based on the testimony introduced by said plaintiffs."

As a conclusion of law from the foregoing facts, the court found that the plaintiffs were not entitled to recover in the action. The plaintiffs excepted to the conclusion of law, and to the judgment, and have brought a writ of error.

*360 As a result of the findings of fact the circuit court held that the sale and delivery of the pipe by the defendant were made at Bay City, Mich., but that in view of the decision *361 of this court in Adams v. Burke, 17 Wall. 453, the defendant could not be held as an infringer by reason of his knowledge that the pipe was to be used in a territory of which the plaintiffs held the monopoly. The circuit court said that in the case of Adams v. Burke an undertaker had purchased patented coffin lids from certain manufacturers, who held the right from the patentee to manufacture and sell within a circle whose radius was 10 miles, having the city of Boston as a center; that the undertaker lived outside of that circle, and within a territory owned by the plaintiff under the patent, and he made use of the coffin lids in his business; that the owner of the territory in which the undertaker carried on his business brought suit against him as an infringer, and it was held by this court that, the sale having been made by a person who had full right to make, sell, and use the invention within his own territory, such sale carried with it the title to the use of the machine without, as well as within, such territory; that the action in that case was brought against the user, but this court announced a principle of law which was equally applicable to the seller; that, if the user of the article was not liable to the patentee, it was because he purchased it of a person who had the legal right to sell it; that, if it was legal for him to buy, it was equally legal for the other party to sell; and that in the opinion of this court, in the case as well as in the dissenting opinion, it was stated, in substance, that the question raised was whether an assignment of a patented invention for a limited district conferred upon the assignee the right to sell such patented article to be used outside of such limited district. The circuit court further said that there was no evidence in Adams v. Burke that the sale was made under the belief on the part of the seller that the article was to be used within his territory, and that the case was authority for the broad proposition that the sale of a patented article by an assignee within his territory carries the right to use it everywhere, notwithstanding the knowledge of both parties that a use outside of the territory is intended.

We understand that to be the true interpretation of the decision in Adams v. Burke. It is said in the opinion in that case that *362 when the patentee, or the person having his rights, sells a machine or instrument whose *363 sole value is in its use, he receives the consideration for its use, and parts with the right to restrict that use; that the patentee, or his assignee, having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser, without further restriction on account of the monopoly of the patentee; that although the right of the assignees of the coffin-lid patent to manufacture, to sell, and to use the coffin lids was limited to the circle of 10 miles around Boston, a purchaser from them of a single coffin acquired the right to use that coffin for the purpose for which all coffins are used; that so far as the use of it was concerned the patentee had received his consideration, and it was no longer within the monopoly of the patent; that it would be to ingraft a limitation upon the

right of use, not contemplated by the statute, nor within the reason of the contract, to say that it could only be used within the 10-mile circle; and that whatever might be the rule, when patentees subdivided territorially their patents, as to the exclusive right to make or to sell within a limited territory, this court held that in the class of machines or implements it had described, when they were once lawfully made and sold, there was no restriction on their use to be implied, for the benefit of the patentee or his assignees or licensees.

The plaintiffs in error contend that the decision in Adams v. Burke is not applicable to the present case; that in Adams v. Burke it was assumed that the patented coffin lids were first lawfully sold to the purchaser, without condition or restriction, by assignees of the patent for the territory of Boston and vicinity; that then the question was presented whether, as an incident of such a lawful sale, the buyer could use outside of the limits of the territory of the assignees the article so lawfully purchased; that it was not shown in that case that the sellers sold the patented coffin lids for use in other territory, or knew of, or had any interest in, such use; that in the case now before us the lawfulness, as against the plaintiffs, of the alleged sale of the patented pipe by the defendant, in the actual circumstances of such sale, was contested, the *363 claim of the plaintiffs being that such sale, and the shipment thereunder, expressly for use within the territory of the plaintiffs, constituted an invasion of their rights, and were unlawful, as against the plaintiffs; and that actual sale, delivery, and acceptance of the pipe at Bay City, for actual use, would be one thing, but a form of delivery at Bay City, with an acceptance at Hartford, and knowledge and intention on the part of the defendant that the sole use would be at Hartford, and shipments on that basis and understanding, would not constitute a lawful sale of the pipe at Bay City, as against the plaintiffs.

But we are of opinion that the case of Adams v. Burke cannot be so limited; that the sale was a complete one at Bay City; and that neither the actual use of the pipes in Connecticut, nor a knowledge on the part of the defendant that they were intended to be used there, can make him liable. Adams v. Burke, in the particular in question, is cited with approval by this court in Birdsell v. Shaliol, 112 U. S. 485, 487, 5 Sup. Ct. Rep. 244; Wade v. Metcalf, 129 U. S. 202, 205, 9 Sup. Ct. Rep. 271; and Boesch v. Graff, 133 U. S. 697, 703, 10 Sup. Ct. Rep. 378.

The authorities which are cited on the part of the plaintiffs, holding that where a person makes one element of a patented combination, with the intent that other persons shall supply the other elements, and thus complete the combination, he is guilty of infringement, because he contributes to it, establish a doctrine applicable to the case of a naked infringer. But in the present case the defendant was not such an infringer, because he had a right, under the patent, to make, use, and vend the patented article in the state of Michigan, and the article was lawfully made and sold there. The pipes in question were not sold by the Hartford Steam Company in Connecticut, but were merely used there, and necessarily perished in the using.

It is easy for a patentee to protect himself and his assignees when he conveys exclusive rights under the patent for particular territory. He can take care to bind every licensee or assignee, if he gives him the right to sell articles made under the patent, by imposing conditions which will prevent any other licensee or assignee from being interfered with. There is no condition or restriction in the present case in the title of the defendant. He was the assignee and owner of the patent for the state of Michigan.

*364

Judgment affirmed.

(149 U. S. 304)

NIX et al. v. HEDDEN, Collector.

(May 10, 1893.)

No. 137.

CUSTOMS DUTIES—CLASSIFICATION—TOMATOES.

Tomatoes are "vegetables," rather than "fruits," in the common and popular acceptation of such words, and were not free of duty under the provision of the free list for "fruits, green, ripe, or dried," but were dutiable at 10 per cent. ad valorem, under the provision in Schedule G of the tariff act of March 3, 1883, for "vegetables in their natural state." 39 Fed. Rep. 109, affirmed.

In error to the circuit court of the United States for the southern district of New York.

At law. Action by John Nix, John W. Nix, George W. Nix, and Frank W. Nix against Edward L. Hedden, collector of the port of New York, to recover back duties paid under protest. Judgment on verdict directed for defendant. 39 Fed. Rep. 109. Plaintiffs bring error. Affirmed.

Statement by Mr. Justice GRAY:

*305 This was an action brought February 4, 1887, against the collector of the port of New York to recover back duties paid under protest on tomatoes imported by the plaintiff from the West Indies in the spring of 1886, which the collector assessed under "Schedule G.—Provisions," of the tariff act of March 3, 1883, (chapter 121,) imposing a duty on "vegetables in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem;" and which the plaintiffs contended came within the clause in the free list of the same act, "Fruits, green, ripe, or dried, not specially enumerated or provided for in this act." 22 Stat. 504, 519.

At the trial the plaintiff's counsel, after

reading in evidence definitions of the words "fruit" and "vegetables" from Webster's Dictionary, Worcester's Dictionary, and the Imperial Dictionary, called two witnesses, who had been for 30 years in the business of selling fruit and vegetables, and asked them, after hearing these definitions, to say whether these words had "any special meaning in trade or commerce, different from those read."

One of the witnesses answered as follows: "Well, it does not classify all things there, but they are correct as far as they go. It does not take all kinds of fruit or vegetables; it takes a portion of them. I think the words 'fruit' and 'vegetable' have the same meaning in trade to-day that they had on March 1, 1883. I understand that the term 'fruit' is applied in trade only to such plants or parts of plants as contain the seeds. There are more vegetables than those in the enumeration given in Webster's Dictionary under the term 'vegetable,' as 'cabbage, cauliflower, turnips, potatoes, peas, beans, and the like,' probably covered by the words 'and the like.'"

The other witness testified: "I don't think the term 'fruit' or the term 'vegetables' had, in March, 1883, and prior thereto, any special meaning in trade and commerce in this country different from that which I have read here from the dictionaries."

The plaintiff's counsel then read in evidence from the same dictionaries the definitions of the word "tomato."

*306 *The defendant's counsel then read in evidence from Webster's Dictionary the definitions of the words "pea," "egg plant," "cucumber," "squash," and "pepper."

The plaintiff then read in evidence from Webster's and Worcester's dictionaries the definitions of "potato," "turnip," "parsnip," "cauliflower," "cabbage," "carrot," and "bean."

No other evidence was offered by either party. The court, upon the defendant's motion, directed a verdict for him, which was returned, and judgment rendered thereon. 39 Fed. Rep. 109. The plaintiffs duly excepted to the instruction, and sued out this writ of error.

Edwin B. Smith, for plaintiffs in error. Asst. Atty. Gen. Maury, for defendant in error.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The single question in this case is whether tomatoes, considered as provisions, are to be classed as "vegetables" or as "fruit," within the meaning of the tariff act of 1883.

The only witnesses called at the trial testified that neither "vegetables" nor "fruit" had any special meaning in trade or commerce different from that given in the dictionaries, and that they had the same meaning in trade to-day that they had in March, 1883.

The passages cited from the dictionaries define the word "fruit" as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are "fruit," as distinguished from "vegetables," in common speech, or within the meaning of the tariff act.

There being no evidence that the words "fruit" and "vegetables" have acquired any special meaning in trade or commerce, they must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. Brown v. Piper, 91 U. S. 37, 42; Jones v. U. S., 137 U. S. 202, 216, 11 Sup. Ct. Rep. 80; Nelson v. Cushing, 2 Cush. 519, 532, 533; Page v. Fawcet, 1 Leon. 242; Tayl. Ev. (8th Ed.) §§ 16, 21.

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.

The attempt to class tomatoes as fruit is not unlike a recent attempt to class beans as seeds, of which Mr. Justice Bradley, speaking for this court, said: "We do not see why they should be classified as seeds, any more than walnuts should be so classified. Both are seeds, in the language of botany or natural history, but not in commerce nor in common parlance. On the other hand in speaking generally of provisions, beans may well be included under the term 'vegetables.' As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced." Robertson v. Salomon, 130 U. S. 412, 414, 9 Sup. Ct. Rep. 559.

Judgment affirmed.

(149 U. S. 451)

CATES et al. v. ALLEN et al.[1]

(May 10, 1893.)

No. 153.

FEDERAL COURTS—EQUITY JURISDICTION—VACATING FRAUDULENT ASSIGNMENT—JURY TRIAL—REMANDING CAUSE TO STATE COURT—COSTS.

1. Simple contract creditors, who have not reduced their claims to judgment, have no standing in the United States circuit court, sitting as a court of equity, on a bill to vacate a fraudulent assignment for the benefit of creditors, though by Code Miss. 1880, §§ 1843, 1845, the state courts of chancery are given jurisdiction of bills of creditors, who have not obtained judgments at law, to vacate such assignments, and subject the property to their demands.

2. The fact that section 1845 aims to create a lien by the filing of the bill does not affect the question, for, in order to invoke equity interposition in the federal courts, the lien must exist at the time the bill is filed, and form its basis; and to allow a lien resulting from the issue of process to constitute such ground would be to permit state legislation to withdraw all actions of law from the one court to the other, and to unite legal and equitable claims in the same action, which cannot be allowed in the practice of the federal courts, where the distinction between law and equity is a matter of substance, and not merely of form and procedure.

3. Where the ascertainment of complainant's demand is properly by action at law, the fact that the chancery court has the power to summon a jury on occasion cannot be regarded as the equivalent of the right of trial by jury secured by the seventh amendment.

4. Where the adverse citizenship of the parties and the amount involved entitle a cause to be removed from a state to a United States circuit court, but the subject-matter of the controversy is not properly cognizable by the circuit court, and jurisdiction of the cause is assumed by such court, the supreme court, on appeal, will remand the cause to the circuit court, with directions to remand it to the state court.

5. Where a cause is so remanded by the supreme court, the costs are cast on the party applying for the removal of the cause to the circuit court.

Mr. Justice Brown and Mr. Justice Jackson, dissenting.

Appeal from the district court of the United States for the northern district of Mississippi. Reversed.

*455 Statement by Mr. Chief Justice FULLER:

*R. C. Cates, D. Andrews, and L. L. Cates, as individuals and as composing the firms of Luke Cates & Co. and Andrews, Cates & Co., made their deed of assignment for the benefit of creditors December 7, 1886, whereby they conveyed their property to assignees therein mentioned, to be converted into money, and applied to the payment of their debts, certain creditors being preferred. J. H. Allen, T. W. West, and J. C. Bush, citizens, respectively, of Louisiana, Missouri, and Alabama, and doing business in New Orleans as general commission merchants and cotton factors, under the name of Allen, West & Bush, filed their bill of complaint, December 8, 1886, in the chancery court of Lee county, Miss., against R. C. Cates, L. L. Cates, D. Andrews, and the assignees mentioned in the assignment, alleging an indebtedness to the complainants of more than $16,000 on open account, and charging that the assignment above mentioned was fraudulent in law and in fact, made without any valuable consideration, and with the fraudulent intent to hinder, delay, and defraud the complainants and other creditors, and that the same ought to be set aside, and the property assigned subjected to the payment of complainants' demand. The bill also charged that one of the assignees, who at the time of the filing of the bill was in possession of a large part of the assigned property, was insolvent, and that it would be dangerous to allow him to remain in the possession and control thereof; that he was in possession of the books of account and choses in action of the assignors, and was proceeding to collect the same; that there was danger that they would be lost to complainants and the other creditors; and that irreparable injury might thereby result. The bill prayed for answers under oath, and that on final hearing the assignment might be decreed to be void and set aside; that all the property *covered by the assignment might *456 be subjected to the payment of complainants' debts, and then to the payment of such other demands as might be brought before the court; for an injunction; for a writ of sequestration; for a receiver; that the filing of the bill be held to give complainants the first lien on the effects of the said debtors in the hands of the assignees, or either of the parties, or any other person; and for general relief. A writ of sequestration was issued, and the sheriff took possession of the property, and a number of other creditors were subsequently admitted as co-complainants.

On December 15, 1886, Allen, West & Bush and their co-complainants filed their petition to remove the cause into the United States district court for the northern district of Mississippi, exercising the jurisdiction of a circuit court of the United States, and bond was given, and the cause removed accordingly. Receivers were thereafter appointed, and on April 15, 1887, the Tishomingo Savings Institution, a preferred creditor, was made a defendant. A demurrer was filed, alleging as grounds that there was no equity on the face of the bill; that the claims of complainants had not been reduced to judgment; that they had no lien, and were not entitled to file a bill under the law; and for want of proper parties. This demurrer was overruled, and defendants answered. Evidence was taken and hearing had, and on October 28, 1887, the court adjudged the assignment to be fraudulent and void, and set the same aside; found the sum of $17,732.71 to be due Allen, West & Bush; decreed that indebtedness to be a first lien and charge on the assets of Andrews, Cates & Co.; and ordered the receiver to pay said sum out of the proceeds of the sales and collections of and from the assets of that firm. Various

[1] For dissenting opinion, see 13 Sup. Ct. Rep. 977.

other orders were entered in that behalf and with reference to other funds and appropriations for the claims of other creditors, which it is unnecessary to notice. The report of the receiver showed amounts paid to Allen, West & Bush of nearly $14,000.

E. H. Bristow and W. B. Walker, for appellants. John M. Allen, for appellees.

*456 *Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

Complainants were simple contract creditors, who had not reduced their claims to judgment, and therefore had no standing in the United States circuit court, sitting as a court of equity, upon a bill to set aside and vacate a fraudulent conveyance. The suit was originally brought in the state court, under sections 1843 and 1845 of the Code of Mississippi of 1880, which provided that the chancery courts of that state should have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, had not had executions returned unsatisfied, to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors, and might subject the property to the satisfaction of the demands of such creditors as if the complainants had had judgment, and execution thereon returned "No property found;" and that "the creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such bill."

These sections were considered in Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. Rep. 712, and it was therein determined that the circuit courts of the United States in Mississippi could not, under their operation, take jurisdiction of a bill in equity to subject the property of the defendants to the payment of a simple contract debt in advance of any proceeding at law, either to establish the validity or amount of the debt or to enforce its collection. It was there shown that the constitution of the United States, in creating and defining the judicial power of the general government, had established the distinction between law and equity, and that equitable relief in aid of demands cognizable in the courts of the United States only on their law side could not be sought *457 in the same action, although allowable in the *state courts by virtue of state legislation, (Bennett v. Butterworth, 11 How. 669; Thompson v. Railroad Co., 6 Wall. 134; Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. Rep. 148;) and that the Code of Mississippi, in giving to a simple contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property, whereby the whole suit involving the determination of the validity of the contract and the amount due thereon is treated as one in equity, to be heard and disposed of without a trial by jury, could not be enforced in the courts of the United States, because in conflict with the constitutional provision by which the right to a trial by jury is secured.

The principle that a general creditor cannot assail, as fraudulent against creditors, an assignment or transfer of property made by his debtor until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon the property, or is in a situation to perfect a lien thereon, and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer, is elementary. Wait, Fraud. Conv. § 73, and cases cited. The existence of judgment, or of judgment and execution, is necessary — First, as adjudicating and definitely establishing the legal demand; and, second, as exhausting the legal remedy.

This was well settled in Mississippi prior to the enactment in question. In Partee v. Mathews, 53 Miss. 140, it was ruled by the supreme court that no creditor but one who has a lien by judgment or otherwise, in full force at the time the bill is filed, can attack in equity a transfer of property as fraudulent; and that, as between equitable and legal assets, the creditor must exhaust legal means, by the issue of execution, and its return nulla bona, in order to reach the first; while, as to the latter, a judgment which acts as a lien on the property sought to be charged would be sufficient as the basis of a bill.

In Fleming v. Grafton, 54 Miss. 79, the subject was very much considered, and the English and American *authorities cited to a large extent, and the opinion concludes: "Courts of equity are not ordinarily tribunals for the collection of debts. Some special reason must be offered by the creditor before they will extend aid to him. If he is a judgment creditor, he must show that he has a lien, either by judgment, if the statute gives such lien; if it arises from the execution, he must show that one has been issued; or, if it arises from a levy of the writ, that must have been made."

In Scott v. Neely it was said by Mr. Justice Field, speaking for the court: "In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment; or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property, or a lien thereon, created by con-

tract or by some distinct legal proceeding. Smith v. Railroad Co., 99 U. S. 398, 401; Angell v. Draper, 1 Vern. 398, 399; Shirley v. Watts, 3 Atk. 200; Wiggins v. Armstrong, 2 Johns. Ch. 144; McElwain v. Willis, 9 Wend. 548, 556; Crippen v. Hudson, 13 N. Y. 161; Jones v. Green, 1 Wall. 330. * * * It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract or by contribution to its value by labor or material, or by judicial proceedings had, which distinguishes such cases for the enforcement of such lien or interest from the case at bar."

The mere fact that a party is a creditor is not enough. He must be a creditor with a specific right or equity in the property, and this is the foundation of the jurisdiction in chancery, because jurisdiction on account of the alleged fraud of the debtor does not attach as against the immediate parties to the impugned transfer, except in aid of the legal right.

Doubtless new classes of cases may by legislative action be directed to be tried in chancery, but they must, when tested by the general principles of equity, be of an equitable character, or based on some recognized ground of equity interposition. This will be found to be true of the decisions in *459 Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. Rep. 276, and like cases.

The fact that section 1845 aims to create a lien by the filing of the bill does not affect the question, for, in order to invoke equity interposition in the United States courts, the lien must exist at the time the bill is filed, and form its basis; and to allow a lien resulting from the issue of process to constitute such ground would be to permit state legislation to withdraw all actions at law from the one court to the other, and unite legal and equitable claims in the same action, which cannot be allowed in the practice of the courts of the United States, in which the distinction between law and equity is matter of substance, and not merely of form and procedure. And, as the ascertainment of the complainants' demand is by action at law, the fact that the chancery court has the power to summon a jury on occasion cannot be regarded as the equivalent of the right of trial by jury secured by the seventh amendment. Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. Rep. 276; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. Rep. 249.

The result is that this decree must be reversed, as the case comes directly within Scott v. Neely, from the rule laid down in which we have no disposition to recede. It is suggested that the bill might be sustained under the prayer for general relief, as brought for the administration of the assets under the assignment, but such relief would not be agreeable to the case made by the bill, which was directed to the setting aside of that instrument. The circuit court was therefore in error in proceeding in the case.

The bill was originally filed in the state court, and removed December 15, 1886, under the act of March 3, 1875, (18 Stat. 470,) on the ground of diverse citizenship. By the fifth section of that act, if, in any suit "removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it *460 to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." Under the act of March 3, 1887, (24 Stat. 553,) a circuit court may remand a case upon deciding that it was improperly removed. So far as citizenship and amount were concerned, the plaintiffs were entitled to file their petition for removal; but the nature of the controversy was such that the suit was not properly cognizable in the circuit court for the reasons heretofore given. While there are cases where the courts of the United States may acquire jurisdiction by removal from state courts when jurisdiction would not have attached if the suits had been originally brought therein, those are cases of jurisdiction over the parties, and not of jurisdiction based upon the subject-matter of the litigation, and furnish no rule for the disposition of cases such as that before us. But it is not to be concluded where diverse citizenship might enable the parties to remove a case but for the objection arising from the nature of the controversy, that, if such removal has been had, the suit must be dismissed on the ground of want of jurisdiction. On the contrary, we are of opinion that it is the duty of the circuit court, under such circumstances, to remand the cause. The circuit court has jurisdiction to determine whether or not the case was properly removed, and this court has jurisdiction to pass upon that determination.

In Thompson v. Railroad Co., 6 Wall. 134, an ordinary action at law was brought in the state court and removed to the United States court, where a bill in equity was substituted by leave of court, and the suit progressed as a suit in chancery. It was held that the distinctions between the two kinds of proceeding could not be obliterated by state legislation, and the decree was reversed, and the cause remanded, with directions to dismiss the bill without prejudice. In the case before us, a bill in equity, sustainable in the state court, was removed by the complainants under the act of 1875, and it was the duty of the circuit court, up-

on ascertaining that it was improperly removed, to remand the case. Under the acts of congress that court was not compelled to dismiss the case,*but might have remanded it, and we may therefore direct it to do now what should have been done in the first instance. Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. Rep. 510.

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It will be for the state court to determine what orders should be made, if any, in regard to the amounts complainants have received under the decrees of the circuit court. As the removal was upon the application of appellees, they must be cast in the costs.

The decree of the circuit court is accordingly reversed, with costs against the appellees, and the cause remanded to the circuit court, with directions to render judgment against them for costs in that court, and to remand the cause to the chancery court of Lee county, Miss., and it is so ordered.

Mr. Justice BROWN and Mr. Justice JACKSON dissented.

(149 U. S. 315)

DALZELL et al. v. DUEBER WATCH-CASE MANUF'G CO., (two cases.)

(May 10, 1893.)

Nos. 213 and 214.

PATENTS FOR INVENTIONS — ORAL AGREEMENT TO ASSIGN—SPECIFIC PERFORMANCE — INVENTIONS BY EMPLOYE—EVIDENCE.

1. An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within Rev. St. § 4898, requiring assignments of patents to be in writing; and such agreement may be specifically enforced in equity upon sufficient proof thereof.

2. A manufacturing corporation which has employed a skilled workman, for a stated compensation, to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents for inventions made by him while so employed, in the absence of express agreement to that effect. Hapgood v. Hewitt, 7 Sup. Ct. Rep. 193, 119 U. S. 226, followed.

3. Specific performance of an alleged contract by an employe to procure and assign to his employer patents for any inventions he might make during his employment will not be enforced when practically the only evidence of the existence of such contract consists of the testimony of the employer, which is directly contradicted by the employe, and when there is much to impeach the credibility of both witnesses.

4. In a suit for infringment of a patent, defendant filed a plea alleging that the patentee had been in its employ; that his wages were increased in consideration of his agreement to dedicate his skill and inventive talent and genius towards perfecting machines and devices used in defendant's business, and to obtain patents at defendant's expense, and assign them to defendant. The only evidence to support this plea was that plaintiff asked for an increase of salary, saying that he was about to make improvements which would amply justify the same; that such increase was thereupon made; that thereafter plaintiff represented that he had made valuable improvements, for which patents should be obtained; that he offered to procure such patents, and assign them to defendant free of charge, if defendant would pay the expense of obtaining the same; and that patents were so obtained at defendant's expense, but that plaintiff refused to assign them. *Held*, that this evidence was insufficient to support the contract alleged in the plea, and that the plea should therefore have been overruled.

Mr. Justice Brewer, dissenting.

Appeals from the circuit court of the United States for the southern district of New York. Reversed.

Statement by Mr. Justice GRAY:

These were two bills in equity, heard together in the circuit court, and argued together in this court.

On March 31, 1886, Allen C. Dalzell, a citizen of the state of New York, and the Fahys Watch-Case Company, a New York corporation, filed a bill in equity against the Dueber Watch-Case Manufacturing Company, a corporation of Ohio, for the infringement of two patents for improvements in apparatus for making cores for watch cases, granted to Dalzell, October 27, 1885, for the term of which he had, on January 21, 1886, granted a license, exclusive for three years, to the Fahys Company.

To that bill the Deuber Company, on June 4, 1886, filed the following plea: "That prior to the grant of the said*letters patent upon which the bill of complaint is based, and prior to the application therefor, and prior to any alleged invention by said Dalzell of any part, feature, or combination described, shown, or claimed in either of said letters patent, the said defendant being then engaged in the manufacture of watch cases in the city of Newport, in the state of Kentucky, and the said Dalzell having been in its employ as a tool maker for a year preceding, it, said defendant, at the request of said Dalzell, re-employed said Dalzell, at increased wages, to aid in experimenting upon inventions upon machinery and tools to be used in the manufacture of various portions of watch cases; that said Dalzell did then and there agree with said defendant, in consideration of said increased salary as aforesaid to be paid to him, and which was paid to him by this defendant, to dedicate his best efforts, skill, and inventive talent and genius towards the perfecting and improvement of watch-case machinery and such other devices as this defendant should direct and order, and in experimenting under the direction of this defendant for this purpose, and further agreed that any inventions or improvements made or contributed to by him (said Dalzell) should be patented at the expense of this defendant, and for its benefit exclusively, and that said Dalzell should execute proper deeds of assignment, at the expense of this defendant, to be lodged with the applications for all such patents in the United States patent office, and said patents were to be granted and issued directly to this defendant; that, in pursuance of said agreement, said Dalzell entered upon said employment, and while thus employed at

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the factory of this defendant, and while using its tools and materials, and receiving such increased wages from it, as aforesaid, the said alleged inventions were made; that said patents were applied for, with the permission of this defendant, by the said Dalzell; and that all fees and expenses of every kind, necessary or useful for obtaining said patents, including as well patent-office fees as fees paid the solicitor employed to attend to the work incident to the procuring of said patents and drawing said assignments to this defendant, were paid by this defendant; and that, notwithstanding the foregoing, said *317 Dalzell did *not sign the said deeds, although he had promised so to do, but fraudulently and secretly procured the said patents to be granted to himself, of all of which this defendant avers the complainant the Fahys Watch-Case Company had notice at and prior to the alleged making of the license by said Dalzell to it, more particularly referred to in the bill of complaint; and defendant avers that, by reason of the premises, the title in equity to said patents is in this defendant."

The plea, as required by equity rule 31 of this court, was upon a certificate of counsel that in his opinion it was well founded in point of law, and was supported by the affidavit of John C. Dueber that he was the president of the Dueber Company, that the plea was not interposed for delay, and that it was true in point of fact.

After a general replication had been filed and some proofs taken in that case, including depositions of Dueber and of Dalzell, the Dueber Company, on January 17, 1887, filed a bill in equity against Dalzell and the Fahys Company for the specific performance of an oral contract of Dalzell to assign to the Dueber Company the rights to obtain patents for his inventions, and for an injunction against Dalzell and the Fahys Company, and for further relief.

This bill contained the following allegations:

"That heretofore, to wit, prior to November 1, 1884, the said defendant Dalzell was in the employment of your orator, making and devising tools to be used in the construction of watch cases. That on or about said last-mentioned date, at the request of said Dalzell, his wages were raised, in consideration of a promise then made by said Dalzell to your orator that in the future his services would be of great value in the devising and perfecting of such tools. That, in pursuance of said promise and contract, the said Dalzell continued in the employ of your orator, and wholly at its expense, to devise and construct various tools to be used in your orator's watch-case factory in the manufacture of various parts of watch cases. That said Dalzell was so employed for a great length of time, to wit, a whole year, a large part of which time he was assisted by various workmen employed and paid by your orator to assist* him (the said Dalzell) in *318 constructing such tools and in the experiments incident thereto."

"That subsequently thereto, and when said tools were completed, said Dalzell requested your orator to apply for letters patent for the various inventions embodied in all of said tools, for the use and benefit of your orator, representing to your orator that he (said Dalzell) had made valuable discoveries and inventions while engaged in designing and constructing said tools; and further representing that, if your orator did not secure the exclusive right to said inventions by letters patent, in all probability some of the workmen employed at your orator's factory, who were familiar with the said inventions and the construction of said tools, might go to some other and rival watch-case company, and explain to it the construction of such tools, and make similar tools for such other company, in which case your orator would be without remedy."

"That said Dalzell then and there, and as a further inducement to your orator to have letters patent applied for for said inventions, voluntarily offered to your orator that, if your orator should permit him (Dalzell) to apply for letters patent, and your orator pay all the expenses incident to obtaining such letters patent, such letters patent might be taken for the benefit of your orator, and that he (Dalzell) would not ask or require any further or other consideration for said inventions and such letters patent as might be granted thereon, which proposition was then and there accepted by your orator, and it was then fully agreed between said parties that said Dalzell should immediately proceed, through a solicitor of his own selection, to procure said patents for and in the name of your orator, and that your orator should pay all bills that might be presented by said Dalzell, or such solicitor as might be selected to attend to the business of procuring said patents."

This bill further alleged that Dalzell did, in pursuance of that agreement, select a solicitor, and apply for the two patents mentioned in the bill for an infringement, and three other patents; that, when some of the patents had "passed for issue," the solicitor employed by Dalzell sent blank assignments thereof to the Dueber Company, with a request that *Dalzell sign them, and *319 thus transfer the legal title in the inventions to the Dueber Company, and enable the patents to be granted directly to it; that it exhibited these assignments to Dalzell, and requested him to sign them; that Dalzell replied that he would postpone signing them until all the patents had "passed for issue," and would then sign all together, to all which the Dueber Company assented; that the Dueber Company paid all the fees and expenses necessary or useful in obtaining the patents, but that Dalzell fraudulently procured the patents to be granted to himself,

and refused to assign them to the Dueber Company, and, as that company was informed and believed, conveyed, with the intention of defrauding it, certain interests in and licenses under the patents to the Fahys Company, with knowledge of the facts; and that Dalzell and the Fahys Company confederated and conspired to cheat and defraud the Dueber Company out of the patents, and, in pursuance of their conspiracy, filed their bill aforesaid against the Dueber Company.

Annexed to this bill was an affidavit of Dueber that he had he had read it and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believed it to be true.

To this bill answers were filed by Dalzell and the Fahys Company, denying the material allegations, and a general replication was filed to these answers.

By stipulation of the parties, the evidence taken in each case was used in both. After a hearing on pleadings and proofs, the circuit court dismissed the bill of Dalzell and the Fahys Company, and entered a decree against them, as prayed for, upon the bill of the Dueber Company. 38 Fed. Rep. 597. Dalzell and the Fahys Company appealed from each decree.

Edmund Wetmore and J. E. Bowman, for appellants. James Moore, for appellee.

*320 *Mr. Justice GRAY, after stating the substance of the pleadings and decrees, delivered the opinion of the court.

The more important of these cases, and the first to be considered, is the bill in equity of the Dueber Watch-Case Manufacturing Company to compel specific performance by Dalzell of an oral agreement, alleged to have been made by him while in its employment, to assign to it the right to obtain patents for his inventions in tools for making parts of watch cases.

An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within section 4898 of the Revised Statutes, requiring assignments of patents to be in writing, and may be specifically enforced in equity, upon sufficient proof thereof. Somerby v. Buntin, 118 Mass. 279; Gould v. Banks, 8 Wend. 562; Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. Rep. 366; Blakeney v. Goode, 30 Ohio St. 350.

But a manufacturing corporation which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect. Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. Rep. 193.

Upon the question whether such a contract was ever made by Dalzell as is alleged in the bill of the Dueber Company, the testimony of Dalzell and of Dueber, the president and principal stockholder of the Dueber Company, is in irreconcilable conflict.

Dalzell was a skilled workman in the manufacture of various parts of watch cases, and was employed by the Dueber Company, first for eight months as electroplater and gilder, and then for a year in its tool factory, at wages of $25 a week, from February, 1883, until November, 1884, and thenceforth, at wages of $30 a week, until January 19, 1886, when he left their employment, and immediately entered the employment of the Fahys Company, and executed to that company a license to use his patents.

*321 *The matters principally relied on by the Dueber Company as proving the contract sought to be enforced are a conversation between Dalzell and Dueber at the time of raising his wages, in November, 1884, another conversation between them in the spring of 1885, and oral promises, said to have been made by Dalzell in the summer of 1885, to assign to the Dueber Company his rights to obtain patents. It will be convenient to consider these matters successively.

The bill alleges that Dalzell's wages were raised in November, 1884, at his request, "and in consideration of a promise then made by said Dalzell to" the Dueber Company "that in the future his services would be of great value in the devising and perfecting of such tools," and that, "in pursuance of said promise and contract," Dalzell continued in the company's employ, at its expense, and with the assistance of its workmen, to devise and construct such tools.

Dueber's whole testimony on this point appears in the following question and answer: "Question. Please state the circumstances which induced your company to increase Mr. Dalzell's wages at the time they were increased. Answer. Mr. Dalzell came to me in the office, and he says, 'Mr. Dueber, a year is now up since I worked for you in this factory. I suppose you are satisfied with the improvements I have made, and I have come to have my wages raised, and I will show you that, if you raise my wages, the improvements I will make this year will justify you in doing so.' I asked him what wages he wanted. He said, 'Thirty dollars per week;' and he was paid that until the time he left. When that year was up, nothing was said about wages."

This testimony tends to show no more than that Dalzell expressed a confident belief that, if his wages should be raised, the improvements which he would make during the coming year would justify the increase. It has no tendency to prove any such prom-

ise or contract as alleged in the bill, or any other promise or contract on Dalzell's part. So far, therefore, no contract is proved, even if full credit is given to Dueber's testimony.

323 As to what took place in the spring of 1885, the bill alleges that subsequently to the aforesaid interview, "and when said tools were completed," Dalzell requested the company to apply, for its own use and benefit, for patents for inventions which he represented that he had made "while engaged in designing and constructing said tools," and which, he suggested, might, if not secured by letters patent, be made known and explained by some of the workmen then employed there to rival companies; and, as a further inducement to the company to have such patents applied for, voluntarily offered, if the company would permit him to do so, and would pay all expenses of obtaining patents, to apply therefor, for the benefit of the company, and "not ask or require any further or other consideration for said inventions and such letters patent as might be granted thereon;" and that this proposition was "then and there accepted by" the company, and "it was then fully agreed between said parties" that Dalzell should immediately proceed, through a solicitor of his own selection, to procure the patents in the name of the company, and the company should pay the necessary expenses.

Upon this point, Dueber's testimony was as follows: "Question. Who first suggested the idea of patenting these devices, and when? Answer. Mr. Dalzell, in the spring of 1885. Q. Please state all that took place at that time. A. Mr. Dalzell came to me, and said: 'Mr. Dueber, we have got a very good thing here. Let us patent this for the benefit of the concern. We have some men here who may run away and carry those ideas with them.' I objected at first. Finally he says: 'If you will pay for getting them out, I don't want anything for them.' I then said: 'Let us go over to Mr. Layman to-morrow, and attend to it.' He said he knew a more competent lawyer than that, that he would send for." Dueber also testified that, when Dalzell first suggested taking out letters patent, Dueber told him that he did not think the improvements of sufficient value to justify taking out patents and paying for them; and that "about all" that Dalzell replied was: "We have a good many men here who may carry off these ideas into other shops, and I want to retain them for this concern."

323 All this testimony of Dueber was given in September, 1886, before the filing of the bill for specific performance. Being recalled, after this bill had been filed, he testified, on cross-examination, that he now considered the inventions covered by the patents sued on as valuable, because the company had spent a great deal of money on them, and he declined or evaded giving any other reason.

Bearing in mind that there was no proof whatever of any previous agreement between the parties on the subject, the contract, as alleged in the bill and testified to by Dueber, by which Dalzell is said to have voluntarily offered, with no other motive than to prevent workmen from injuring the Dueber Company by communicating the inventions to rival companies, and for no other consideration than the payment by the Dueber Company of the expenses of obtaining patents, and without himself receiving any consideration, benefit, or reward, and without the company's even binding itself, for any fixed time, to pay him the increased wages, or to keep him in its service, is of itself highly improbable; and it may well be doubted whether, if such a contract were satisfactorily proved to have been made, a court of equity would not consider it too unconscionable a one, between employer and employed, to be specifically enforced in favor of the former against the latter. Cathcart v. Robinson, 5 Pet. 264, 276; Railroad Co. v. Cromwell, 91 U. S. 643; Manufacturing Co. v. Gormully, 144 U. S. 224, 12 Sup. Ct. Rep. 632.

Moreover, Dueber throughout manifests extreme readiness to testify in favor of the theory which he is called to support, and much unwillingness to disclose or to remember any inconsistent or qualifying circumstances. The record shows that he has at different times made oath to four different versions of the contract:

(1) On March 16, 1886, when the Dueber Company filed a petition in the superior court of Cincinnati against Dalzell to compel him to assign his patents to it, Dueber made oath to the truth of the statements in the petition, one of which was "that, at the time of the making of application for said patents, it was agreed, for a valuable consideration before that time paid, that said patents and inventions were the property* of this plaintiff, and should be transferred to it immediately upon the issue thereof, and prior to the grant of the patents."

(2) On June 4, 1886, he made oath that the plea was true in point of fact, which stated that the whole contract, both for an increase of Dalzell's wages and for his assignment to the Dueber Company of his rights to patents for his inventions, was made "prior to any alleged invention by said Dalzell," and in consideration of an increase of wages to be thereafter paid.

(3) In September, 1886, he testified that the increase of wages was made upon the mere statement of Dalzell that he would show that the improvements he would make during the coming year would justify the increase, and that the subsequent contract to assign the patent rights was after the inventions had been made.

(4) On January 17, 1887, he made oath to the truth, of his own knowledge, of this bill, which alleged that Dalzell's wages were

raised "in consideration of a promise" by Dalzell "that in the future his services would be of great value in the devising and perfecting of such tools," and also alleged that the agreement to assign the patent rights was made after the inventions.

Dalzell, being called as a witness in his own behalf, directly contradicted Dueber in every material particular, and testified that the real transaction was that, after his inventions had been made, and shown to Dueber, the latter was so pleased with them that he, of his own accord, raised Dalzell's wages, and offered to furnish the money to enable him to take out patents. There is much evidence in the record which tends to contradict Dalzell in matters aside from the interviews between him and Dueber, and to impeach Dalzell's credibility as a witness; but impeaching Dalzell does not prove that Dueber's testimony can be relied on.

What took place, or is said to have taken place, after these interviews, may be more briefly treated.

Whitney, the solicitor employed at Dalzell's suggestion, applied for and obtained the patents in Dalzell's name, and was paid *325 his fees and the expenses of applying for the patents* by the Dueber Company, with Dalzell's knowledge. In the summer of 1885, before the patents were issued, he sent blank assignments thereof to the Dueber Company to be signed by Dalzell, which Moore, the general manager of the company, as well as Dueber, in the absence of each other, asked Dalzell to sign.

Upon what Dalzell then said, as upon nearly every material point in the case, the testimony is conflicting. Dueber and Moore testified, in accordance with the allegations in the bill, that Dalzell replied that he would not sign any of them until all the patents had "passed for issue," and would then sign all together. But the manner in which they testified to this does not carry much weight; and Dalzell testified that he positively refused to assign the patents until some arrangement for compensating him had been agreed upon.

Parts of a correspondence of Whitney with Dueber and with Dalzell, during the summer of 1885, were put in evidence, which indicate that Whitney, while advising Dalzell as to his interests, sought to ingratiate himself with the Dueber Company. But they contain nothing to show any admission by Dalzell that he had agreed or intended to assign the patent rights to the Dueber Company without first obtaining some arrangement whereby he might be compensated for his inventions.

The circuit court, in its opinion, after alluding to various matters tending to throw discredit on the testimony of each of the principal witnesses, said: "The case is one on which different minds may well reach a contrary opinion of the merits." 38 Fed. Rep. 599. We concur in that view, and it affords of itself a strong reason why the specific performance prayed for should not be decreed.

From the time of Lord Hardwicke it has been the established rule that a court of chancery will not decree specific performance unless the agreement is "certain, fair, and just in all its parts," (Buxton v. Lister, 3 Atk. 383, 385; Underwood v. Hitchcox, 1 Ves. Sr. 279; Franks v. Martin, 1 Eden, 309, 323;) and the rule has been repeatedly affirmed and acted on by this court. In Colson v. Thompson, Mr. Justice Washington, speaking for the court, said: "The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy." 2 Wheat. 336, 341. So, this court has said that chancery will not decree specific performance "if it be doubtful whether an agreement has been concluded, or is a mere negotiation," nor "unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms." Carr v. Duvall, 14 Pet. 79, 83; Nickerson v. Nickerson, 127 U. S. 668, 676, 8 Sup. Ct. Rep. 1355; Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. Rep. 109.

For these reasons we are of opinion that the contract set forth in the bill for specific performance has not been so clearly and satisfactorily proved as to justify a decree for specific performance of that contract, and that the decree for the plaintiff on the bill of the Dueber Company must therefore be reversed, and the bill dismissed.

The decree sustaining the plea to the bill against the Dueber Company for an infringement, and ordering that bill to be dismissed, is yet more clearly erroneous, for none of the evidence introduced by either party tended to prove such a contract as was set up in that plea. The only issue upon the plea and replication was as to the sufficiency of the testimony to support the plea as pleaded; and, as the plea was not supported by the testimony, it should be overruled, and the defendant ordered to answer the bill. Stead v. Course, 4 Cranch, 403, 413; Farley v. Kittson, 120 U. S. 303, 315, 318, 7 Sup. Ct. Rep. 534; Equity Rule 34.

It is proper to add that the question whether the Dueber Company, by virtue of the relations and transactions between it and Dalzell, had the right, as by an implied license, to use Dalzell's patents in its establishment, is not presented by either of these records, but may be raised in the further proceedings upon the bill against the Dueber Company for an infringement.

* Decrees reversed, and cases remanded to

the circuit court, with directions to dismiss the bill for specific performance, and to overrule the plea to the other bill, and order the defendant to answer it.

Mr. Justice BREWER dissented.

(149 U. S. 346)

HEDDEN v. RICHARD et al.

(May 10, 1893.)

No. 208.

STATUTES—CONSTRUCTION OF TARIFF ACT—WORDS USED IN TRADE SENSE.

A term, used in a tariff law, which has a general meaning as used by society at large, and also a special trade signification, is presumed to have been used by congress in its trade sense, unless the contrary is shown.

In error to the circuit court of the United States for the southern district of New York.

At law. Action by Oscar L. Richard and Emil L. Boas against Edward L. Hedden, (for whom his executrix, Elizabeth C. Hedden, was substituted,) collector of the port of New York, to recover duties paid under protest. A verdict was directed for plaintiffs and judgment entered thereon. 42 Fed. Rep. 672. Defendant brings error. Reversed.

Asst. Atty. Gen. Maury, for plaintiff in error. Edwin B. Smith, for defendants in error.

Mr. Justice SHIRAS delivered the opinion of the court.

At various times in the year 1886 the defendants in error imported into the port of New York certain articles of furniture for the account of Jacob and Josef Kohn, of Vienna, Austria, the manufacturers and consignors thereof, which the collector of the port classified as "furniture finished," under the provision for "cabinet ware and house furniture, finished," contained in Schedule D of the tariff act of March 3, 1883, and upon which he laid and collected duty at the rate of 35 per cent. ad valorem. Against this classification and exaction the importers duly protested, claiming that the *347 furniture was in piece, and not finished, and therefore dutiable at 30 per cent.* ad valorem, under the provision for "house or cabinet furniture in piece, or rough, and unfinished;" and on March 23, 1887, they brought an action in the superior court of the city of New York, which was duly remanded by certiorari into the circuit court of the United States for the southern district of New York, against Edward L. Hedden, the collector, alleging that they had been compelled to pay him a certain amount in excess of the lawful duty on the goods, and demanded judgment for the amount of such excess, with interest. The defendant answered, asserting that the duty collected by him as aforesaid was assessed at the lawful rate, and the issue thus joined came for trial in the court on May 14, 1886, before the court and a jury.

On the trial the plaintiffs in the action introduced testimony tending to show that the furniture in question consisted of Vienna bent wood chairs, settees, etc., which were imported into this country in separate parts or pieces, but varnished or polished, and requiring nothing but to be screwed together, (the holes for screws or bolts being already prepared,) and to have the ends of the screws or bolts "touched up" with paint or varnish, to form articles of furniture fit for use. The bolts or screws used came over with the furniture, and all the parts of the articles, as received by the importer, were ready to be put together. A sample chair, in the condition in which it was received by the importers, was brought into court by the plaintiffs, and the manner of putting the parts together was explained to the jury. The plaintiffs also introduced the testimony of a liquidator of duties at the customhouse of New York, to the effect that the difference between the amount of duties exacted from the plaintiffs and the sum which would have been collectible from them if the furniture had been assessed at 30 per cent. ad valorem amounted, with interest, to $443.34.

The testimony on behalf of the defendant tended to show that the articles of furniture described were first put together at the factory in completed form, then varnished or polished, and then taken apart and packed for shipment. The term "finished," as applied to furniture, had, in the furniture trade,* on and prior to March 3, *348 1883, a particular trade meaning, namely, that an article had been varnished, stained, oiled, polished, or the like. The chair exhibited by the plaintiffs had been "finished," and was what was known to the trade as a "finished knocked-down" chair. The terms "in piece" and "rough" had no special meaning in the trade, different from their general meaning, though the trade used the expression "in the rough" in the sense of "unfinished."

Upon the conclusion of the testimony the defendant's counsel moved the court (1) to direct the jury to find a verdict for the defendant, on the ground that the uncontradicted evidence in the case and the exhibit showed that the furniture imported was "furniture finished," within the meaning of the statute; (2) that the jury be directed to find a verdict for the defendant on the ground that the plaintiffs had not proven facts sufficient to enable them to recover; and (3) to allow the case to go to the jury on the question of whether the furniture imported was "furniture finished," or "furniture in piece, or rough, and not finished," within the meaning of the statute. These motions having been

successively made and denied, and exceptions to the denials duly taken, the court, on motion of the plaintiffs' counsel, directed the jury to render a verdict in favor of the plaintiffs for the sum of $443.34. The jury then found a verdict for the plaintiffs in the said amount, and judgment was entered October 7, 1889, in accordance therewith. The defendant thereupon sued out a writ of error.

The subject of contention presented by this record is simply as to the proper construction of the statute. The collector put in testimony to show that in the furniture trade the word "finished" had a particular trade meaning, and the court below refused to admit the application of such meaning, if it should be found to exist, to the word as used in the act. The question is, therefore, whether, if a term used in a tariff law has a general meaning, as understood by society at large, and also a special trade signification, it is to be presumed that congress used the word in its general sense, or in its trade sense.

349 With regard to the language of commerce, the general rule laid down by this court is that it must be construed, when used in laws imposing duties on importations of goods, and particularly when employed in the denomination of articles, according to the commercial understanding of the terms used. U. S. v. 112 Casks of Sugar, 8 Pet. 277; Elliott v. Swartout, 10 Pet. 137. While it is true that "language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown," (Swan v. Arthur, 103 U. S. 597,) yet "the commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws. * * * A specific designation eo nomine must prevail over general terms, and a commercial designation is the standard by which the dutiable character of the article is fixed." Arthur v. Lahey, 96 U. S. 113. This rule is equally applicable where a term is confined in its meaning, not merely to commerce, but to a particular trade, and in such case also the presumption is that the term was used in its trade signification.

While a customs law taxing an article which every one in the community might be expected to import, such as "wearing apparel," may use words which every one understands, and which, unless taken in the ordinary sense, would mislead the whole community, and cannot, therefore, be supposed to be intended in any other sense, unless there is something to indicate such intention, yet, on the other hand, a tariff law may use language not intended for the community at large, but for merchants, or for a particular trade, and such as to mislead those for whom it is intended, if not taken in the commercial or trade sense; and such language is that under consideration, speaking of a manufactured article in various stages of its construction. In such a case, as in the other case, the words are to be taken in the sense in which they will be naturally understood by those to whom they are addressed.

We are of opinion that, as the collector offered to prove that the word in question had, at and prior to the passage of the act of 1883, a particular trade meaning, the court should have considered the trade meaning, if established, as applicable to the matter at issue, and should have submitted the case to the jury, with instructions to render a verdict for the importers if they found that the furniture was not "finished" within the trade meaning of the term, and for the collector if they found the contrary.

The judgment of the court below should be reversed, and the case remanded, with directions to award a new trial, and proceed in conformity with this opinion. It is so ordered.

(140 U. S. 27)

WADE et al. v. CHICAGO, S. & ST. L. R. CO. et al.

AMERICAN LOAN & TRUST CO. OF NEW YORK v. WADE et al.

(May 10, 1893.)

Nos. 247 and 248.

RAILROAD MORTGAGES—CONSTRUCTION—FORECLOSURE—INTERVENTION.

1. A railroad company chartered to build a road from Springfield to East St. Louis, via Litchfield, contracted with a construction company to deliver certain bonds secured by mortgage in consideration of the construction and equipment of the road. Part of the road was built, and a proportionate part of the bonds delivered, and a mortgage executed and recorded, covering all the property of the railroad company then in possession, or afterwards acquired. The contract was then canceled, and W., the chief promoter of the railroad company, and the president and only stockholder of the construction company, conveyed all the property of the construction company north of Litchfield, including all rights of way acquired or contracted for on behalf of the railroad company, by deed duly recorded, to a firm which immediately conveyed to a new railroad company chartered to build a road from Springfield to Litchfield. The same thing was done with the property of the construction company south of Litchfield, which thus passed into the hands of a third railway company, chartered to build the road south from that point; and the two new companies completed the road on the line originally projected. *Held*, that they took with full knowledge of the interest of the original company, and the mortgage executed by it secures to its bondholders a lien on the whole of the road, as completed, which is prior to that created by any mortgage executed by the new companies.

2. The bonds delivered to the construction company by the original railroad company were pledged by W. to secure a note made by him and indorsed by one R., who was given power to purchase in case the bonds were sold to pay the note. They were so sold, and were bought by R. for less than their face value. *Held* that, on foreclosure

of the mortgage, R. was entitled to recover the face value of the bonds, and not merely the amount he paid for them.

3. Where, in a suit to foreclose a mortgage given to secure railroad bonds, the mortgagor admits that it has made default in the payment of the bonds, a new party, which was admitted on condition that it would adopt the mortgagor's answer as its own, cannot object that the suit was prematurely brought because there was, as yet, no default in the payment of the principal.

Appeals from the circuit court of the United States for the southern district of Illinois.

This was a suit by Belle N. B. Wade and Warner M. Hopkins, trustees, against the Chicago, Springfield & St. Louis Railroad Company and others, (the American Loan & Trust Company of New York, intervener,) for foreclosure of a mortgage. The relief prayed by complainants was granted in part, and they and the intervener appealed. Reversed as to the former, and affirmed as to the latter.

F. N. Judson and Saml. P. Wheeler, for complainants. Adrian H. Joline, for Pratt, trustee, successor to Am. L. & T. Co., intervener.

*Mr. Justice JACKSON delivered the opinion of the court.

The appellants, Belle N. B. Wade and Warner M. Hopkins, testamentary trustees of the estate of Robert B. Wade, as holders of 50 first mortgage bonds of the Chicago, Springfield & St. Louis Railroad Company, on January 27, 1887, filed their bill in the United States circuit court for the southern district of Illinois for the purpose of enforcing a mortgage lien upon the property and railway of said company, extending from Springfield, Ill., to East St. Louis, Ill. The material facts of the case, as set out in the bill, and as disclosed by the record, are as follows:

The Chicago, Springfield & St. Louis Railroad Company was incorporated January 17, 1883, under the general laws of Illinois, to build and operate a proposed line of railroad from Springfield to East St. Louis, in that state. After surveying the route, and designating the same on a map filed in the office of the company, and after securing certain rights of way on the line of the road, on March 3, 1883, it entered into a contract with the Empire Construction Company, of which one Wing was president and sole stockholder, to build, finish, and equip the proposed railway of the Chicago, Springfield & St. Louis Railroad Company within a stipulated time. The contract provided as follows:

"These articles of agreement, made and entered into this third day of March, A. D. 1883, by and between the Empire Construction Company, a corporation of the state of Illinois, party of the first part, and the Chicago, Springfield & St. Louis Railroad Company, a railroad corporation of the same state, party of the second part, witnesseth:

"That for and in consideration of the covenants and payments hereinafter recited, to be made by said party of the second part, said party of the first part hereby, for itself, its successors and assigns, covenants and agrees to furnish all the material and labor necessary to construct, iron, bridge, and complete the railroad of said party of the second part, as now surveyed and designated on a map filed in the office of the party of the second part, which railroad commences at a point on the Gilman and Clinton branch of the Illinois Central Railroad at the city of Springfield, and extends, by way of Litchfield and Mount Olive, to the bridge junction at East St. Louis, Illinois, a distance of about ninety-eight (98) miles, passing through the towns of Pawnee, Litchfield, Mount Olive, Alhambra, Marine, Troy, and Collinsville, with four and one-half (4½) miles of side track, (necessary to the places marked on said map for the business of the line at the time of the opening,) and to furnish the said railroad with depots, water tanks, and turntables, and to equip the same with engines and cars as hereinafter provided.

"The road and side tracks hereby agreed to be constructed are those on said map marked and specified only, and said map is hereby referred to for further particulars in this behalf; and the said road and side tracks are to be built in manner and according to the specifications and conditions following; and the bridges, depots, water tanks, turntables, engines, and cars are to be those only also hereinafter mentioned in the specifications."

Certain specifications were made a part of the contract, but they need not be recited.

In consideration of the premises and of the undertakings of the construction company thus set forth, the railroad company agreed to pay therefor, in its negotiable bonds to be issued thereafter, the amount of $2,500,000, and $990,000 of its capital stock, fully paid and nonassessable. The bonds were to be secured by a trust deed or mortgage in proper form, and duly executed by the company, upon all its property, real or personal, owned by it, or afterwards acquired, including its franchises of every kind. The construction company, its successors or assigns, were to receive from the trustee 25 bonds, to the amount of $25,000, and eighty shares of capital stock, of the value of $8,000, as each mile of the road was constructed and completed, and on the chief engineer's certificate obtained therefor.

The contract further provided that the construction company, its successors or assigns, for the purpose of construction, should have the right to the full and free possession, use, and control of said railway, equipment, and property of the railroad company, as constructed, made, or furnished under the agreement, or otherwise obtained, together with the right to use and operate said railway in the name of the railroad

company, under its franchises necessary thereto, for the transportation of persons and property, until the final and ultimate completion and acceptance of said railroad, without charge therefor by the railroad company, and, also, at its own cost, keep said railroad in good repair and condition, ordinary wear and tear excepted.

The contract further provided that, if at any time a change of the route of the said road was necessary to be made, it was agreed that the same might be done on certificate of the chief engineer, and approval of the president of the construction company, and thereupon all of the terms and conditions of the contract as to said modified route were to be the same as agreed in respect to the route then specified on the map.

In pursuance of this contract, and under proper authority of law, by vote of the stockholders of the railroad company, its board of directors was authorized to issue bonds of the company in the sum of $2,500,000 to pay for the building of the road, and to execute to the Central Trust Company of New York a mortgage upon all the properties and franchises, which were particularly described in the mortgage as follows:

*331 "All and singular, the several pieces or parcels of land *forming the track or roadway of said railroad company from a point on the Gilman and Clinton branch of the Illinois Central railway at the city of Springfield, and extending by way of Litchfield and Mt. Olive to the bridge junction at East St. Louis, Illinois, a distance of about ninety-eight miles, passing through the towns of Crow's Mills, Pawnee, White Oak, Litchfield, Mt. Olive, Alhambra, Nervine, Troy, and Collinsville, and being in or through the counties of Sangamon, Montgomery, Macoupin, Madison, and St. Clair, whether the same is now acquired and owned by said railroad company, or may be hereafter acquired and owned by said company; also, the railroad of said party of the first part, and any and all its branches thereof, and any and all switches, and turnouts thereof, together with all the rails, bridges, depots, stations, station houses, section houses, fences, and other structures and appurtenances thereto belonging, now owned by said railroad company, or that may hereafter be constructed, completed, finished, acquired, or owned by said company; also, all the tolls, income, issues, and profits and alienable franchises of said party of the first part, connected with its railroad, or relating thereto, including its rights and franchises as a corporation; and also, all and singular, the property of every kind hereinafter mentioned, whether now owned, or that may hereafter be acquired and owned by said railroad company; that is to say, all the rolling stock of every description, all the machine shops, car shops, and blacksmith shops, all the machinery, stationary engines, and all articles used in the construction, replacing, and repairing thereof, together with all the tools and materials, and any and all other property now owned, or hereafter to be acquired by said party of the first part."

This mortgage was duly executed and properly recorded, near that date, in the several counties through which the railroad was located, and was to be constructed. The bonds secured thereby were 2,500 in number, of the denomination of $1,000 each, redeemable in gold May 1, 1913, with interest-bearing coupons attached, payable semi-annually at the American Exchange National Bank, New York. These bonds *were delivered to the trustee, to be by it delivered to the construction company in amounts of $25,000, on the certificate of the engineer of the railroad company as each mile of the road was completed, under and in accordance with the terms of the contract of the construction company with the railroad company; and, in addition to the bonds to be thus delivered, 80 shares of nonassessable stock of the railroad company, at the par value of $8,000, were to be delivered to the construction company upon the same conditions.

The construction company, under and in pursuance of this contract, commenced the construction of the railroad, and in July, or early in August, 1883, had completed two miles of the road, and thereafter, in October, 1883, received from the Central Trust Company, upon certificate of the chief engineer of that fact, 50 of the mortgage bonds.

These bonds, so received by the construction company, were deposited on November 5, 1883, by Wing, the representative of said company, with a trustee, as collateral security to secure the payment of the sum of $35,000, evidenced by the note of said Wing, and indorsed by Robert B. Wade for the accommodation of Wing and the said construction company. By the terms of the pledge of these bonds the trustee was authorized, upon the failure of Wing or the construction company, to pay said note at maturity, to sell said bonds, which sale it was agreed might be made without notice to Wing or to the construction company, and by express terms Wade was to have the same power or privilege of purchasing at said sale as any other person. Demand was made upon Wing, at the maturity of the note, to pay the same, which he failed to do; and thereupon the trustee holding the collateral, on due notice of time, place, and terms of sale, sold the bonds. They were purchased by the testamentary trustees of Wade, he having died in the mean time, for the sum of $20,000, which amount was credited upon a judgment on the note, previously confessed by Wing, and the balance of the indebtedness was subsequently collected by process of law. Under this pur-

chase the appellants became the holders of the bonds.

*333 These bonds, amounting to $50,000, were all that were ever actually issued under the above-described mortgage of the Chicago, Springfield & St. Louis Railroad Company, for, while the construction company graded considerable portions of the road, and acquired for the railroad company rights of way throughout a large part, if not the entire route, it failed to complete any other mile or miles of the road so as to become entitled to additional bonds.

In April, 1885, the railroad company becoming satisfied that the construction company was unable to execute its contract, or would fail to perform the same, the stockholders authorized its board of directors to "make such arrangements with said company or other parties as will secure the construction of this road, and preserve the rights of all parties interested, and that they be authorized to modify or change said contract, or make a new contract with the Empire Construction Company, if they think necessary to secure the building of this road, maintaining legal rights of all parties concerned; and, upon the surrender of all outstanding bonds, said directors may satisfy the present mortgage, and issue new bonds, and secure same by mortgage on the property and franchises of this road."

Acting under this authority, the railroad company, on April 29, 1885, entered into a new contract with the construction company, which need not, however, be specially noticed, as it was vacated and canceled on May 23, 1885, in compliance with the request of said construction company.

Wing, who was the chief promotor of the Chicago, Springfield & St. Louis Railroad Company, and the sole stockholder and owner of the Empire Construction Company, after suspending operations under the contract of the latter with the railroad company, organized and caused to be incorporated on May 19, 1885, the St. Louis & Chicago Railway Company. This company was incorporated to construct a railroad from Litchfield to Springfield in Illinois, on the line of the Chicago, Springfield & St. Louis Railroad Company; and on May 26, 1885, a few days after the organization of the new company, and after the construction company had been released from its contract with the Chicago, Springfield *334 & St. Louis Railroad Company, the said construction company, by Wing, as its president, conveyed and transferred to H. H. Cooley & Co., a firm composed of a brother and a brother-in-law of Wing, for the consideration of $142,015.11, the following-described property: All right of way acquired by the Empire Construction Company for the Chicago, Springfield & St. Louis Railroad Company between Litchfield, Ill., and Springfield, Ill., estimated, as per voucher, to be of the value of $4,785.40; all cross-ties between Litchfield and Springfield, Ill., on the side (site) of survey made for the Chicago, Springfield & St. Louis Railroad Company, estimated, per voucher, to be of the value of $2,546; all embankments, excavations, trestlework, tiling, and all other work done in the building and construction of a railroad on the line of survey between Litchfield and Springfield, Ill., done and constructed by the Empire Construction Company, estimated, per voucher, to be of the value of $72,134.22; all contracts for right of way guarantied the Empire Construction Company for the Chicago-Springfield Railroad Company, estimated, per voucher, at the sum of $19,000; all right of way contracted for the Chicago, Springfield & St. Louis Railroad Company by the Empire Construction Company, estimated, per voucher, at the sum of $12,000; all right of way in Litchfield acquired by the Empire Construction Company for the right of way for the Chicago, Springfield & St. Louis Railroad Company, estimated to be of the value of $10,000; all engineering services and engineering in the construction, location, surveys, estimates, and superintendence of construction in the work done between Litchfield and Springfield, Ill., estimated, as per voucher, at $4,672.93; all estimates, rights, and advantages accrued to the Empire Construction Company by reason of any contract heretofore existing, and all rights in the Empire Construction Company resulting from work done, material furnished, money expended, and included in the term "miscellaneous," as per vouchers, $16,876.56; all surveys, contracts, profiles, books, and all property belonging to the Empire Construction Company, except that of like nature as above enumerated, on the *335 line of the Chicago, Springfield & St. Louis Railroad Company south of the line of the Indianapolis & St. Louis Railroad Company.

This conveyance was duly recorded in Montgomery county, Ill., May 27, 1885. On the same day the above conveyance was executed, H. H. Cooley & Co., by deed duly recorded in Montgomery county, Ill., transferred the same property to the St. Louis & Chicago Railway Company in consideration of one dollar, and of a contract entered into that day by H. H. Cooley & Co. with the St. Louis & Chicago Railway Company to build a line of railroad north from Litchfield to Springfield,—a distance of about 45 miles. This road was completed in 1886 on the same line, substantially, as that surveyed for the Chicago, Springfield & St. Louis Railroad Company, and described in the conveyance of the Empire Construction Company to H. H. Cooley & Co. The St. Louis & Chicago Railway Company, on July 1, 1885, executed a mortgage to the Mercantile Trust Company of New York to secure an issue of its bonds to the amount of $500,000, which bonds were put in circulation, and are outstanding. The mortgage

securing the bonds was duly recorded in each of the counties through which the said railroad extended.

It further appears from the record, and the findings of fact in the decree of the court below, that on June 12, 1886, the Empire Construction Company conveyed to the said firm of H. H. Cooley & Co., for the express consideration of $5,000, all the real estate and personal property, rights, and easements acquired by said construction company for the Chicago, Springfield & St. Louis Railroad Company south of the Indianapolis & St. Louis Railway, and between Litchfield and Alhambra, Ill., over the line surveyed, and on the rights of way acquired, for the Chicago, Springfield & St. Louis Railroad Company, together with all embankments, excavations, trestlework, and all other work done in the building and construction of a railroad on the line of said Chicago, Springfield & St. Louis Railroad Company south of Litchfield; and on the same date, June 12, 1886, the firm of *336 Cooley & Co., for the expressed consideration of $75,000, conveyed *the same property and rights to the Litchfield & St. Louis Railway Company, which the said Wing and associates also organized and incorporated, under the laws of Illinois, for the purpose of completing the road of the Chicago, Springfield & St. Louis Railroad Company between Litchfield and East St. Louis. This line was constructed between Litchfield and Mt. Olive, a distance of about 10 miles, but the new corporation appropriated the rights acquired for the Chicago, Springfield & St. Louis Railroad Company between Litchfield and Alhambra. The Litchfield & St. Louis Railway Company executed a mortgage to the Central Trust Company of New York for the purpose of securing $200,000 of bonds. It is claimed by the complainants that this mortgage was canceled and discharged, but that does not distinctly appear from the record, and is not deemed material, in the view we take of the case.

The Central Trust Company, as trustee of the mortgage of the Chicago, Springfield & St. Louis Railroad Company, executed in 1883, and also as trustee of the mortgage of the Litchfield & St. Louis Railway Company, executed in 1886, when applied to by the complainants, declined to institute foreclosure proceedings upon the first mortgage, and thereupon the complainants filed their bill making the three above-described railroad companies, and the trustees of the mortgages executed by them, respectively, defendants to the bill. The complainants claim that under the foregoing facts the 50 bonds held by them are a lien upon the entire line originally surveyed, and partially constructed, for the Chicago, Springfield & St. Louis Railroad Company, by which said bonds were issued, and that said company had made default in the payment of the same, and the interest coupons thereto attached, which matured May 1, 1884, and all interest coupons maturing since that date.

The bill was answered by the three railroad companies, viz. the Chicago, Springfield & St. Louis Railroad Company, the St. Louis & Chicago Railway Company, and the Litchfield & St. Louis Railway Company. Each of the companies admitted in its separate answer the execution of the various *337 *mortgages; that complainants were the holders of the 50 mortgage bonds issued by the Chicago, Springfield & St. Louis Railroad Company; that said company had made default in the payment of the bonds and coupons, as stated in the bill; and that said railroad company was insolvent; but they each denied that any of the insolvent company's property was in the possession of the other defendants.

The Central Trust Company, in its answer, admitted that the complainants had applied to it to file a bill to foreclose the mortgage made by the Chicago, Springfield & St. Louis Railroad Company, and that it had refused to do so, and declared its purpose of resigning its trusteeship under both of the mortgages aforesaid; that before the actual commencement of this suit it resigned its trusteeship under each of these mortgages, and that the reasons for so doing were that it was advised by counsel that, owing to its trust relation to holders of bonds secured by each mortgage, it ought not to take part, on behalf of one or the other, in any controversy between such bondholders; and that the rights of the complainants could be fully protected in any suit or suits brought by said complainants in their own names.

The answer of the Mercantile Trust Company admitted the execution of the mortgage to it of the St. Louis & Chicago Railway Company, but denied that it accepted the trust therein with notice and subject to the prior rights of the complainants as holders of the 50 bonds of the Chicago, Springfield & St. Louis Railroad Company; and, as to other allegations of the bill, it answered that it had no knowledge or information.

Proofs were taken upon the issues thus made, and the court below, on August 5, 1889, rendered its decision in the premises, dismissing the bill as to the St. Louis & Chicago Railway Company, and its trustee, the Mercantile Trust Company, and ordered and adjudged that the defendant the Chicago, Springfield & St. Louis Railroad Company, or some one in its behalf, pay to the complainants, within 90 days, the sum of $22,976.59, being the said sum of $20,000, for which said bonds were bid off by complainants, and 6 per cent. interest thereon *until paid, with costs of the suit to be taxed, and that in default of said payment all the right, title, interest, and equity of redemp-

tion of said Chicago, Springfield & St. Louis Railroad Company, and of the Litchfield & St. Louis Railway Company, and the St. Louis & Chicago Railway Company, in and to that portion of the property described in said mortgage, and lying south of the Indianapolis & St. Louis Railroad, originally surveyed and laid out for the Chicago, Springfield & St. Louis Railroad Company, (which is specially described,) be sold by a special master, without any equity of redemption, and that out of the proceeds of said sales, after the payment of costs and expenses attending the execution of the decree, the complainants be paid the amount decreed, with interest thereon at the rate of 6 per cent. from the date of the decree.

After this decree was passed the American Loan & Trust Company made application to intervene in the case as a trustee under a mortgage made April 1, 1887, by the St. Louis & Chicago Railway Company, to secure bonds to the amount of $1,100,000, which the intervener claimed was a lien on that portion of the railroad line and property south of Litchfield, on which the decision of the court below had awarded a lien to the complainants. This application of the American Loan & Trust Company was allowed, and by order of the court it was "made a defendant to this cause, with all rights of exceptions, appeal, and the prosecution of writs of error; the said American Loan & Trust Company hereby entering its appearance, and adopting and accepting the answer of the defendant the Chicago, Springfield & St. Louis Railroad Company as its answer herein, and agreeing that the replication to said answer heretofore filed shall stand as the replication to said answer as adopted by said American Loan & Trust Company; and it being further provided that this order shall not make it necessary to retake any of the evidence in this cause, or to set aside any interlocutory proceedings or orders heretofore had or entered therein."

*339 It appears from the proof that pending complainants' suit the St. Louis & Chicago Railway Company had in some way acquired or been consolidated with the Litchfield & St. Louis Railway Company, and that the mortgage to the American Loan & Trust Company covered the whole line, both north and south of Litchfield.

The complainants appeal from so much of the decree of the circuit court as denied them a recovery upon the entire issue of bonds held by them, $50,000 and interest, and in denying them a prior lien upon the entire line of railroad, described in the bill as extending from Springfield to East St. Louis; and the American Loan & Trust Company appeal from so much of the decree as awarded complainants a lien for $22,976.59 on the Litchfield & St. Louis branch of the road, lying south of Litchfield. These constitute, in substance, the errors assigned by the respective appellants. The corporate existence of the American Loan & Trust Company having terminated during the pendency of these appeals, Dallas B. Pratt was substituted as trustee, and by order of this court has become a party to the record, in place of his predecessor in the trust.

The testimony clearly establishes that the completed road south of Litchfield, to Mt. Olive, was the same road surveyed, located, and mapped for the Chicago, Springfield & St. Louis Railroad Company, which was located over the right of way acquired partly by the railroad company, and partly by the construction company, under contract, for the railroad company. The court below found, as the proof clearly establishes, that "the Litchfield & St. Louis Railway Company took possession of the said uncompleted line of railroad, and mingled other work and material therewith, and upon a survey made, and in accordance with plats and profiles thereto made, for the Chicago, Springfield & St. Louis Railroad Company, did complete a line of railroad from Litchfield to Mt. Olive, Ill., and did also appropriate the rights acquired by and for the Chicago, Springfield & St. Louis Railroad Company between Mt. Olive and Alhambra, Ill."

It is further established by the proof that the defendant the St. Louis & Chicago Railway Company built and constructed its road *340 a distance of about 18 miles on that portion of the line of the Chicago, Springfield & St. Louis Railroad north of Litchfield, on the surveyed route and located line, and upon rights of way which had been theretofore acquired by and for the latter road. The rest of the line of the St. Louis & Chicago Railway to Springfield, while slightly divergent from the line of the Chicago, Springfield & St. Louis Railroad, was substantially the same, so that there is no practical difference between those portions of the line, either north or south of Litchfield.

It is further clearly established by the recitals in the conveyances made by the Empire Construction Company to H. H. Cooley & Co., and from said firm to the St. Louis & Chicago Railway Company, and to the Litchfield & St. Louis Railway Company,—all of which conveyances were duly recorded,—that the newly-organized railway companies, and their mortgagees, were affected with full notice of the rights, properties, and interests which the Chicago, Springfield & St. Louis Railroad Company had in, to, and over the lines of road which the newly-organized roads completed under their contracts with Cooley & Co., as the successors or assignees of the Empire Construction Company.

It is clear, therefore, that the St. Louis & Chicago Railway Company and the Litchfield & St. Louis Railway Company must be held to occupy, in respect to the complainants, the same position which H. H. Cooley & Co. and the Empire Construction Company would have occupied if the roads in

question had been completed by either of them without the organization or incorporation of the two railroad companies which now claim and assert title to said lines of railway. Being charged with full notice and knowledge of the fact that the lines which they were completing belonged to the Chicago, Springfield & St. Louis Railroad Company, and with the further notice that that company had issued and put in circulation, for value, $50,000 in bonds, secured by its mortgage of 1883, they must be held to have acquired and to hold their rights in said lines in subordination to the rights of complainants. It may be true that all the rights *341 of way,* easements, embankments, and appurtenances which the Empire Construction Company acquired for the Chicago, Springfield & St. Louis Railroad Company under the contract between those parties did not invest that railroad company with a perfect legal title thereto; but it cannot be questioned that all the rights thus acquired conferred upon or gave to the Chicago, Springfield & St. Louis Railroad Company an equitable title and interest therein which would be covered by the "after-acquired clause" of its mortgage, and that the construction company had no right to transfer such interests over to third parties, especially as against the bonds in question, which the railroad company had issued for value, and the construction company had put in circulation.

The "after-acquired clause" in the mortgage of the Chicago, Springfield & St. Louis Railroad Company, under the decisions of this court, covers all acquisitions made to that property by either the construction company, or others acquiring rights under it. Dunham v. Railroad Co., 1 Wall. 254; Galveston Railroad Co. v. Cowdrey, 11 Wall. 459; Porter v. Steel Co., 122 U. S. 267, 7 Sup. Ct. Rep. 1206; Railroad Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. Rep. 546; Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. Rep. 357. In this latter case it was held that the "after-acquired property clause" of a mortgage will cover, not only legal acquisitions, but all equitable rights and interests subsequently acquired by or for the mortgagor.

If the two newly-organized corporations, which have appropriated the line of road, rights of way, and easements of the Chicago, Springfield & St. Louis Railroad Company, had taken their transfers directly from the latter, it would admit of no question that the lien of complainants' bonds would extend over the whole line; and this result is not, and cannot be, changed by the fact that they have acquired their rights through the intervention and conveyances of the Empire Construction Company to Cooley & Co., and by that firm to the newly-organized companies, as those conveyances, together with the mortgage of the Chicago, Springfield & St. Louis Railroad Company, put them in full notice of the rights of the latter company, and also of the rights of its mortgagee. Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. Rep. 243.

*It cannot be assumed, therefore, that the St. Louis & Chicago and the Litchfield & St. Louis Railway Companies, or their mortgagees, are such bona fide transferees or purchasers for value of the partially constructed Chicago, Springfield & St. Louis Railroad as to cut off the rights of bondholders secured by the prior mortgage of the latter company. Their acquisitions of the rights and interests of the Chicago, Springfield & St. Louis Railroad Company have in no way displaced the lien of complainants' mortgage, which had previously attached, not only to all of said partially constructed road, but to all accessions which might be made thereto, either by the mortgagor, or others succeeding to its rights.

Under the facts in this case the newly-organized railway companies are, in legal effect, the successors of the Chicago, Springfield & St. Louis Railroad Company, cum onere, and the mortgage lien held by the complainants upon the franchises and all property acquired in completing their mortgagor's railroad between the original termini, whether by itself or its successors, remains in full force. It follows, therefore, that the decree of the court below was erroneous in limiting the complainants to a lien on that portion of the road lying south of Litchfield, completed in the name of the Litchfield & St. Louis Railway Company. The same principles and consideration which entitle the complainants to a lien on that portion of the road lying south of Litchfield apply with equal force to the line lying north of Litchfield; and under the facts of the case, as already stated, they should have had their lien declared upon that portion of the railroad north, as well as south, of Litchfield. The complainants' lien has a clear and undoubted priority over the lien of the mortgage executed by the St. Louis & Chicago Railway Company to the American Loan & Trust Company on April 1, 1887, as that mortgage was executed pendente lite after the filing of complainants' bill herein.

The remaining question to be considered is whether complainants are entitled to a decree for the full amount of their bonds and interest, instead of the price they paid therefor* when the bonds were sold under pledge made by Wing, president of the construction company. The pleadings do not raise the question as to whether complainants were entitled to the full amount of their bonds. There was no issue presented on that question; and it was not proper, therefore, on the proof, even if the proof had warranted it, to have reduced the complainants' claim to the amount which they paid for the bonds when sold under the pledge thereof. The bonds were valid securities in the hands of the trustee for the

protection of Wade as accommodation indorser for Wing, or the construction company, by whom they were pledged, and the pledgee or purchaser thereunder succeeded to the rights of the pledgor; and upon no principle could such purchaser, as against the maker, be restricted to what he might pay for the bonds. Negotiable securities, once put in circulation for value, may be transferred for less than their face, but the maker, and those claiming under him, cannot limit the right of a subsequent holder to a recovery of what he may have paid therefor.

In the case of Cromwell v. County of Sac, 96 U. S. 51, 59, 60, in which it was held that the holder of such negotiable securities, regularly issued, is not limited to the amount which he may have paid therefor, it is said by the court, speaking by Mr. Justice Field: "We are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market,—one day being above par, and the next below it, and often passing, within short periods, from one half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with *344 reference to their par value. It would introduce, therefore, inconceivable confusion if bona fide purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them."

The same general principle is held in Fowler v. Strickland, 107 Mass. 552; Moore v. Baird, 30 Pa. St. 138; Bange v. Flint, 25 Wis. 544; Bank of Michigan v. Green, 33 Iowa, 140; Baily v. Smith, 14 Ohio St. 396. By the decisive weight of authority in this country, where negotiable paper has been put in circulation, and there is no infirmity or defense between the antecedent parties thereto, a purchaser of such securities is entitled to recover thereon, as against the maker, the whole amount, irrespective of what he may have paid therefor.

This was the position occupied by the complainants in respect to the bonds in question, which were regularly issued for value, and constituted bona fide debts against the mortgagor in the hands of Wade, or of the construction company before they were pledged. The testimony in respect to that pledge, and the price at which the complainants purchased the bonds, was objected to as incompetent, and it should have been excluded on two grounds: First, because there was nothing in the pleadings to warrant its introduction; and, secondly, because nothing disclosed thereby authorized the scaling of the bonds, as was done by the decree. We are therefore of opinion that the decree was wrong in limiting complainants' right of recovery to the amount, and interest thereon, for which they purchased the bonds.

It is urged on behalf of Pratt that the principal of the bonds was not due; but in becoming a party to the cause the American Loan & Trust Company (to whose rights Pratt has succeeded) was required to adopt, and did adopt, the answer of the Chicago, Springfield & St. Louis Railroad Company, which admitted by its answer that it was in default in the payment of the bonds, and a similar admission was made by the St. Louis & Chicago Railway Company, under whose mortgage said trustee claims his rights were acquired. But, aside from this, it is by no means certain, under the terms of the Chi- *345 cago, Springfield & St. Louis Railroad Company's mortgage, that the complainants did not have the right to foreclose, both for principal and for interest on their bonds.

This mortgage contained the provision "that, upon default made in the payment of either interest or principal upon any one hundred of said bonds for the period of sixty days, then each and all of said bonds shall become absolutely due, at the option of the majority in interest of the holders of said one hundred bonds in default; and, upon decree rendered as aforesaid, judgment shall be made for the whole of said indebtedness thus due upon default of the part of said indebtedness, as if all were absolutely due according to the terms of said bond." It was further provided that in the event of a sale the proceeds thereof, after defraying expenses incident thereto, should be applied in paying the several holders of the then outstanding bonds and coupons, secured by the mortgage, the amount of principal and interest which might be due and unpaid, and, in case of a deficiency in the fund to pay the same in full, then to distribute the fund pro rata among such holders. But, the defendants having admitted that the bonds were in default, we do not feel disposed, in view of the fact that $50,000 constituted the entire issue, to reverse or modify the decree on the doubtful point as to whether the principal of the bonds, under the terms of the mortgage, could properly be treated as due.

Our conclusion is that there is no error in the decree of the circuit court, of which the American Loan & Trust Company, or its successor, Pratt, can complain; and further, that the decree of the circuit court was erroneous in not allowing the complainants the full amount of their bonds, and in not declaring said bonds a lien upon the entire line of completed road from Springfield to Mt. Olive.

The decree is accordingly reversed, in this

respect, and the cause remanded to the circuit court with directions to enter a decree in conformity with this opinion, and it is accordingly so ordered.

Mr. Justice FIELD did not sit in this case, and took no part in its decision.

(149 U. S. 298)

MOSES et al. v. NATIONAL BANK OF LAWRENCE COUNTY.

(May 10, 1893.)

No. 166.

STATUTE OF FRAUDS — GUARANTY OF NEGOTIABLE INSTRUMENTS—PLEADING.

1. Though Code Ala. 1887, § 1732, provides that a special promise to answer for the debt of another is void "unless such agreement * * * expressing the consideration is in writing," etc., a guaranty of a negotiable note written by a third person on the note before its delivery need express no consideration, for the guaranty requires no other consideration than that which the note on its face implies to have passed between the original parties.

2. It is otherwise, however, when the guaranty is written on the note after it has been delivered and has taken effect as a contract, for the guaranty then requires a distinct consideration to support it, and must, under the Alabama statute, express such consideration.

3. The validity and effect of such a guaranty made in Alabama is governed by the statute of frauds of that state when sued on in the federal courts; for that statute is such a law of the state as has been declared to be a rule of decision in the courts of the United States by the judiciary act of 1789, (Rev. St. § 721.)

4. Where, in a suit on such a guaranty, the defendant pleads specially the statute of frauds, his right to a review of a ruling sustaining a demurrer to such pleas is not prejudiced by the fact that he might have availed himself of the same defense under the general issue, which he did not plead; for under Code Ala. § 2675, he had the right to rely on his special pleas.

5. The suggestion of counsel that by the practice in Alabama the entry of an appearance of counsel for the defendant was equivalent to filing a plea of the general issue is too novel to be accepted by the supreme court of the United States without proof, especially when the record shows a number of special pleas.

In error to the circuit court of the United States for the middle district of Alabama.

This was an action by the National Bank of Lawrence county against H. C. Moses, M. L. Moses, Alfred H. Moses, O. O. Nelson, and J. R. Adams on a guaranty. There was a judgment for plaintiff, and defendants bring error. Reversed.

Statement by Mr. Justice GRAY:

This was an action, brought April 16, 1888, by a national bank, organized under the acts of congress, and doing business in and a citizen of Pennsylvania, against six persons, citizens of Alabama, and residing in the middle district of Alabama, to recover the amount due on a guaranty of a promissory note.

The complaint alleged that on August 15, 1887, the Sheffield Furnace Company, an Alabama corporation, made a promissory note for $12,111.51, payable to its own order four months after date at the banking house of Moses Bros. in Montgomery; that, contemporaneously with the making of the note, and before its delivery or negotiation, and in order to give it credit and currency, its payment at maturity was guaranteed by the defendants, for a valuable consideration, by an indorsement in writing on the note in these words, "We hereby guaranty the payment of the note at maturity," signed by the defendants, and which was intended by them to induce, and which in fact induced, James P. Witherow and all others to whom the note and guaranty were offered for negotiation and sale, to take the note and guaranty, and to give value therefor; that the note, with the guaranty thereon, was before its maturity duly indorsed for value by the Sheffield Furnace Company to the order of Witherow; that afterwards, and before the maturity of the note and guaranty, Witherow indorsed the note, guarantied as aforesaid, to the plaintiff for value; that afterwards, and before the maturity of the note and guaranty, the defendants indorsed in writing on the note their waiver of protest and notice; that the note was not paid at maturity, and that the note and guaranty remained unpaid, and the property of the plaintiff.

The defendants pleaded 12 pleas, of which the only ones material to be stated were as follows:

Fourth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration for the promise.

Fifth. That the note was given by the Sheffield Furnace Company for a debt owing to Witherow before it was made, and was not founded upon a consideration paid or liability accrued at the time of the making thereof, and the guaranty was without any consideration.

Eighth. That the Sheffield Furnace Company paid the debt sued on to Witherow before this action was commenced.

Twelfth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration therefor, and was not executed contemporaneously with, nor before the negotiation of, the note of which it guarantied the payment.

The plaintiff demurred to the fourth and fifth pleas, because they did not deny that the defendants indorsed the guaranty upon the note contemporaneously with its execution and before any negotiation thereof; and also demurred to these pleas, as well as to the twelfth, because they did not deny that the defendants indorsed the guaranty upon the note before its negotiation to the plaintiff and in order to give it credit

and currency, nor allege that the plaintiff had notice of any want of consideration for the guaranty.

*300 *To the eighth plea a replication was filed, alleging that the plaintiff became the owner of the note for a valuable consideration before maturity, and that no part thereof had ever been paid to the plaintiff, or to any one authorized by the plaintiff to receive it. To this replication the defendants demurred.

The court sustained the demurrers to the pleas, and overruled the demurrer to the replication.

Issue was then joined on the eighth plea and the replication thereto, and a trial by jury was had upon that issue, at which the plaintiff gave in evidence the note, purporting to be "for value received," and the following indorsements thereon, in the order in which they appeared upon the note: First. "Pay to the order of J. P. Witherow," signed by the Sheffield Furnace Company. Second. An indorsement in blank by Witherow. Third. "We hereby guaranty the payment of this note at maturity," signed by the defendants. Fourth. Another blank indorsement by Witherow under the guaranty. No other evidence was introduced. Thereupon the court instructed the jury to render a verdict for the plaintiff for the amount sued for, with interest. A verdict was returned accordingly, and the defendants, having duly excepted to the evidence and to the instruction, tendered a bill of exceptions, and sued out this writ of error.

John D. Roquemore and W. A. Gunter, for plaintiffs in error. Henry B. Tompkins, for defendant in error.

*302 *Mr Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

By the statute of frauds of Alabama a special promise to answer for the debt, default, or miscarriage of another is void, "unless such agreement, or some note or memorandum thereof, expressing the consideration," is in writing, and subscribed by or in behalf of the party to be charged. Code Ala. 1887, § 1732. The words "value received," or acknowledging the receipt of one dollar, sufficiently express a consideration. Neal v. Smith, 5 Ala. 568; Bolling v. Munchus, 65 Ala. 558.

Every negotiable promissory note, even if not purporting to be "for value received," imports a consideration. Mandeville v. Welch, 5 Wheat. 277; Page v. Bank, 7 Wheat. 35; Townsend v. Derby, 3 Metc. (Mass.) 363. And the indorsement of such a note is itself prima facie evidence of having been made for value. Riddle v. Mandeville, 5 Cranch, 322, 332.

The promissory note in the case at bar, having been made payable to the maker's own order, first took effect as a contract upon its indorsement and delivery by the maker, the Sheffield Furnace Company, to Witherow, the first taker. Lea v. Bank, 8 Port. (Ala.) 119; Little v. Rogers, 1 Metc. (Mass.) 108; Hooper v. Williams, 2 Exch. 13; Brown v. De Winton, 6 C. B. 336.

A guaranty of the payment of a negotiable promissory *note, written by a third person *303 upon the note before its delivery, requires no other consideration to support it, and need express none other, (even where the law requires the consideration of the guaranty to be expressed in writing,) than the consideration which the note upon its face implies to have passed between the original parties. Leonard v. Vredenburg, 8 Johns. 29; D'Wolf v. Rabaud, 1 Pet. 476, 501, 502; Nelson v. Boynton, 3 Metc. (Mass.) 396, 400, 401; Bickford v. Gibbs, 8 Cush. 154; Nabb v. Koontz, 17 Md. 283; Parkhurst v. Vail, 73 Ill. 343.

The demurrers to the fourth and fifth pleas, therefore, were rightly sustained.

But a guaranty written upon a promissory note, after the note has been delivered and taken effect as a contract, requires a distinct consideration to support it; and, if such a guaranty does not express any consideration, it is void, where the statute of frauds, as in Alabama, requires the consideration to be expressed in writing. Leonard v. Vredenburg, and other cases, above cited; Rigby v. Norwood, 34 Ala. 129.

The demurrer to the twelfth plea, therefore, should have been overruled, and judgment rendered thereon for the defendant, unless the court saw fit to permit the plaintiff to file a replication to that plea.

It was argued in behalf of the original plaintiff that the validity and effect of the guaranty must be governed by the general commercial law, without regard to any statute of Alabama. But there can be no doubt that the statute of frauds, even as applied to commercial instruments, is such a law of the state as has been declared by congress to be a rule of decision in the courts of the United States. Act Sept. 24, 1789, c. 20, § 34, (1 Stat. 92;) Rev. St. § 721; Mandeville v. Riddle, 1 Cranch, 290, and 5 Cranch, 322; D'Wolf v. Rabaud, 1 Pet. 476; Kirkman v. Hamilton, 6 Pet. 20; Brashear v. West, 7 Pet. 608; Paine v. Railroad Co., 118 U. S. 152, 161, 6 Sup. Ct. Rep. 1019.

It was also contended that the order sustaining the demurrers, if erroneous, did not prejudice the defendant, because he might have availed himself of the defense of the statute of *frauds under the general issue. *304 That might have been true, if he had pleaded the general issue. Kannady v. Lambert, 37 Ala. 57; Pollak v. Association, 128 U. S. 446, 9 Sup. Ct. Rep. 119. But he did not plead it, and had the right to rely on his special pleas only. Code Ala. § 2675.

The suggestion of counsel that by the practice in Alabama the entry of an appearance of counsel for the defendant was

equivalent to filing a plea of the general issue, is too novel to be accepted without proof, and seems inconsistent with Grigg v. Gilmer, 54 Ala. 425. If the record did not show what the pleadings were, it might be presumed that the general issue was pleaded. May v. Sharpe, 49 Ala. 140; Hatchett v. Molton, 76 Ala. 410. But in this case 12 pleas are set forth in the record, and it cannot be assumed that there was any other.

The eighth plea was payment. The defendant introduced no evidence to support this plea, and has, therefore, no ground of exception to the rulings and instruction at the trial of the issue joined thereon.

But the erroneous ruling on the demurrer to the twelfth plea requires the judgment to be reversed, and the case remanded to the circuit court for further proceedings in conformity with this opinion.

(149 U. S. 287)

LEGGETT v. STANDARD OIL CO.

(May 10, 1893.)

No. 225.

PATENTS—REISSUE—VALIDITY—ESTOPPEL—LACHES.

1. The claim of letters patent No. 143,770, issued October 21, 1873, to Edward W. Leggett, was for a "process of coating or lining the inside of barrels, casks, etc., with glue, wherein the glutinous material, instead of being produced by reduction from a previously solid state, is permitted to attain only a certain liquid consistency, and is then applied to the package, and is permitted to harden thereon for the first time." The patentee expressly disclaimed the use of the glue-covered barrel as an article of manufacture. Thereafter he filed an amended specification, setting forth that the glue as applied by his process was more freely absorbed by the wood, and penetrated deeper into its fiber, and procured a reissue,—No. 5,785, of March 10, 1874,—containing the additional claim for "a barrel coated or sized by the material and by the mode or process whereby it is absorbed into and strengthened by the wood fiber." *Held*, that this claim of the reissue was invalid, being an extension in order to embrace an invention not specified in the original patent. 38 Fed. Rep. 842, affirmed.

2. The first claim of the reissue—identical with the claim of the patent—is void, both because it fails to show invention as compared with the old and well-known process of coating barrels with the ordinary glue of commerce dissolved into a hot liquid glue soup, and because it appeared that the identical process covered by the patent had been used by manufacturers prior to the patentee's alleged invention. 38 Fed. Rep. 842, affirmed.

3. In a suit for the infringement of a patent the plaintiff set up an estoppel of defendant to dispute the validity of the patent by reason of the fact that he had disclosed his secret to defendant upon the latter's promise to take no advantage of it without plaintiff's consent. It was shown that when he disclosed the alleged secret he neither had a patent nor intended to apply for one, and that he afterwards procured a patent to guard against any violation of defendant's promise. *Held*, that there was no estoppel upon defendant because plaintiff did not rely upon the promise to his injury.

4. So far as the alleged promise embodied any element of contract, plaintiff's delay to take any action upon it for more than 14 years is such laches as will defeat his right to any relief thereon, and poverty during that period is no excuse for his delay.

Appeal from the circuit court of the United States for the southern district of New York.

In equity. Suit by Edward W. Leggett against the Standard Oil Company for the infringement of a patent. The court below dismissed the bill, (38 Fed. Rep. 842,) and complainant appeals. Affirmed.

Edmund Wetmore, for appellant. Chas. C. Beaman and Jos. H. Choate, for appellee.

*Mr. Justice JACKSON delivered the opinion of the court.

This is a suit in equity, brought April 8, 1887, in the circuit court of the United States for the southern district of New York, by Edward W. Leggett, a citizen of New York, against the Standard Oil Company, an Ohio corporation, for the alleged infringement of reissued letters patent No. 5,785, granted to the complainant March 10, 1874, for an "improvement in lining oil barrels with glue."

The original patent, No. 143,770, was issued October 21, 1873. The specification and claim of this original patent are as follows:

"Be it known that I, Edward Wright Leggett, of the city, county, and state of New York, have invented an improved process of coating or lining the inside of barrels, casks, etc., for the purpose of rendering the same impervious to water, oil, or any contained substance, of which the following is a specification:

"This invention relates to that class of processes employed for the coating or lining of the insides of barrels for the above-mentioned purpose, and consists in preparing from any suitable glutinous substance glue, said glue being permitted to attain but a certain consistency, and then applied directly as a coating or lining.

"In carrying out my invention I proceed as follows: Take any of the materials from which glue may be made, and proceed in the usual or any suitable manner for the manufacture of glue until the soup has attained a certain consistency.

*"This consistency must be considerably less than that which is required wherein semi-fluid, solid, or cake glue is to be produced, and while it is in this half-finished state, so to speak, it is applied directly to the inside of the barrel or cask, where, after due evaporation, it will be found that said cask or barrel is lined thoroughly and completely with glue, inasmuch as a pressure of steam generated by the heat applied is sufficient to force the thin glutinous fluid well into the pores and recesses of the wood, thus insuring a perfect lining.

"I am aware that barrels, etc., have been lined or coated with glue when said glue

has been subjected to a process of reduction by dilution from its original consistency to a sufficiently liquid state, but I am not aware of any process wherein the glutinous material has been permitted to attain only its proper consistency, and then applied directly, thus saving the time, labor, and expense heretofore employed by continuing the manufacture of the glutinous soup until it has attained a semifluid or gelatinous consistency, thus necessitating a reduction by dilution and reheating before it is fit for application, as set forth in this specification, traveling over, as it were, the same ground, backward and forward, two or three times, whereas by my process this trouble is entirely dispensed with by operating as within described.

"This invention has nothing to do with the glue-lined barrel as an article of manufacture, but relates particularly to a new and inexpensive process of constructing a glue-lined barrel, cask, etc.

*290 "Heretofore the glue has been taken in its complete state as an article of manufacture, has been reheated, diluted, and then applied, but such a process necessarily carries with it all the expense of preparing the glue at first as an article of trade or commerce.

"My process contemplates taking the glue when at a proper consistency, and applying it to the inside of the package, permitting it to harden for the first time upon that surface.

"I claim as my invention:

"The within-described process of coating or lining the inside of barrels, casks, etc., with glue, wherein the glutinous material, instead of being produced by reduction from a previously solid state, is permitted to attain only a certain liquid consistency, and is then applied to the package, and permitted to harden thereon for the first time, substantially as herein set forth and described."

An application for the reissue of this patent was filed February 2, 1874, and contained substantially the same specification. It repeated the claim of the original patent, and, in addition thereto, made a second claim for "a barrel, cask," etc., "coated or sized by the material and by the mode or process substantially as herein described." On February 6, 1874, the examiner rejected the second claim thus made, for the reason "that a barrel coated by the process described has no features or characters to distinguish it from a barrel coated with glue as prepared in the ordinary way." Thereafter the patentee amended the specification on which the reissue was applied for by inserting the following:

"The distinguishing feature of this improvement may be found on examination to be the superior integrity of the lining by the use of soup glue. By its peculiar character it is more freely absorbed by the wood, penetrating into fiber deeper than by the ordinary mode. Hence the sizing or coating is not only upon the surface, but penetrates into the wood, thereby presenting a thicker covering to the action of the oil, and this sizing is not liable to be broken off or cracked in handling the cask, as part of the coating is absorbed into the fiber and cells of the wood, which gives additional strength to it."

*291 The reissue was thereupon allowed March 10, 1874, with a second claim for "a barrel, cask, etc., coated or sized by the material and by the mode or process whereby it is absorbed into and strengthened by the wood fiber, substantially as herein described."

In both the original and reissued patents the specifications disclaim any idea or invention in a glue-lined barrel as such. The first claim of the reissue, like the first claim of the original, is limited to a process, and the specification of the original declares that the invention "relates particularly to a new and inexpensive process of constructing a glue-lined barrel, cask, etc." The reissued specification broadens this description by adding at this point the following words: "Better adapted to the purpose designed by coating and sizing, as set forth, than by the ordinary means;" and by the additional paragraph in the specification of the reissue, above recited.

Among the defenses set up in the answer were (1) noninfringement; (2) want of patentable novelty in the invention; (3) anticipation thereof by various other specified American patents; and (4) prior use of the patented process by a large number of persons in New York, Pennsylvania, Ohio, and Massachusetts, whose names are given.

After replication filed, and after some of the proofs had been taken by the respondent on the question of prior use of the patented invention by other persons, the complainant, by leave of court, filed an amended bill, setting up, in addition to the averments of the original bill, the claim that, prior to the issue of his original patent, he had disclosed his secret or process to the defendant company on its promise that no use would be made of the process, or any part of it, without his consent; but that the defendant, disregarding this promise, did use said process without his permission, and thereby violated its said agreement with him, by reason whereof the defendant, in equity, should be estopped from denying or in any way questioning the validity of the complainant's invention and the letters patent issued therefor.

The defendant filed a supplemental answer, denying the new averments of the amended bill, and interposed the defenses *292 of the statute of limitations and of laches, so far as the amended bill sought or attempted to hold it liable in any way on the alleged promise not to use complainant's secret or process. Replication having been filed, and voluminous proofs taken on the questions presented by the pleadings, the

court, on the hearing upon the merits, entered a decree dismissing the complainant's bill with costs. From that decree the present appeal is prosecuted. The opinion of the court below is reported in 38 Fed. Rep. 842, and the ground upon which the decision proceeded was that there was a lack of patentable invention in the thing patented.

We are of opinion that there is no error in the judgment of the court below for various reasons. In the first place, the second claim of the reissue, secured, as it was, by important changes in the specification of the original patent, was a manifest enlargement or broadening of the patent. It is not pretended that there was any mistake, accident, or inadvertence in either the specification or the claim of the original patent, such as would render it void or inoperative, and warrant the granting of a reissue thereof with an additional and enlarged claim. After the complainant had secured his patent for the process, which was all he could claim under the original specification, he ascertained that he was still not protected against the use by the defendant of barrels, casks, etc., coated or lined by the process covered by his patent; and it was then that he conceived the idea of a reissue which should be broad enough to include not only the claim set forth in the original, but also a claim for a barrel, cask, etc., coated or sized with glue, by the process described. This was, in effect, an expansion of the claims in order to embrace an invention not specified in the original patent, and therefore rendered the second claim of the reissue invalid, under the well-settled rule of this court, as announced in Miller v. Brass Co., 104 U. S. 350; Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451; Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. Rep. 1137; and other cases. It is shown by the complainant's own testimony that he procured the reissue for the purpose of having it cover barrels so as to make the defendant an infringer. Furthermore, to give the second claim of the reissue any validity in its application to the barrel cannot be permitted, in view of the rejection of the second claim first presented in the application for reissue, and which necessitated the modification or the specification as above stated, and which declared that the "distinguishing feature of his improvement may be found on examination to be the superior integrity of the lining by the use of soup glue," etc. The second claim being allowed upon this amendment of the specification, if it had any validity at all, cannot properly cover the coated barrel, cask, etc., as a product, but would have to be limited in its operation to the "glue soup," or material used in coating or sizing barrels, and the alleged superiority thereof in being absorbed into and strengthened by the wood fiber in some way distinguishable from and superior to the coating with glue in the ordinary way. But there is, however, no testimony in the record that barrels coated or sized by the complainant's process are, in fact, distinguishable from barrels lined in the ordinary way, or that barrels so "glued" are any better than those coated by the old process. The testimony shows that barrels lined under either the old or the new process are practically indistinguishable.

This second claim of the reissue, being a manifest attempt to broaden the original patent, cannot, in view of the amended specification on which it was based or procured, be held to cover a glue-lined barrel as an article of manufacture, which was distinctly disclaimed by the original specification.

But the invalidity of this new claim in the reissue does not impair the validity of the original claim, which is repeated, and made the first claim of the reissued patent. Gage v. Herring, 107 U. S. 640, 646, 2 Sup. Ct. Rep. 819. The complainant's rights, therefore, must be determined upon the validity of the claim of the original patent, and upon the estoppel set up against the defendant, growing out of its alleged promise not to use his process or secret without his consent. This latter claim cannot possibly be sustained, for the reason that the promise, if made, in no way misled or deceived the patentee to his injury or damage. According to his own testimony, he had not applied, and had not thought of applying, for a patent on his process at the time of disclosing his secret, but shortly thereafter he concluded that he had acted unwisely in imparting it to the defendant, and at once applied for and obtained his original patent for the very purpose of protecting himself against the defendant's use thereof. He did not, therefore, rely upon that alleged promise, but took proceedings by obtaining a patent to directly guard against its violation. He did not disclose his process to the defendant as an invention, or as one which he proposed to patent. Under such circumstances, no estoppel arises against the defendant from questioning the validity of the patent, which was not then in existence, and which the defendant did not know was to be claimed as an invention.

So far as the alleged promise embodies any element of a contract or of an undertaking to compensate the complainant for the use of his so-called "secret," the statute of limitations and laches interposed by the defendant was clearly a bar to any recovery on that ground, because the alleged promise, if the proof was sufficient to establish it, was made in September, 1873, and the amended bill seeking relief thereon was not filed until January 13, 1883,—some 14 or 15 years later. This lapse of time not only constitutes a bar, such as the statute of limitations interposes, but shows such laches as will clearly preclude any right to relief.

McLean v. Fleming, 96 U. S. 245; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. Rep. 610; Galliher v. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. Rep. 873.

No sufficient reason is given for this delay in suing. It is sought to be excused on the ground of the plaintiff's poverty during this period; but in the case of Hayward v. Bank, 96 U. S. 611, 618, this court said that a party's poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. So that this alleged promise of the defendant can in no way avail the complainant in the present case, either as a ground on which to predicate any claim for relief or as an estoppel upon the defendant from denying the validity of the patent.

295 In addition to these difficulties in the way of the complainant succeeding in this case, his alleged invention was clearly anticipated by the prior use and sale of liquid glue, or size, used for various purposes, including that of coating barrels. The patentee's claim of novelty is based upon the theory that prior to 1873 and 1874 oil barrels were lined with the ordinary glue of commerce dissolved into a hot liquid glue of the proper consistency, and that the discovery made by him, after repeated experiments, was that the same effect could be accomplished with better and less expensive results by using the hot liquid or "glue soup" at a proper consistency in the process of manufacture, before it had been prepared for commercial purposes by drying; and that by the use of "glue soup" labor, expense, and the loss incident to the process of drying the jelly glue, so as to render it marketable in that shape, were avoided. In other words, the claim of invention in his patent is that, previous to his discovery, the process in lining barrels with glue had been to melt the dried glue of commerce and pour it into a barrel, close up the barrel, and roll it around until the inside surface thereof was thoroughly coated; and that his discovery made it cheaper for the oil people to manufacture their own glue, and use it in the same manner, but before it had been dried.

This use of the liquid glue before drying differed in no essential respect from the use of the liquid glue which had been obtained by melting the dried glue of commerce, and certainly does not rise to the dignity of invention. It would have occurred, and did occur, as the testimony shows, to manufacturers of glue where there was occasion or necessity for using glue in large quantities. The alleged invention was properly held by the court below to be a commercial suggestion that would naturally occur to any one engaged largely in the use of glue. It was well known that liquid glue had these coating and sticking qualities before it had ever been dried for commercial purposes, and to use it in its liquid state certainly did not embody the quality of invention. The only object or reason in drying the glue at all is to preserve it for transportation and commercial purposes, it being, in its liquid or jelly condition, susceptible to atmospheric influences, 296 under the operation of which it is more liable to be spoiled than when dried. It may be true, as claimed, that the adhesive qualities of glue before it is dried are somewhat superior to what they are after the glue has been dried, and then remelted for actual use. But this is merely a question of degree, and the application of the "glue soup" before drying cannot properly be called a discovery, such as involves the exercise of the inventive faculties.

But, aside from this, and even admitting that such a discovery and use of liquid glue would involve invention or patentable novelty, it is clearly established by the evidence in the record that there had been such a prior use of the alleged discovery as to preclude the issue of any valid patent covering it. Whatever advantages there may be in using liquid glue, or "glue soup" before it is dried, over a similar use of remelted dried glue, were well known prior to the date of the complainant's application for the patent in question. It is shown by the testimony that in various general publications and trade journals published in Germany in the years 1869, 1870, and 1871, and circulated in this country, the advantages of using hot or liquid glue are set out, as well as the description of the manufacture of glue jelly by different parties and in different localities; and from extracts produced from these journals, which are standard authorities on chemical industries, and contain information on the subject in question, it is shown that manufacturers in Germany were making and selling liquid glue in its jelly form for the same purposes and uses for which the glue in its dried form is ordinarily used, and that it was considered better and cheaper to use it in that condition, rather than go to the expense and labor of first drying it. In the glue industries, both in this country and in Germany, the fact was well recognized that the adhesive qualities of glue, before it was dried, were superior to what they were after the glue had been dried for commerce, and that by using it before drying there would be a great saving of time, expense, and loss. It was shown that in some instances the glue jelly was prepared and put away in 297 hermetically sealed casks for commercial use in the future. In addition to these publications relating to the use of "glue soup," it is shown that glue in that state or condition had been used in the extensive glue factory of Peter Cooper & Co., at Williamsburg, (now a part of Brooklyn,) New York, as early as 1859 or 1860. It is proven that in the Cooper factory barrels used for the purpose of shipping neat's foot oil were

lined or coated with hot liquid glue, that had never been dried, substantially in the same manner, and by the identical process described in complainant's patent. In fact, the process on which he claims a patent was well known at that factory long prior to the date of his alleged invention, and no one seems to have had any idea that it was either new, or could be considered such a secret or discovery as involved invention, or was entitled to protection.

It is furthermore shown by the testimony that precisely this same process of lining oil barrels with hot "glue soup" was used in the oil regions of Pennsylvania and Ohio as early as 1861.

It is not deemed necessary to go into this evidence more in detail. It is not successfully impeached or contradicted by the complainant. In addition to this, the complainant concedes in his own testimony that his "glue soup" is the same thing as "sizing," which was in use long prior to the date of his invention by manufacturers of writing and wall paper.

It being thus clearly established that the use of liquid glue was well known to glue manufacturers and oil refiners, and had been actually applied in the very way and for the very purposes described by the complainant long before the date of his alleged invention, it is too clear for discussion that he could have no valid patent which would cover a process for using liquid glue for coating or sizing purposes as a new discovery or invention; and our conclusion, therefore, is that the decree of the court below was clearly correct, and should be affirmed.

(149 U. S. 608)

BYERS v. McAULEY et al.

McAULEY et al. v. McAULEY.

(May 10, 1893.)

Nos. 124, 130.

FEDERAL COURTS — JURISDICTION — ADMINISTRATION OF ESTATES — PROPERTY IN GREMIO LEGIS — DISTRIBUTION.

1. An estate which is in course of administration in a state probate court is in gremio legis, and a federal court has no jurisdiction, on the filing of a bill by a citizen of another state against the administrator to recover a share in the property, to take the administration of the estate out of the state court, and itself make a decree of distribution, determining the rights of citizens of the same state as between themselves. Its jurisdiction in such case is limited to determining and awarding the shares of citizens of other states. Mr. Justice Shiras and Mr. Chief Justice Fuller dissenting.

2. Under the law of Pennsylvania, first cousins are entitled to take the property of an intestate to the exclusion of second cousins. Rogers' Appeal, 18 Atl. Rep. 871, 131 Pa. St. 382, followed.

Appeals from the circuit court of the United States for the western district of Pennsylvania. Reversed.

Statement by Mr. Justice BREWER:

James McAuley, who died on the 9th day of January, 1871, by his will, dated November 26, 1870, made large bequests to his sisters, Margaret and Mary, and also devised to them a house and lot on Duquesne way, in the city of Pittsburgh. Margaret died intestate in 1871, a few months after her brother, and her interest passed to her sister Mary, who died January 6, 1886, seised of said real estate, and leaving also a large personal estate. As respects the latter, she died intestate, but she left an instrument in writing, signed by her, the body thereof being also in her handwriting, of which the following is a copy:

"By request of my dear brother, my house on Duquesne way is to be sold at my death, and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women. Mary McAuley."

On January 12, 1886, this instrument was admitted to probate by the register of Allegheny county, Pa., as the will of Mary McAuley, and letters of administration cum testamento annexo upon her estate were issued to Alexander M. Byers.

Byers proceeded with the administration of the estate, and on January 29, 1887, he filed in the register's office an account, showing his receipts and expenditures, and what balance he had in his hands for distribution, amounting to the sum of $212,235.61.

The account of Byers, as administrator with the will annexed, was examined and allowed by the register, and was presented for approval to the orphans' court of Allegheny county, and was by that court, on March 7, 1887, approved and confirmed nisi, and, no exceptions thereto having been filed, the confirmation became absolute.

Thereupon, in pursuance of statutory directions, this confirmed account was put upon the audit list of the orphans' court for distribution of the balance shown to be in the administrator's hands, and the court fixed March 29, 1887, as the day to hear the case.

On March 28, 1887, the day before the hearing thus fixed, a bill in equity was filed in the circuit court of the United States for the western district of Pennsylvania by Henry B. Shields, a resident and citizen of the state of Ohio, assignee of James McAuley, a citizen of the state of Kansas, and Henry B. Shields, in right of his wife, Melissa M. Shields, also a resident and citizen of Ohio, against the administrator, Byers, and other parties claiming to be interested in the estate, among them the two corporations named in the instrument above quoted. The bill set forth the death of Mary McAuley; that there were two classes of claimants to the estate, to wit, the first and second cousins of the decedent; that the so-called will was null and void; and that there was a large amount of personal estate in the hands

of defendant Byers, administrator, etc. The prayer was that the will and the probate be declared void and of no effect; that the administrator be enjoined from disposing of the real estate, and from collecting the rents therefrom, and that some suitable person be appointed to take charge of it until partition; that a partition of it be had and made to and among the various parties in interest, and that the defendant Byers be ordered and directed to make a full, just, and true account of all assets in his hands; that an account be taken of the testator's debts and funeral expenses, and the surplus be distributed among the plaintiff and all other parties legally entitled thereto; and for general relief. To this bill the administrator, Byers, filed a plea, setting up the proceedings in the orphans' court. This plea was, after argument, overruled by the circuit court.

The cause was then put at issue by answer and replication. On May 20, 1888, an interlocutory decree was entered, directing that said A. M. Byers, administrator of Mary McAuley, deceased, should file an account of the personal estate before a master, who was then appointed, and the master was directed to take testimony as to the parties interested in the distribution of the balance in the hands of said administrator, and to report the testimony, with a schedule of distribution, to the court. The administrator stated before the master an account, which was identical with the account theretofore confirmed by the orphans' court. The master further took testimony as to who were the distributees, and reported the same to the court, with a schedule of distribution.

*611 *On January 5, 1889, a final decree was made by the circuit court, as follows:

"And now, to wit, January 5, 1889, this cause came on to be heard on bill, answers, replication, testimony, and the report of the master with exceptions thereto, and was argued by counsel; whereupon, upon consideration thereof by the court, it is ordered, adjudged, and decreed that the proceeds of the sale of the real estate that was of Mary McAuley, deceased, situate on Duquesne way, in the city of Pittsburgh, after deducting expenses attending the same, shall be distributed equally between the Home for the Friendless and the Home for Aged Protestant Women.

"And it is further ordered, adjudged, and decreed that the exceptions to the master's report be overruled, and the said report confirmed, and that the personal estate of said decedent be distributed among the thirteen first cousins of said decedent, to the exclusion of her second cousins, in conformity with said master's report; and that, unless an appeal be duly entered from this decree within sixty days from this date, the administrator is ordered to transfer the stocks and pay out the cash of said decedent's personal estate in accordance with the schedule of distribution reported by the said master, adding the sum of nine dollars and sixty-one cents ($9.61) to the cash share of each of said thirteen distributees, to cover the duplicate credit of one hundred and twenty-five dollars ($125) for examiner's fees inadvertently allowed in said master's report."

From this decree several appeals were taken to this court, two of which remain for consideration, to wit, the appeal of the administrator, and that of Dora McAuley and others, second cousins of the deceased, with their husbands.

D. T. Watson, for appellant Byers, administrator. D. F. Patterson, for appellees Sarah Thompson and others. M. P. Patterson, for appellee Pittsburgh & Allegheny Home for the Friendless. Geo. C. Burgwin, for appellee Home for Aged Protestant Women. S. Schoyer, Jr., Walter Lyon, and W. M. Watson, for appellants in No. 130.

*612 *Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

It is obvious from the decree which was entered that the circuit court of the United States assumed full control of the administration of the estate. That decree disposed of and distributed the entire estate among all the persons interested therein, citizens and noncitizens of the state. It did not stop with an adjudication of the claims of citizens of other states against the estate, but assumed to determine controversies between citizens of the same state, for the two corporations named in the first paragraph were both citizens of Pennsylvania, and yet the decree determined their rights as against the estate, as well as between themselves. Not only that, of both the first and second cousins, between whom, as shown by the last paragraph, distribution was made, some were citizens of the state of Pennsylvania and some of other states, and yet all their claims, as between themselves and as against the state, were disposed of by this decree.

Indeed, the decree as a whole cannot be sustained, unless upon the theory that the federal court had the power, on the filing of this bill, to take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum. It was not a judgment against the estate, but a decree binding personally the administrator, and compelling him, subject to the penalties of disobedience of a decree of a court of chancery, to administer the estate according to the orders of the federal, rather than those of the state, court, which had appointed him. If we look back of the decree to *613 the proceedings which were had in the circuit court intermediate the filing of the bill and the decree, it will be perceived that that court proceeded as though the entire administration of the estate had been trans-

ferred to it from the state court. Thus, on December 3, 1887, the administrator filed in the circuit court a petition, commencing as follows: "The petition of A. M. Byers, administrator of all and singular the goods and chattels of Mary McAuley, late of the county of Allegheny, deceased, respectfully shows that this honorable court has taken jurisdiction of your petitioner as administrator, and of the assets of the decedent which your petitioner has in his hands," setting forth the ownership of 250 shares of railway stock, and praying for an order as to its disposal. Upon the filing of such petition the court directed that notice be given to all counsel of record, and on December 10th made an order for the disposition of the stock. So, on December 24, 1888, the administrator having filed a petition for leave to sell the real estate, the circuit court made an order directing the sale, "report of such sale to be made to this court for confirmation, and the proceeds to be held subject to the decree of this court." It is true that the administrator presented like applications to the state court, and obtained like orders, except that in the order for the sale of the real estate there was, in terms, no command to report the sale for confirmation, and hold the proceeds subject to the decree of that court. Evidently the administrator did not know which court had the power to control in these matters the actual administration of the estate; and so, for prudential reasons, applied to and obtained similar orders from both. So, both by the terms of the final decree and by the proceedings in the circuit court, preliminary thereto, it is clear that the question is fairly presented to us as to the power of the circuit court of the United States to interfere with the administration of an estate in a state court. Such a question is of importance. No officer appointed by any court should be placed under the stress which rested upon this administrator, and compelled for his own protection to seek orders from two courts in respect to the administration of the same estate.

*614 *In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this court; and, first, it is a rule of general application that, where property is in the actual possession of one court, of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. Hagan v. Lucas, 10 Pet. 400; Taylor v. Carryl, 20 How. 583; Peck v. Jenness, 7 How. 612, 625; Freeman v. Howe, 24 How. 450; Ellis v. Davis, 109 U. S. 485–498, 3 Sup. Ct. Rep. 327; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. Rep. 355; Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. Rep. 342. In Covell v. Heyman, supra, the matter was fully discussed, and in the opinion by Mr. Justice Matthews, on page 179, 111 U. S., and page 356, 4 Sup. Ct. Rep., the rule is stated at length: "The point of the decision in Freeman v. Howe, supra, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court, but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of the property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States."

Secondly. An administrator appointed by a state court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is a possession which cannot be disturbed by any other court. Upon this proposition we have direct decisions of this court. In Williams v. Benedict, 8 How. 107, 112, it was said: "As, therefore, the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the probate court has ordered to be sold for the purpose of an equal distribution among all creditors. The jurisdiction of that court has attached to the assets. They are in gremio legis. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction." And in Youley v. Lavender, 21 Wall. 276, it was

held that where the statute of a state places the whole estate, real and personal, of the decedent within the custody of the probate court of a county, a nonresident creditor may get a judgment in the federal court against the resident executor or administrator, and come in under the law of the state for such payment as that law marshaling the rights of creditors awards to creditors of his class; but he cannot, because he has obtained a judgment in the federal court, issue execution, and take precedence of other creditors who have no right to sue in the federal courts; and if he do issue execution, and sell the lands, the sale is void. And in the course of the opinion, on page 280, it was observed: "The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the federal courts in the enforcement of individual *616 rights. These laws, on the death of Du Bose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the state, and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter, in contemplation of law, in the custody of the probate court, of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by any one. The recovery of judgment gave no prior lien on the property, but simply fixed the status of the party, and compelled the administrator to recognize it in the payment of debts. It would be out of his power to perform the duties with which he was charged by law if the property intrusted to him by a court of competent jurisdiction could be taken from him, and appropriated to the payment of a single creditor to the injury of all others. How can he account for the assets of the estate to the court from which he derived his authority if another court can interfere and take them out of his hands?" See, also, Vaughan v. Northup, 15 Pet. 1; Peale v. Phipps, 14 How. 368.

There is nothing in any decision of this court controverting the proposition thus stated, that the administrator is the officer of the state court appointing him, and that property placed in his possession by order of that court is in the custody of the court. One of the cases specially relied on by counsel for appellees is Payne v. Hook, 7 Wall. 425. The opinion in that case was written by Mr. Justice Davis, who wrote the opinion in the case last quoted from, and in the latter opinion he said that there was nothing in Payne v. Hook to conflict with the views therein expressed; and, indeed, there was not. Payne v. Hook was the case of a bill filed by one of the distributees of an estate against the administrator and the sureties on his official bond, to obtain her distributive share in the estate of the decedent. Plaintiff was a citizen of Virginia, and the defendant a citizen of Missouri, and an administrator appointed by the probate court of one of its counties. Suit was brought in the circuit court of the United States for the district of Missouri. The charge in the bill was gross misconduct on the part of the administrator, and false settlement with the probate court; and that he had, by fraudulent misrepresentations, *617 obtained a settlement with plaintiff for a sum less than she was entitled to. A demurrer to the bill was sustained in the court below, but this court held that the bill was sufficient, and that the demurrer was improperly sustained. In other words, the ruling was that plaintiff, a citizen of another state, could apply to the federal courts to enforce her claim against an administrator arising out of his wrongful administration of the estate. To the objection that the other distributees were not made parties the court replied that it was unnecessary, that it was a proceeding alone against the administrator and his sureties. In the opinion, on page 431, it is said: "The bill under review has this object, and nothing more: It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother, and, in case he should not do it, to fix the liability of his sureties on his bond." There was no suggestion in the bill that the federal court take possession of the estate, and remove it from the custody of the administrator appointed by the state court; no attempt to settle the claims of citizens of the state, as between themselves; no attempt to take the administration of the estate, but simply to establish and enforce, in behalf of a citizen of another state, her claim to a share of the estate. That this is the true interpretation of that case is also evident from these quotations from subsequent opinions. Thus, in Ellis v. Davis, 109 U. S. 485, 498, 3 Sup. Ct. Rep. 327, it was said: "In Payne v. Hook, 7 Wall. 425, it was decided that the jurisdiction of the circuit court of the United States in a case for equitable relief was not excluded because, by the laws of the state, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the res which is the subject of the litigation is entitled to administer it. Williams v. Benedict, 8 How. 107; Bank v. Horn, 17 How. 157; Youley v. Lavender, 21 Wall. 276; Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450." And in Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. Rep. 342, after a quotation from the opinion in Payne v. Hook, it *618 is added: "The only qualification in the application of this principle is that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state." The distinction be-

tween that case and this is like that which exists between the cases of Freeman v. Howe, 24 How. 450, and Buck v. Colbath, 3 Wall. 334. In the former of these cases this court held that, when property was in the custody of a United States marshal, under process from a federal court, it could not be taken from him by any process out of a state court; that the possession of the marshal was the possession of the court, and no other court could disturb it; while, in the latter case, it held that an action of trespass could be maintained in a state court against a marshal of the federal court for goods improperly taken possession of, because such an action in no way interfered with the custody of property by the federal court. So here Payne v. Hook established that a citizen of another state could recover from an administrator the share of an estate wrongfully withheld by him, and enforce that recovery by a decree over against the sureties of the administrator's bond; while the opinion of the court below in the present case gives to the federal court power to take possession of property in the hands of an administrator appointed by the state court, and thus dispossess that court of its custody.

Thirdly. The jurisdiction of the federal courts is a limited one, depending upon either the existence of a federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, it cannot proceed, even with the consent of the parties. There is in the controversies growing out of the settlement of this estate no federal question. The jurisdiction, therefore, must depend upon diverse citizenship, and can go no further than that diverse citizenship extends. The fact that other parties may be interested in the question involved is no reason for the federal courts taking jurisdiction of the controversy between such parties.

It is true that when the federal court takes property into its custody, as it does sometimes by a receiver, it may entertain jurisdiction of claims against that property in *619 favor of citizens of the same state as the receiver, or either of the parties. But that is an ancillary jurisdiction; it is in aid of that which it has acquired by virtue of the seizure of the property, and in order, it having possession, that it may make final disposition of the property. Possession of the res draws to the court having possession all controversies concerning the res. If original jurisdiction of the administration of the estates of deceased persons were in the federal court, it might, by instituting such an administration, and taking possession of the estate through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not, in this case, assume to take possession of the estate in the first instance; and it could not, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it.

Under the present law of congress, a receiver appointed by a federal court, and in possession of property, may be subjected to suits in the courts of the state without leave obtained in the first instance from the federal court. 25 Stat. 436. Would it be tolerated for a moment that the commencement of such a suit in the state court against a receiver enabled the state court to draw to itself the entire administration of the receivership, and oust the federal court from the possession and custody of the property? The mere statement of the question carries its own answer. While the validity of a claim against the receiver may be established in the state court, the administration of the property in the hands of the receiver remains with the federal court, whose officer he is; and the amount the claimant will receive from the proceeds of the property in the hands of the receiver is not settled by the state court, which only determines the validity and extent of the demand, but rests upon the result of the administration, as ordered by the federal court. The fact that the federal court entertaining the suit of one claimant against an estate may entertain a different view of the law controlling the rights of that claimant from that entertained by the court of the state in a suit brought by a claimant, citizen of the state, holding a like character of claim, is no ground for enlarging the jurisdiction of the federal court beyond that given to it by the constitution of the United States.

A citizen of another state may establish a debt against the estate, (Youley v. Lavender, 21 Wall. 276; Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. Rep. 377;) but the debt thus established must take its place and share of the estate as administered by the probate court, and it cannot be enforced by process directly against the property of the decedent, (Youley v. Lavender, supra.) In like manner, a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, (Payne v. Hook, supra,) or against any other parties subject to liability, (Borer v. Chapman, supra,) or in any other way which does not disturb the possession of the property by the state court. (See the many cases heretofore cited.)

Our conclusion, therefore, is that the federal court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the state as between themselves. The state court has proceeded so far as the administration of the estate carries it forward to the time

when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees, and in that exigency the circuit court might entertain jurisdiction in favor of all citizens of other states, to determine and award their shares in the estate. Further than that it was not at liberty to go. In that determination it made two rulings, in respect to both of which we think the court was correct: First. In holding that the distributees had no interest in the real estate specially described in the first paragraph of the decree. Indeed, the ruling of the court in this respect is not seriously challenged. It is true that there is an assignment of error, in the first appeal, to the action of the court below in treating *623 the provision in the will of Mary McAuley, that the proceeds of sale of the real estate on Duquesne way should be divided between the Home for the Friendless and the Home for Aged Protestant Women as a valid declaration of a trust, and in decreeing accordingly. But this assignment seems to have been abandoned, or, at all events, is not contended for in the appellants' brief. We content ourselves, therefore, with saying that we see no error in the judgment of the court below in that particular. It needs no argument to show that a written instrument, though inefficacious as a will, from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust. 1 Perry, Trusts, § 91.

The other ruling was that the first cousins were entitled to take the estate to the exclusion of the second cousins. In this the circuit court of the United States had to deal with a question of local law. The state statutes prescribed the scheme of distribution, and, if the meaning of those statutes was disputable, the construction put upon them by the state courts was binding upon the circuit court.

Our inquiry is, therefore, restricted to the question whether the circuit court correctly applied the statute law of Pennsylvania as interpreted by the courts of that state.

The supreme court of Pennsylvania, in Brenneman's Appeal, 40 Pa. St. 115, construed the statute law, as it then stood, as preferring first cousins to the entire exclusion of second cousins; and this case was approved in the subsequent case of Hayes' Appeal, 89 Pa. St. 256. Some statutory changes were made in the law, but in the recent case of Rogers' Appeal, 131 Pa. St. 382, 18 Atl. Rep. 871, where the opposite view of the case was presented by the same counsel who represents the appellants in the present appeal, in an argument termed by that court ingenious and able, it was held that Brenneman's Appeal should not be overruled or even modified.

The court below, therefore, in sustaining the claim of the first, to the exclusion of the second, cousins, followed the law as construed by the state supreme court.

The decree of the circuit court must be reversed, and the case remanded, with instructions to enter a decree in favor of those citizens of other states than Pennsylvania, *624 who have petitioned the circuit court for relief, and who are first cousins of the decedent, for their shares of the estate other than the real estate described in the declaration of trust, the amount of such shares being determined by the fact that the first cousins only inherit; and an order that they recover from the administrator such sums thus found to be due. No decree will be entered in favor of the two corporations named in the first paragraph, and none in favor of the parties to the suit who are citizens of the state of Pennsylvania.

Mr. Justice JACKSON did not hear the argument, and takes no part in the decision of the case.

Mr. Justice SHIRAS, dissenting.

I am unable to concur in the judgment of the court, or in the reasoning used to support it.

If it be true, as is argued in the opinion, that in the case of an administration of the estate of a decedent by proceedings in the probate court of a state the possession of the assets by the administrator is the possession of the court, and such assets, as to custody and control, are to be deemed to be in gremio legis, so as to bring the case within the doctrine of Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. Rep. 355, and kindred cases, then it would follow, as I think, that the plea of the administrator, wherein he set up the pendency of the proceedings in the orphans' court of the state as a bar to the bill of complaint, ought to have been sustained. Between the granting of the letters of admnistration and the final distribution of the fund realized by the administration there is no point of time when the jurisdiction and possession of the state court change their character, and hence, if it be the law that the possession and control of the administrator is that of the court appointing him, within the meaning of the cases cited by the majority, there can be no point of time or stage of the proceedings between their inception and conclusion when the process of another court can be legitimately invoked to take from the state court its power of control and decision.

In this view of the case, citizens of states other than that having possession and control of the estate through its officer, *625 must, like the home residents, assert their claims in the state court; and, if their claims have a federal character, and if the state courts should disregard that feature of their rights, the remedy would be found in an ultimate appeal to the supreme court of the United States.

But it is certain that such a view of this question cannot prevail without reversing a long line of decisions, of which Payne v. Hook, 7 Wall. 425, may be cited as an early, and Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. Rep. 342, as a recent, case, and in which this court has held that the jurisdiction conferred on the federal court by the constitution and laws of the United States extends to controversies arising in the distribution of estates of decedents, where such jurisdiction is invoked by citizens of other states than that of the domicile, notwithstanding the peculiar structure of the local probate system.

The logic of the opinion of the majority, as I understand it, seems to require a reversal of the action of the court below in overruling the administrator's plea, setting up that he was an officer of the state court, proceeding in the due and regular performance of his duties as such officer.

As, however, the opinion refrains from accepting this conclusion, though apparently rendered necessary by its own reasoning, the next questions that arise are as to those particulars in which the opinion reverses the decree of the court below.

Having conceded that the jurisdiction of the circuit court had duly attached under a bill in equity brought by citizens of another state, alleging legitimate matters of controversy arising out of the distribution of the decedent's estate, the opinion of the majority proceeds to consider the propriety of the action of the court below in the exercise of that jurisdiction.

The matters of controversy which formed the subject of the bill of complaint were two. The first was as to the legal effect of that provision of the will of the decedent which devised the proceeds of certain real estate, situated in the city of Pittsburgh, in equal shares to the Home of the Friendless and the Home for Aged Protestant Destitute* Women, two charitable institutions organized under the laws of the state of Pennsylvania. As the decedent left no husband, children, brothers, or sisters, but certain first cousins and second cousins, a dispute arose whether both these classes were entitled to share in the distribution of the estate, and this formed the second subject-matter of the bill.

In respect to the first matter, the court below held that, while the will of the decedent could not operate as a testamentary disposition of the real estate in question, because such will had not been executed in conformity with certain statutory requirements, yet that it constituted a valid declaration of a trust, under which the two charitable institutions were entitled to the proceeds of the real estate.

The controversy between the two classes of cousins the court resolved in favor of the first cousins, following, in so doing, the construction put upon the Pennsylvania intestate laws by the supreme court of that state.

This disposition by the court below of the two questions before it is approved by this court, but, in the opinion of the majority, the court below erred in including in the scope of its final decree all the parties before it, and in not restricting its decree to an adjudication of the case so far as the citizens of states other than Pennsylvania were concerned.

Be it observed, that all the parties concerned in the matters in controversy were before the circuit court. The administrator, the two charitable institutions, and all the individuals constituting both classes of cousins, were parties plaintiff and defendant in the suit, and none of them, either in the court below or in this court, objected to the jurisdiction of the circuit court, except the administrator, and his plea to the jurisdiction had been rightfully, as is admitted by the majority opinion, overruled.

In such a state of facts, why was not the action of the court fully warranted in awarding a decree finally establishing the rights of the parties before it?

There is force and logical consistency in the position that the settlement of a decedent's estate is not a suit at law or in equity, but that such an estate constitutes a res, as to which the jurisdiction of the probate court, when it once attaches, is exclusive.

The position of the court below in exercising its jurisdiction to the extent of final determination and enforcement is likewise consistent with reason, and, as I think, with the doctrine of our previous cases.

But the conclusion of the majority in the present case, requiring the court below to shorten its arm, and to dismiss parties who were before it, assenting to its jurisdiction, is one that I cannot accept.

Let us see to what consequences such a doctrine will lead; and no better case than the one in hand is needed to illustrate its possible consequences.

The federal court having held that the will of the decedent was efficacious as an acknowledgment of a valid trust, of course the real estate, which formed the subject of the trust, was withdrawn from the operation of the intestate law, and was declared to be the property of the cestuis que trustent. From this it follows that the rest of the estate is to be equally divided among the first cousins, who are held to be entitled to it. Here we have a consistent decree that binds all the world, for all concerned were before the court, and their contentions were all heard and considered. The administrator had no official or personal concern in the questions mooted. The suggestion that he would not be protected by obeying the decree of the circuit court from his responsibility to the orphans' court, which had appointed him, has no force. If the decree of the circuit court were declared valid by this court, of course that decision would

involving as it does a question of the jurisdiction of the federal courts, be obligatory upon the state court, and a perfect protection to the administrator in carrying it into effect. There may be some foundation for criticism in the action of the court below in going behind the account that the administrator had filed in the orphans' court, and in subjecting him to verify his account before a master; but, if this were error, it
*626 did not affect the final decree, inasmuch as *the account of the administrator, as filed in the orphans' court, was approved and confirmed without change by the master.

But out of the decree recommended by the majority opinion all kinds of confusion and uncertainty may arise. The state courts may take a different view of the will of the decedent, and decline to find in it a valid declaration of a trust. In that event, the amount of the estate would be increased by the proceeds of the sale of the real estate thus added to the fund for distribution. The citizens of states other than Pennsylvania, the extent of whose rights to participate in the fund had already been determined, and, perhaps, satisfied, under the decree of the circuit court, could not avail themselves of such action of the state courts. Consequently the first cousins resident in Pennsylvania would receive larger shares of the estate than those received by the first cousins in other states, and thus inequality would arise.

Again, if the state courts should happen to change their views as to the proper construction of the intestate law, and hold that second cousins were entitled to participate equally with first cousins, then the second cousins who were citizens of other states would, under the decree of the federal court, binding upon them, receive nothing, while the second cousins living in Pennsylvania would participate. So, too, it is entirely possible, under the division of jurisdiction recommended by the majority opinion, that all of the first cousins might be citizens of other states, and second cousins only be residents of Pennsylvania. Then, as the decree of the circuit court gave the estate only to first cousins, and as such decree would be forthwith enforceable, it might result that, when the state court reached an adjudication in favor of the second cousins, there would be nothing left in which they could participate. Many other absurd consequences, not farfetched, but likely to occur, could be readily suggested, if the novel proposition of dividing jurisdiction should prevail.

I submit that the error in the reasoning of the majority opinion is found in the latent assumption that the citizens of Pennsylvania have no rights in the federal courts in
*627 Pennsylvania. The latter are treated as if they were courts only *intended for the advantage of citizens of other states. Yet we know that, admittedly, citizens of Pennsylvania have the right to resort, as parties complainant, to the federal courts, to enforce important rights and interests, such as arise, for instance, out of the patent laws. So, too, as I understand it, when citizens of Pennsylvania have been brought into the circuit court of the United States as parties defendant to a suit by citizens of another state, they have a right and interest in the decree of the court in their favor. The right of the foreign citizens is not to have the federal court decide in their favor, but merely to have the controversy heard and determined by the federal tribunal. The citizens of Pennsylvania who have been brought into the federal court have a right and interest in the decision, which, as it would have been conclusive if against them, so it must be conclusive if in their favor. The Home for the Friendless and the Home for Aged Protestant Women should not, after a decision has been made in their favor, in a suit where all concerned were parties, be turned out of the federal court to wage, in another tribunal, with the same parties, the same question. Nor should the second cousins, resident in Pennsylvania, after having consented to submit their claims to adjudication in the circuit court, be permitted, as against the same parties, to try a second fall in the state court.

The apprehension is expressed in the opinion of the majority that the principles upon which the court below proceeded in adjudicating finally upon the parties and questions before it would lead to a conflict between the courts, federal and state, and subject the administrator to a divided duty.

If the previous reasoning is not altogether wrong, it will be readily seen that, on the contrary, a conflict between the state and federal courts will be brought about by an attempt to divide between them the jurisdiction and decision of the same subjects of litigation, and that the "divided duty" which will perplex the administrator will be that of having to obey two courts instead of one.

To conclude: Either the plea of the administrator, setting up the jurisdiction of the
*628 orphans' court, as having already *attached, and as being, therefore, exclusive, ought to have been sustained, or the course of the court below, in dealing with the subjects and parties before it, by a final decree, not to be interfered with or thwarted, as between the same parties, by any other court, should be affirmed.

Jurisdiction has been defined by this court in U. S. v. Arredondo, 6 Pet. 709, to be "the power to hear and determine a cause." In Ober v. Gallagher, 93 U. S. 206, it was said that a circuit court "having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief."

"Jurisdictio est potestas de publico introducta cum necessitate jurisdicendi," (Hall v.

Stanley, 10 Coke, 73,)—jurisdiction is the power introduced for the public good, with the necessity of expounding the law.

"Juris effectus in executione consistit," (Co. Litt. 289,)—the effect of law consists in execution.

I am unable to give my adhesion to a doctrine under which, in the distribution of the estate of a decedent, parties bearing the same relation to it shall or may receive different treatment as they may happen to be citizens of one state or another in our federal union. The rights of all parties should be measured by the same yardstick. And when, as in the present case, all persons concerned in the distribution of an estate have been duly made parties to a suit in equity in the circuit court of the United States by a bill bringing into adjudication all the questions between such persons, and their several contentions have been heard and considered, the decree of such court ought to operate as a decision final between the parties and as to the matters in controversy.

I think the decree of the court below ought to be affirmed, and am authorized to say that the Chief Justice concurs in that conclusion and in this dissent.

Mr. Justice JACKSON, not having heard the argument, did not take part in the decision.

(149 U. S. 368)

BALTIMORE & O. R. CO. v. BAUGH.

(May 1, 1893.)

No. 89.

FEDERAL COURTS—FOLLOWING STATE DECISIONS—MASTER AND SERVANT—NEGLIGENCE — LOCOMOTIVE ENGINEER AND FIREMAN.

1. Decisions by the highest court of the state are not "laws" of the state, within the meaning of Rev. St. § 721, which provides that, in the absence of federal legislation, "the laws of the several states" shall be regarded as rules of decision in actions at law in the federal courts, in cases where they apply. Mr. Justice Field, dissenting.

2. The question whether the engineer and fireman of a locomotive are fellow servants, so as to preclude the fireman from recovering damages against the company for personal injuries caused by the engineer's negligence, is a question of general law, as to which the federal courts are not controlled by state decisions, but are free to exercise an independent judgment. Mr. Justice Field, dissenting.

3. An engineer in charge of a locomotive, which is running detached from any train, cannot be regarded as in control of a department of the company's business, so as to render him a vice principal in his relation to the fireman of the locomotive; but the two are fellow servants, although the company's rules declare that under such circumstances the engineer shall also be regarded as a conductor. Railroad Co. v. Ross, 5 Sup. Ct. Rep. 184, 112 U. S. 377, distinguished. Mr. Chief Justice Fuller and Mr. Justice Field, dissenting.

4. In determining the liability of a master to his servant for injuries caused by the negligence of another servant, the question does not turn merely on the matter of subordination and control, but rather on the character of the alleged negligent act. If that act is done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master, irrespective of the gradations of service as between the servants themselves. If the act is not one in the discharge of such positive duty, then there should be some personal wrong on the part of the master before he can be held liable.

In error to the circuit court of the United States for the southern district of Ohio. Reversed.

Statement by Mr. Justice BREWER:

John Baugh, defendant in error, was employed as a fireman on a locomotive of the plaintiff in error, and while so employed was injured, as is claimed, through the negligence of the engineer in charge thereof. He commenced a suit to recover for these injuries in the circuit court of the United States for the southern district of Ohio.

The circumstances of the injury are these: The locomotive was manned by one Hite, as engineer, and Baugh, as fireman, and was what is called in the testimony a "helper." On May 4, 1885, it left Bellaire, Ohio, attached to a freight train, which it helped to the top of the grade about 20 miles west of that point. At the top of the grade the helper was detached, and then returned alone to Bellaire. There were two ways in which it could return, in conformity to the rules of the company: one, on the special orders of the train dispatcher at Newark, and the other, by following some regular scheduled train, carrying signals to notify trains coming in the opposite direction that the helper was following it. This method was called in the testimony "flagging back." On the day in question, without special orders, and not following any scheduled train, the helper started back for Bellaire, and on the way collided with a regular local train, and in the collision Baugh was injured. Baugh had been in the employ of the railroad company about a year, had been fireman about six months, and had run on the helper, two trips a day, about two months. He knew that the helper had to keep out of the way of the trains, and was familiar with the method of flagging back.

No testimony was offered by the defendant, and at the close of plaintiff's testimony the defendant asked the court to direct a nonsuit, which motion was overruled, to which ruling an exception was duly taken. In its charge to the jury the court gave this instruction: "If the injury results from negligence or carelessness on the part of one so placed in authority over the employe of the company, who is injured, as to direct and control that employe, then the company is liable." To which instruction an exception was duly taken. The jury returned a verdict for the plaintiff for $6,750, and upon this verdict judgment was entered, to reverse which the railroad company sued out a writ of error from this court.

John K. Cowen, J. H. Collins, and Hugh L. Bond, Jr., for plaintiff in error. L. Danford, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The single question presented for our determination is whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former.

This is not a question of local law, to be settled by an examination merely of the decisions of the supreme court of Ohio, the state in which the cause of action arose, and in which the suit was brought, but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant.

The question as to what is a matter of local, and what of general, law, and the extent to which in the latter this court should follow the decisions of the state courts, has been often presented. The unvarying rule is that in matters of the latter class this *371 court, while leaning towards an agreement with the views of the state courts, always exercises an independent judgment; and as unvarying has been the course of decision that the question of the responsibility of a railroad corporation for injuries caused to or by its servants is one of general law. In the case of Swift v. Tyson, 16 Pet. 1, the first proposition was considered at length. On page 18 it is thus stated: "But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the judiciary act of 1789, (c. 20,) furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to the positive statutes of the *372 state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the judiciary act of 1789, congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. This decision was in 1842. Forty years thereafter, in Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. Rep. 10, the matter was again fully considered, and it was said by Mr. Justice Bradley, on pages 33 and 34, 107 U. S., and pages 21 and 22, 2 Sup. Ct. Rep., that "the federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. * * * As, however, the very object of giving to the na-

tional courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be *373 supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressisons used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail." And in the note referred to over 50 cases are cited, in which the proposition had been in terms stated or in fact recognized. Since the case of Burgess v. Seligman the same proposition has been again and again affirmed.

Whatever differences of opinion may have been expressed have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law. Thus in the case of Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. Rep. 974, these facts appeared: A statute of Massachusetts forbade travel on the Lord's day, except for necessity or charity, under penalty of a fine not exceeding $10. The plaintiff, while riding in the cars of the defendant in violation of that statute, was injured through its negligence. The defendant pleaded his violation of this statute as a bar to any recovery, citing repeated decisions of the highest court of that state sustaining such a defense. This court followed those decisions. It is true, as said in the opinion, that there was no dispute about the meaning of the language used by the legislature, so this court was not following the construction placed upon the statute by the Massachusetts court, but only those decisions as to its effect. And yet, from that opinion two of the justices dissented, holding that, notwithstanding it was a dispute as to the effect of a state statute, it was still a question of general law.

Again, in the case of Detroit v. Osborne, *374 135 U. S. 492, 10 Sup. Ct. Rep. 1012, the plaintiff was injured while walking in one of the streets of Detroit, through a defect in the sidewalk. The supreme court of Michigan had held that the duty resting upon the city, of keeping its streets in repair, was a duty to the public, and not to private individuals, the mere neglect of which was a nonfeasance only, for which no private action for damages arose. This court followed that ruling, although conceding that it was not in harmony with the general opinion, nor in accordance with the views of this court, and this was done on the ground that the question was one of a purely local nature. This quotation was made from the opinion in Claiborne Co. v. Brooks, 111 U. S. 400, 410, 4 Sup. Ct. Rep. 489, as fully expressing the reasons for so following the rulings of the Michigan court: "It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state." Observations of a similar nature are pertinent to other cases, in which this court has felt itself constrained to yield its own judgment to the decisions of the state courts.

Again, according to the decisions of this court, it is not open to doubt that the responsibility of a railroad company to its employes is a matter of general law. In Railroad Co. v. Lockwood, 17 Wall. 357, 368, the question was as to the extent to which a common carrier could stipulate for exemption from responsibility for the negligence of himself or his servants, and notwithstanding there were decisions of the courts of New York thereon, the state in which the cause of action arose, this court held that it was not bound by them, and that in a case involving a matter of such importance to the whole country it was its duty to proceed in the exercise of an independent judgment. In Hough v. Railway Co., 100 U. S. 213, was presented the liability of a company to its servant for injuries caused by negligence, and Mr. Justice Harlan, on page 226, thus expressed the views of the entire court: "Our attention has been called to two cases determined in the supreme court of Texas, and which, it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts." In Myrick v. Railroad Co., 107 U. S. 102, 108, 1 Sup. Ct. Rep. 425, the question was whether a bill of lading, issued by a railroad company, whereby the company agreed to carry cattle beyond its own line to the place named for final delivery, was a through contract. The ticket or bill of lading was issued in Illinois, and the rulings of the supreme court of that state, as to the effect of such a ticket or bill of lading, were claimed to be conclusive; but this court declined to follow them, and

in the exercise of its own judgment placed a different construction upon the contract. And in the recent case of Railway Co. v. Prentice, 147 U. S. 101, 106, 13 Sup. Ct. Rep. 261, where the question arose as to the right to recover from the railway company punitive damages for the wanton and oppressive conduct of one of its conductors towards a passenger, it was said: "This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers, such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment, is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

Not only that, but in the cases of Railway Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. Rep. 932, a case arising in the state of Indiana; Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. Rep. 322, arising in West Virginia; and Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, coming from Minnesota,—all three cases being actions by employes to *376 recover damages against railroad companies for personal injuries,—the question of the liability of the company was discussed as one of general law, and no reference made to the decisions of the state in which the injuries took place. Indeed, in the last case, the instruction given by the circuit judge, which was sustained by this court, was in direct opposition to the rulings of the supreme court of Minnesota. Thus, in Brown v. Railroad Co., 27 Minn. 162, 6 N. W. Rep. 484, a case called to the attention of this court, that court held that "a master is not liable to one servant for injuries caused by the negligence of a coservant in the same common employment," and "that the negligent servant is superior in authority, or an overseer of the one injured, does not take the case out of this rule." And in the opinion, on page 165, 27 Minn., and page 486, 6 N. W. Rep., it is said: "It is upon this point that the authorities disagree. Some courts, the supreme court of Ohio being the leading one, hold that where the injured servant is subordinate to him whose negligence causes the injury, they are not 'fellow servants,' and the master is liable. On the other hand, the great majority of courts, both in this country and in England, hold that mere difference in grade of employment, or in authority, with respect to each other, does not remove them from the class of fellow servants as regards the liability of the master for injuries to one caused by the negligence of the other."

The same doctrine was announced in Brown v. Railway Co., 31 Minn. 553, 18 N. W. Rep. 834, and Fraker v. Railway Co., 32 Minn. 54, 19 N. W. Rep. 349, both decided before the Ross Case, and reaffirmed since in Gonsior v. Railway Co., 36 Minn. 385, 31 N. W. Rep. 515. Indeed, in all the various cases in this court, affecting the relations of railroad companies to their employes, it has either been directly affirmed that the question presented was one of general law, or else the discussion has proceeded upon the assumption that such was the fact.

An examination of the opinions in the cases in the Ohio supreme court, which are claimed to be authoritative here, discloses that they proceed not upon any statute, or upon any custom or usage, or, indeed, upon anything of a local nature, but simply announce the views of that court upon the question as one of general law. We agree with that court, in holding it to be a question of general law, although we differ from it, as to what the rule is by that law. Indeed, the Ohio court is not wholly satisfied with that doctrine, as appears from the cases of Whaalan v. Railroad Co., 8 Ohio St. 249, and Railway Co. v. Devinney, 17 Ohio St. 197. In the last case it disagrees with the conclusions reached by this court in the case of Railroad Co. v. Ross, supra, and holds that a conductor of a train is not always to be regarded as a vice principal or representative of the company. In that case, a brakeman on one train was injured through the negligence of the conductor of another, and they were held to be fellow servants, and the latter not a vice principal or representative of the company, for whose negligence it was responsible. The opinion in that case is significant as showing that the question was regarded as one of common or general law; that the ordinary rule is in accordance with the views we have reached in this case; and that the Ohio doctrine is confessedly an exception. We quote from it as follows: "The true general rule is, and so it must be, that, when men are employed for the prosecution of a lawful but hazardous business, they assume the hazards of such employment arising from the negligence of coemployes, and stipulate for compensation according to their estimate of such hazards; subject, however, to this exception, that the master is liable for such injuries as accrued to the servant from the negligence of a fellow servant in the selection of whom the master has been culpably negligent; and to this we in Ohio have added the further exception of a case where the servant injured is subordinate to, and acting under the orders of, the culpable fellow servant. For the reasoning on which the decisions establishing this exception are based, the members of this court, as now constituted, are not responsible; nor are we at all bound to carry out their logic to its ultimate consequences. In subsequent cases, strictly analogous in their facts, those decisions will doubtless be accepted as authoritative; but the case now before us does not require us to review

*378 them. In adding this last-named exception to the rule elsewhere generally established, we have already diverged from the general current of judicial decision elsewhere. A majority of the court are unwilling to increase the divergency; doubting, as we do, the wisdom of such a step, and being unwilling to assume the responsibility of what would savor so strongly of judicial legislation."

But, passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the "common law." There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our constitution. To-day, the volume of interstate commerce far exceeds the anticipation of those who framed this constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the interstate commerce act and its amendments, (24 Stat. 379,) but also by an act passed at the last session, requiring the use of automatic couplers on freight cars. Pub. Acts, c. 196. The lines of this very plaintiff in error extend into half a dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations, and duties subsisting between it and its employes change at every state line? If to a train running from Baltimore to Chicago it should, within the limits of the state of Ohio, attach a car for a distance only within that state, ought the law *379 controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakemen on the through cars and the company? Whatever may be accomplished by statute,—and of that we have now nothing to say,—it is obvious that the relations between the company and employe are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law. But the question is not local, but general. It is also one of the vexed questions of the law, and perhaps there is no one matter upon which there are more conflicting and irreconcilable decisions in the various courts of the land than the one as to what is the test of a common service, such as to relieve the master from liability for the injury of one servant through the negligence of another. While a review of all these cases is impossible, it may be not amiss to notice some, and to point out what are significant factors in such a question.

Counsel for defendant in error rely principally upon the case of Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, taken in connection with this portion of rule No. 10 of the company: "Whenever a train or engine is run without a conductor, the engine man thereof will also be regarded as conductor, and will act accordingly." The Ross Case, as it is commonly known, decided that "a conductor of a railroad train, who has a right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow servant to the engineer and other employes on the train." The argument is a short one: The conductor of a train represents the company, and is not a fellow servant with his subordinates on the train. The rule of the company provides that, when there is no conductor, the engineer shall be regarded as a conductor. Therefore, in such case he represents the company, and is likewise not a fellow servant with his subordinates. But this gives a potency to the rule of the company which it does not possess. The inquiry must always be directed to the real powers and duties of the official, and not simply to the name given to the office. The regulations of a company cannot make the conductor a fellow servant with his subordinates, and thus overrule the law announced in the Ross Case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally, irrespective of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts.

What was the Ross Case, and what was decided therein? The instruction given on the trial in the circuit court, which was made the principal ground of challenge, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employes under the control and direction of another, that then the two are not fellow servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking." The language of that instruction, it will be perceived, is very like that of the one here complained of, and, if this court had approved that instruction as a general rule of law, it might well be said that that was

sufficient authority for sustaining this, and affirming the judgment. But, though the question was fairly before the court, it did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of that case. This is evident from this language, found in the latter part of the opinion, and which is used in summing up the conclusions of the court: "We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism, but its purport touching the liability of the company is that the conductor and engineer, though both employes, were not fellow servants in the sense in which that term is used in the decisions." It is also clear from an examination of the reasoning running through the opinion, for there is nowhere an argument to show that the mere fact that one servant is given control over another destroys the relation of fellow servants. After stating the general rule, that a servant entering into service assumes the ordinary risks of such employment, and, among them, the risk of injuries caused through the negligence of a fellow servant, and after referring to some cases on the general question, and saying that it was unnecessary to lay down any rule which would determine in all cases what is to be deemed a common employment, it turns to that which was recognized as the controlling fact in the case, to wit, the single and absolute control which the conductor has over the management of a train, as a separate branch of the company's business, and says: "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. * * * We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation." And quotes from Wharton's Law of Negligence, (section 232a:) "The true view is that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." And also from Malone v. Hathaway, 64 N. Y. 5, 12: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employes, provide material and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal."

The court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employes of the company acting under him on the same train. The conductor was, in the language of the opinion, "clothed with the control and management of a distinct department;" he was "a superintending officer," as described by Mr. Wharton; he had "the superintendence of a department," as suggested by the New York court of appeals.

And this rule is one frequently recognized. Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little

further, and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the Ross Case, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master. Even the conclusion announced in the Ross Case was not reached by a unanimous court, four of its *384 members being of opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train.

The truth is, the various employes of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters, and not of fellow servants, and only those on the same steps fellow servants, because not subject to any control by one over the other. Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the Ross Case, page 382, 112 U. S., and page 186, 5 Sup. Ct. Rep., it was said: "Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or, in law, is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employe, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this: there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employe with fit and careful co-workers, and the employe has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person, the fact that he has an incompetent, and, therefore, an improper, employe is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to

a coservant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employe is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty? and this, notwithstanding that, after the servant has been employed, it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employes who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow servant, does not of itself prove any omission of care on the part of the master in his employment; and it is only when there is such omission of care that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him the responsibility for such employe's negligence.

Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution.

In the case of Railroad Co. v. Moore, 29 Kan. 632, 644, Mr. Justice Valentine, speaking for the court, thus succinctly summed up the law in these respects: "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and coemployes. And at common law, whenever the master delegates to any officer, servant, agent, or employe, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employe stands in the place of the master, and becomes a substitute for the master, a vice principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has per-

formed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or coemploye of such servant, where the fellow servant or coemploye does not sustain this representative relation to the master."

It would be easy to accumulate authorities on these propositions, for questions of this kind are constantly arising in the courts. It is enough, however, to refer to those in this court. In the cases of Hough v. Railway Co., 100 U. S. 213, and Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590, this court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was immaterial how or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a coemploye, but upon the character of the act itself, and a breach of the positive obligation of the master. In both of them the general doctrine of the master's exemption from liability for injury to one servant through the negligence of a coemploye was recognized, and it was affirmed that the servant assumed all the risks ordinarily incident to his employment. In Railroad Co. v. Fort, 17 Wall. 553, where a boy was injured through dangerous machinery in doing an act which was not within the scope of his duty and employment, though done at the command of his immediate superior, this court, while sustaining the liability of the master, did so on the ground that the risk was not within the contract of service, and that the servant had no reason to believe that he would have to encounter such a danger, and declared that the general rule was that the employe takes upon himself the risks incident to the undertaking, among which were to be counted the negligence *359 of fellow servants in the same employment. In the cases of *Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. Rep. 322, and Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. Rep. 397, the persons whose negligence caused the injury were adjudged to be fellow servants with the parties injured, so as to exempt the master from liability; and while the question in this case was not there presented, yet in neither case were the two servants doing the same work, although it is also true that in each of them there was no control by one over the other. It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employe assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker. That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that, if one drives his carriage negligently against another employe, the master is exempt from liability.

It may further be noticed that in this particular case the injury was not in consequence of the fireman's obeying any orders of his superior officer. It did not result from the mere matter of control. It was through negligence on the part of the engineer in running his engine, and the injury would have been the same if the fireman had had nothing to do on the locomotive, and had not been under the engineer's control. In other words, an employe carelessly manages an engine, and another employe who happens to be near enough is injured by such carelessness. It would seem, therefore, to be the ordinary case of the injury of one employe through the negligence of another.

Again, this was not simply one of the risks assumed by the employe when entering into the employment, and yet not at the moment fully perceived and understood. On the contrary, the peril was known and voluntarily assumed. The plaintiff admits in his testimony that he knew they had no right to the track without orders, and that there was a local train on the road somewhere between them and Bellaire; and yet, with this knowledge, and without protest, he voluntarily rode on the engine with the engineer. Hammond v. Railway Co., 83 Mich. 334, 47 N. W. Rep. 965; Railway Co. v. Leech, 41 Ohio St. 388; Wescott v. Railroad Co., 153 Mass. 460, 27 N. E. Rep. 10.

In the first of these cases the party injured was a section hand, who was injured while riding on a hand car, in company with a fellow laborer and the section foreman, and the negligence claimed was in propelling the hand car along a curved portion of the track, with knowledge of an approaching train, and without sending a lookout ahead to give warning. In respect to this, Mr. Justice Cahill, speaking for the court, says: "But, if this conduct was negligent, it was participated in by Hammond. The latter had been going up and down this section of the road daily for three months. Whatever hazard there was in such a posi-

tion was known to him, and he must be held to have voluntarily assumed it. * * * Where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to, by the person injured, with full knowledge of the peril, the question of the master's liability does not arise."

So, in this case, Baugh equally with the engineer knew the peril, and with this knowledge voluntarily rode with the engineer on the engine. He assumed the risk.

For these reasons we think that the judgment of the circuit court was erroneous, and it must be reversed, and the case remanded for a new trial.

Mr. Chief Justice FULLER, (dissenting.)

I dissent because, in my judgment, this case comes within the rule laid down in Railway Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, and the decision unreasonably enlarges the exemption of the master from liability for injury to one of his servants by the fault of another.

*391 *Mr. Justice FIELD, (dissenting.)

I am unable to concur in the judgment of reversal in this case. I think the judgment of the circuit court is correct in principle, and in accordance with the settled law of Ohio, where the cause of action arose, which, in my opinion, should control the decision.

The plaintiff below, the defendant in error here, is a citizen of the state of Ohio, and the defendant, the Baltimore & Ohio Railroad Company, is a corporation created under the laws of Maryland. The present action was brought by the plaintiff in the court of common pleas of the county of Belmont, in the state of Ohio. The defendant claimed citizenship in Maryland, by virtue of its incorporation in that state, and it petitioned for and obtained a removal of the action to the circuit court of the United States for the southern district of Ohio. The plaintiff was a fireman on a locomotive of the defendant, which, on the 4th of May, 1885, had been employed in assisting a freight train from Bellaire, in Ohio, to the top of the grade, about 20 miles west of that place, when it was detached from the freight train to return to Bellaire. It would seem that by the regulations or usages of the company it was to return in conformity with orders from the train dispatcher, or upon information from him as to the use or freedom of the road, or, in the absence of such orders or information, by following close behind some regular scheduled train which would carry signals to notify trains coming in the opposite direction that the locomotive was following it. It does not appear what special orders or what information, if any, was on this occasion received by the engineer from the train dispatcher, and by his order the locomotive started back without following any scheduled train. He appears to have relied upon his ability to avoid the train possibly coming in the opposite direction by going upon a side track, and waiting until it passed. The result was that the locomotive on its way collided with the regular local passenger train, which was running on its schedule time, and had the right of the road. In the collision the plaintiff below was injured to such an extent that his right arm had to be amputated near the shoulder, and he was rendered unable to use his right leg in walking. To recover damages for the injuries sustained he brought the present action against the railroad company, and the question presented is whether the company was liable for the injuries. He obtained a verdict for $6,750, for which, and costs, judgment was entered in his favor.

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The locomotive, with the tender attached to it, was called a "helper," because it was used in helping trains up the grade from Bellaire. After it was detached from the train helped, it passed under the direction of the engineer, who was from that time its conductor by appointment under the regular rules of the company. The ninth rule provides that "trains are run under the charge of the conductors thereof, and their directions relative to the management of trains will be observed, except in cases where such directions may be in violation of the rules of this company or of safety, in which cases engineers will call the attention of the conductors to the facts as understood by them, and decline compliance; conductors and engine men being in such cases held equally responsible." And the tenth rule provides that, "whenever a train or engine is run without a conductor, the engine man [that is, the engineer] thereof will also be regarded as conductor, and will act accordingly." The engineer was thus invested from that time with the powers and duties of a conductor. He could then control the movements of the locomotive, and, in the absence of special orders, direct when it should start on its return to Bellaire, the places at which it should stop, and the speed with which it should proceed. The position that the company could not alter its relations to the engineer and those under his direction by such appointment does not rest upon any tenable ground. There certainly is no substantial reason why the company may not at any time constitute one of its employes a conductor of an engine or train. It is a matter resting in its discretion to appoint a conductor or to remove him from that position at any time. The duties and liabilities of the officer and his relations to the company depend upon the nature of the office which he at the time holds, not upon his duties and relations in a previously existing employment. If the corporation, acting by its directors, either by special designation or by established rule, appoint a person as conductor, generally or for a limited time, he takes the duties and incurs the responsibilities of the appointment from that

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date. The person previously a subordinate or coemploye becomes thereby the superior of the fellow laborer in his powers, and changed in his relations to the company. To say that he continues in his previous subordination and relationship to the company would be like stating that a common soldier taken from the ranks and put in command of a company or regiment of which he was a member still retains his subordinate relations to his former fellow soldiers and to the commander in chief. To hold that an engineer in the position placed by the rule of the company did not become a conductor in fact is refusing to give effect to the express terms of the rule. It is declaring that he shall not be what the established rule of the company declares he shall be. I do not think that this position can be maintained.

A conductor of a train or engine is, by the very nature of the office, its manager and director in the particular service in which it is employed within the general regulations of the company. He directs, subject to such general regulations, when the train or engine shall start, at what speed it shall travel, what special route it shall take within the designated limits of the company, and, when necessary, may designate who shall be employed under him. In the case before us he represented the company in all these respects; otherwise the company was without a representative on the helper, which will not be contended. In its management, he, as conductor, stood in the place of the company, and, if any one was injured by his negligence in the discharge of his duties, the company was responsible.

The court below instructed the jury in substance as follows: That the law assumes that where a person enters into any employment he takes the risks incident to that employment so far as they may result from the nature of the employment itself, or from the negligence or default of his fellow servants,—that is, of those who are not placed in authority and control over him,—but who occupy substantially the same relation to * 310 the company as he does; but that, if an injury results to an employe from the negligence or carelessness on the part of one placed in authority over the employes of the company so as to direct and control them, the company is liable; that, therefore, if the engineer and the fireman were fellow servants, as thus described, the plaintiff could not recover; but that if the engineer was the agent or representative of the company, and the fireman acted under his direction and was subject to his orders, and the injury resulted from the default or negligence or wrong of the engineer, then it must be attributed to the company as the negligence, default, or wrong of the company.

In thus instructing the jury the court followed the law as settled by the decisions of the supreme court of Ohio,—in which state the cause of action arose and the case was tried,—that the company was liable if the negligence was by one acting in the character of its representative or agent in directing and controlling the movements of the locomotive, and the party injured was subject to his orders. Any other ruling would have been at variance with those decisions. The law of Ohio on the matter under consideration was the law to control. The courts of the United States cannot disregard the decisions of the state courts in matters which are subjects of state regulation. The relations of employes, subordinate to the directors of the company, but supervising and directing the labors of others under them, to their principals, and the liability of the principals for the negligent acts of their subordinate supervising and directing agents, are matters of legislative control, and are in no sense under the supervision or direction of the judges or courts of the United States. There is no unwritten general or common law of the United States on the subject. Indeed, there is no unwritten general or common law of the United States on any subject. See 1 Tuck. Bl. Comm. Append. 422, 433. The common law may control the construction of terms and language used in the constitution and statutes of the United States, but creates no separate and independent law for them. The federal government is composed of independent states, "each of which," as said in Wheaton v. Peters, 8 Pet. 591, 658, "may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the state in which the controversy originated." And there are few subjects upon which there is such diversity of opinion and conflict of decision, not merely between the courts and judges of the different states, but between the judges of the federal courts, as the liability of employers for the negligent acts of their subordinate agents, having control and direction of servants in a common employment under them. Even as to what shall be deemed a common employment, Mr. Beach, a leading writer on contributory negligence, states that there are many "hundreds of clearly irreconcilable decisions." Conceding that a federal court, sitting within a state where the law relating to the subject under consideration is unsettled and doubtful, must exercise an independent judgment and declare the law upon the best light it can obtain, this rule has no application where the law of the state is neither unsettled nor doubtful, but is established and certain, and recognized as such by its judicial authorities. While, as

we have indicated, there is no general or common law throughout the country—that is, of the United States—as to the extent and limits of the liability of a corporation to its employes in the case of a common employment under a supervising and directing agent, in Ohio the law on the subject is neither uncertain nor doubtful; it has been settled there for many years. In Railroad Co. v. Stevens, 20 Ohio, 415, it was held by the supreme court of that state, over 40 years ago, that where an employer placed one in his employ under the direction of another, also in his employ, such employer was liable for injury to the person placed in a subordinate situation by the negligence of his superior; and that decision has been adhered to ever since. There a railroad company had placed an engineer in its employ under the control of a conductor of one of its trains, who directed *when the cars were to start and when to stop, and it was held liable for an injury received by him caused by the negligence of the conductor. A collision had occurred by reason of the omission of the conductor to inform the engineer of a change of place ordered in the passing of trains. The company claimed the exemption from liability on the ground that the engineer and conductor were fellow servants, and that the engineer had assumed by his contract the risk of the negligence of the conductor, and also that public policy forbade a recovery in such cases; but the court rejected both positions. In Railway Co. v. Keary, 3 Ohio St. 201, the same court affirmed the doctrine thus declared, and held that where a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible, holding that the conductor was the representative of the company upon which rested the obligation to manage the train with skill and care. In its opinion the court said no service was common that did not admit a common participation, and no servants were fellow servants when one was placed in control over the other. In Stone Co. v. Kraft, 31 Ohio St. 287, decided in 1877, that court held that a master was liable for an injury to a servant resulting from the negligence of a superior servant. There the corporation was organized to quarry and manufacture stone, and, while in the employment of the company and engaged in loading stone on its cars, one of the employes received an injury through the carelessness and negligence of an agent and servant of the company in the selection and use of unsafe and dangerous implements and machinery for the purpose of loading the stone upon the cars for transportation. The unsafe and defective machinery was selected by the foreman of the quarry. It was contended that the foreman and the laborers under him were fellow servants, but the court held that the foreman, occupying substantially the relation of principal, was in no just or proper sense a fellow servant, nor in what might be properly denominated a common service, and said: "The relation existing between them was such as *brings the case clearly within the rule established by repeated adjudications of this court and now firmly settled in the jurisprudence of the state,—that where one servant is placed by his employer in a position of subordination to and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury." It will be observed that the court states in this opinion that the rule of liability was then firmly settled in the jurisprudence of the state. If any rule of law can be considered as settled by judicial decisions, that rule is settled as the law of Ohio. The question is not whether that is the best law for Ohio, but whether it is the law of that state. It will be time to consider of its change or improvement when that matter is submitted to us, which is not yet. If the law were expressed in a statute, no federal court would presume to question its efficacy and binding force. The law of the state on many subjects is found only in the decisions of its courts, and when ascertained and relating to a subject within the authority of the state to regulate, it is equally operative as if embodied in a statute, and must be regarded and followed by the federal courts in determining causes of action affected by it arising within the state. Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. Rep. 974; Detroit v. Osborne, 135 U. S. 492, 497, 10 Sup. Ct. Rep. 1012. For those courts to disregard the law of the state as thus expressed upon any theory that there is a general law of the country on the subject at variance with it, in cases where the causes of action have arisen in the state, and which, if tried in the state courts, would be governed by it, would be nothing less than an attempt to control the state in a matter in which the state is not amenable to federal authority by the opinions of individual federal judges at the time as to what the general law ought to be,—a jurisdiction which they never possessed, and which, in my judgment, should never be conceded to them. That doctrine would inevitably lead to a subversion of the just authority of the state in many matters of public concern. It would also be in direct conflict with section 721 of the Revised Statutes, which declares that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This provision is a re-enactment of section 34 of the original

judiciary act. 1 Stat. 92. Under the term "laws," as here mentioned, are included not merely those rules and regulations having the force of law which are expressed in the statutes of the states, but also those which are expressed in the decisions of their judicial tribunals. The latter are far more numerous, and touch much more widely the interests and rights of the citizens of a state in their varied relations to each other and to society in the acquisition, enjoyment, and transmission of property, and the enforcement of rights and redress of wrongs. The term "laws" in the constitution and the statutes of the United States is not limited solely to legislative enactments unless so declared or indicated by the context. When the fourteenth amendment ordains that no state shall deny to any person within its jurisdiction "the equal protection of the laws," it means equal protection not merely by the statutory enactments of the state, but equal protection by all the rules and regulations which, having the force of law, govern the intercourse of its citizens with each other and their relations to the public, and find expression in the usages and customs of its people and in the decisions of its tribunals. The guaranty of this great amendment, "as to the equal protection of the laws," would be shorn of half of its efficacy if it were limited in its application only to written laws of the several states, and afforded no protection against an unequal administration of their unwritten laws. It has never been denied, that I am aware of, that decisions of the regular judicial tribunals of a state, especially when concurring for a succession of years, are, at least, evidence of what the law of the state is on the points adjudged. The law, being thus shown, is as obligatory upon those points in another similar case, arising in the state, as if expressed in the most formal statutory enactments. If this is not so, I may ask, in anticipation of what I may say hereafter, what becomes of the judicial independence of the states?

*399 *The doctrine that the application of the so-called general and unwritten law of the country to control a state law, as expressed by its courts, in conflict with it, has the sanction of congress by its supposed knowledge of the decisions of this court to that effect, and its subsequent silence respecting them, does not strike me as having any persuasive force. The silence of congress against judicial encroachments upon the authority of the states cannot be held to estop them from asserting the sovereign rights reserved to them by the tenth amendment of the constitution. Such silence can neither augment the powers of the general government nor impair those of the states. Silence by one or both will not change the constitution and convert the national government from one of delegated and limited powers, or dwarf the states into subservient dependencies. Acquiescence in or silence under unauthorized power can never give legality to its exercise under our form of government.

Marshall, when a member of the Virginia convention called to consider the question of the adoption of the constitution of the United States, in answer to an inquiry as to the laws of what state a contract would be determined, answered: "By the laws of the state where the contract was made. According to those laws, and those only, can it be decided." 3 Elliott, Deb. 556.

Judge Tucker, in the appendix to the first volume of his edition of Blackstone, says that the common law has been variously administered or adopted in the several states. Is the federal judicial department to force upon these states views of the common law which their courts and people have repudiated? I cannot assent to the doctrine that there is an atmosphere of general law floating about all the states, not belonging to any of them, and of which the federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law.

The present case presents some singular facts. The verdict and judgment of the court below were in conformity with the law of Ohio, in which state the cause of action arose and the case was tried, and this court reverses the judgment because rendered in accordance with that law, and holds it to have been error that it was not rendered according to some other law than that of Ohio, which it terms the general law of the country. This court thus assumes the right to disregard what the judicial authorities of that state declare to be its law, and to enforce upon the state some other conclusion as law which it has never accepted as such, but always repudiated. The fireman, who was so dreadfully injured by the collision caused by the negligence of the conductor of the engine that his right arm had to be amputated from the shoulder and his right leg was rendered useless, could obtain some remedy from the company by the law of Ohio as declared by its courts, but this court decides, in effect, that that law, thus declared, shall not be treated as its law, and that the case shall be governed by some other law which denies all remedy to him. Had the case remained in the state court, where the action was commenced, the plaintiff would have had the benefit of the law of Ohio. The defendant asked to have the action removed, and obtained the removal to a federal court because it is a corporation of Maryland, and thereby a citizen of that state by a fiction adopted by this court that members of a corporation are presumed to be citizens of the state where the corporation was created, a presumption which, in many cases, is contrary to the fact, but against which no averment or evidence is

held admissible for the purpose of defeating the jurisdiction of a federal court. Railroad Co. v. Letson, 2 How. 497; Cowless v. Mercer Co., 7 Wall. 121; Paul v. Virginia, 8 Wall. 168–178; Steamship Co. v. Tugman, 106 U. S. 120, 1 Sup. Ct. Rep. 58. Thus in this case a foreign corporation not a citizen of the state of Ohio, where the cause of action arose, is considered a citizen of another state by a fiction, and then, by what the court terms the general law of the country, but which this court held in Wheaton v. Peters has no existence in fact, is given an immunity from liability in cases not accorded to a citizen of that state under like circumstances. Many will doubt the wisdom *401 of a system which permits such a vast difference in the administration of justice for injuries like those in this case between the courts of the state and the courts of the United States.

I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence. As said by this court, speaking through Mr. Justice Nelson, "the general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states." Collector v. Day, 11 Wall. 113, 124.

*To this autonomy and independence of the *402 states their legislation must be as free from coercion as if they were separated entirely from connection with the Union. There must also be the like freedom from coercion or supervision in the action of their judicial authorities. Upon all matters of cognizance by the states, over which power is not granted to the general government, the judiciary must be as free in its action as the courts of the United States are independent of the state courts in matters subject to federal cognizance. "Such being the separate and independent condition of the states in our complex system, as recognized by the constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow," as said by the court in the case cited, "as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned them in the constitution, should be left free and impaired, should not be liable to be crippled, much less defeated, by the taxing power of another government," to which we may add, nor by the supervision and action of another government in any form. "We have said," continues the court in the same case, "that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen states were in possession of this power, and had exercised it at the adoption of the constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states."

Such being the nature of the judicial department, and the free exercise of its powers *403 being essential to the independence of the states, how can it be said that its decisions as to the law of the state, upon a matter subject to its cognizance, can be ignored and set aside by the courts of the United States for the law or supposed law of another state or sovereignty, be it the general or special law of that state or sovereignty? If a federal court exercise its duties within one of the states where the law on the subject under consideration is uncertain and unsettled, "where," as Chief Justice Marshall said, "the state courts afford no light," it must, as we have already stated, exercise an independent judgment

thereon, and pronounce such judgment as it deems just. But no foreign law, or law out of the state, whether general or special, or any conception of the court as to what the law ought to be, has any place for consideration where the law of the state in which the action is pending is settled and certain. A law of the state of that character, whether expressed in the form of a statute or in the decisions of the judicial department of the government, cannot be disregarded and overruled, and another law, or notion of what the law should be, substituted in its place, without a manifest usurpation by the federal authorities. I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will in the end "die among its worshipers."

The independence of the states, legislative and judicial, on all matters within their cognizance is as essential to the existence and harmonious workings of our federal system as is the legislative and judicial supremacy of the federal government in all matters of national concern. Nothing can be more disturbing and irritating to the states than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented, and which has no existence except in the brain of the federal judges in their conceptions of what the law of the states should be on the subjects considered.

*404 The theory upon which inferior courts of the United States take jurisdiction within the several states is, when a right is not claimed under the constitution, laws, or treaties of the United States, that they are bound to enforce, as between the parties, the law of the state. It was never supposed that, upon matters arising within the states, any law other than that of the state would be enforced, or that any attempt would be made to enforce any other law. It was never supposed that the law of the state would be enforced differently by the federal courts sitting in the state, and the state courts; that there could be one law when a suitor went into the state courts and another law when the suitor went into the federal courts, in relation to a cause of action arising within the state,—a result which must necessarily follow if the law of the state can be disregarded upon any view which the federal judge may take of what the law of the state ought to be rather than what it is.

As said by the supreme court of Pennsylvania at an early day,—as far back as 1798,—"the government of the United States forms a part of the government of each state." Respublica v. Cobbet, 3 Dall. 473. To which the same court, over a half century later, added: "It follows that its courts are the courts of each state; they administer justice according to the laws of the state as construed and settled by its own supreme tribunal. This has been more than once solemnly determined by the supreme court of the Union to be the rule of their decision, whenever the construction of the constitution of the United States, treaties, or acts of congress does not come in question." Com. v. Pittsburg & C. R. Co., 58 Pa. St. 44.

In Shelby v. Guy, 11 Wheat. 362, 365, this court, in considering the meaning to be given to the words "beyond the seas," in a statute of limitations of Tennessee, said: "That the statute laws of the states must furnish the rule of decision to this court so far as they comport with the constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies, as, where states have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us to administer, as between certain individuals, the laws of the respective states, according to the best lights we possess of what those laws are."

In Beauregard v. New Orleans, 18 How. 497, 502, which was before us in 1855, this court, in speaking through Mr. Justice Campbell, said: "The constitution of this court requires it to follow the laws of the several states as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title of lands. No other course could be adopted with any regard to propriety. Upon cases like the present the relation of the courts of the United States to a state is the same as that of its own tribunals. They administer the laws of the state, and to fulfill that duty they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this the peculiar organization of the judicial tribunals of the states and the Union would be productive of the greatest mischief and confusion."

The position that the plaintiff, the fireman, voluntarily assumed the risk in this case, because he knew the helper had no right to the track without orders, and there was possibly a local train somewhere on the track, by continuing on the train instead of leaving it, does not strike me as having much force. It was not considered of suffi-

cient importance to be called to the attention of the court below, or of the jury. Its suggestion now seems to be an afterthought of counsel. It is not positively shown that any special orders as to the movement of the helper on its return, or any information as to the use or freedom of the road, were received by the engineer from the train dispatcher; but the fireman had no actual knowledge on that point, though he had a right to presume that such was the case, from the fact that immediately upon the receipt of an order given to the conductor, at Burr's Mills, the latter directed that the helper start back. Nor did the fireman have any actual knowledge whether the train he was directed to follow was or was not a regular scheduled train, though he had a right to presume that it was, from the orders of the conductor. His information as to what was known, and consequently directed or omitted, by the engineer on that subject was too imperfect for him to act upon it. His continuance as fireman on the locomotive after its movement to return to Bellaire was not with sufficient knowledge of any failure of the engineer to give the proper orders as to a scheduled train to justify an abandonment of the locomotive. It was under the direction of the engineer, not of the fireman, and he may have felt confident that it could be run on a side track, if necessary, to avoid any possible collision with a train coming in the opposite direction, as was sometimes done. It would be a dangerous notion to put into the heads of firemen and other employes of a railroad company that if they had reason to believe, without positive information on the subject, that dangers attended the course pursued by the movements of the train under the direction of its conductor, they would be deemed to assume the risk of such movements if they did not expostulate with him, and, if he did not heed the expostulation, leave the train, even after it had commenced one of its regular trips. A strange set of legal questions would arise, more embarrassing to the courts than the fellow-servant question, if such action should be deemed essential to the retention by the employe of the right to claim indemnity for injuries which might follow from the course pursued. If the employes could abandon a train after it had commenced one of its regular trips when they had reason to believe, without absolute information, that danger might attend their continuance on it, new strikes of employes would spring up to embarrass the commerce of the country and annoy the community, founded upon such alleged apprehensions. The circumstances attending the cases in which an employe has been held to have voluntarily assumed the risks of an irregular, improper, or ill-advised movement of a train, under directions of its conductor, are essentially different from those of the case before us. The testimony in the record, upon which the allegation is made that the fireman voluntarily assumed the risks taken by the engineer with knowledge of their existence, is of the most flimsy and unsatisfactory character conceivable. It only discloses general ignorance by him of what the engineer did, or of information upon which he acted, as will be seen by its perusal. The allegation, which is founded upon a few broken and detached sentences, loses its entire force when the context is read. The whole testimony bearing upon this subject is given in a note at the foot of this dissent.

It only remains to notice the observations made upon the decision in the Ross Case, 112 U. S. 377, 5 Sup. Ct. Rep. 184, which seem to me to greatly narrow its effect and destroy its usefulness as a protection to employes in the service of large corporations, under the direction and control of supervising agents. That was an action brought by a locomotive engineer in the employ of the Chicago, Milwaukee & St. Paul Railroad Company to recover damages for injuries received in a collision which was caused by the negligence of the conductor of the train. The company claimed exemption from liability on the ground that the conductor and engineer were fellow servants; but the court charged the jury that it was clear that if the company saw fit to place one of its employes under the control and direction of another, then the two were not fellow servants engaged in the same common employment, within the meaning of the rule of law which was the subject of consideration, and that by its general order the company made the engineer, in an important sense, subordinate to the conductor. To this charge exceptions were taken. The correctness of the charge was the question discussed in the case by counsel, and determined by the court. Its correctness was necessarily sustained by the judgment of affirmance, which could not have been rendered if the exceptions to it were well taken. The majority of the court in their opinion, while admitting that the charge is much like the one in the present case, and might be well said to be sufficient authority for sustaining and affirming the judgment, contend that the court did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of the case, and in support of this view cite the language of the court used to show that the conductor of a railway company, exercising certain authority, represents the company, and, therefore, for injuries resulting from his negligent acts the company was responsible, and the statement that the case required no further decision. Clearly, it did not require any further decision, for it covers the instruction objected to, that if the company saw fit to place one of its employes under the control and direction of another, then

the two were not fellow servants engaged in the same employment within the meaning of the rule of law as to fellow servants. *410 A conductor of a railway company, directing the movements of its train, and having its general management, illustrates the general doctrine asserted and sought to be maintained throughout the opinion in the Ross Case, that railroad companies in their operations, extending in some instances hundreds and even thousands of miles, and passing through different states, must necessarily act through superintending agents,—employes subordinate to the company, but superior to the employes placed under their direction and control. The necessity of this doctrine of subordinate agencies standing for and representing the company was well illustrated in the duties and powers of a conductor of a train or engine. They were stated as an illustration of the necessity and wisdom of the rule, and not to weaken or narrow the general doctrine asserted in the decision of the court, and which its opinion, in almost every line, attempted to maintain. The necessity of subordinate agencies exists whenever a train or engine is removed from the immediate presence and direction of the head officers of the company.

The opinion of the majority not only limits and narrows the doctrine of the Ross Case, but, in effect, denies, even with the limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employe of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a co-worker, and that there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service.

A conclusion is thus reached that the company is not responsible in the present case for injuries received by the fireman from the negligent acts of the conductor of the engine.

There is a marked distinction in the decisions of different courts upon the extent of liability of a corporation for injuries to its servants from persons in their employ. One course of decisions would exempt the corporation from all responsibility for the negligence of its employes, of every grade, whether exercising supervising authority and *411 control over other employes of the company or otherwise. Another course of decisions would hold a corporation responsible for all negligent acts of its agents, subordinate to itself, when exercising authority and supervision over other employes. The latter course of decisions seems to me most in accordance with justice and humanity to the servants of a corporation.

I regret that the tendency of the decision of the majority of the court in this case is in favor of the largest exemptions of corporations from liability. The principle in the Ross Case covers this case, and requires, in my opinion, a judgment of affirmance.

* NOTE. The detached and broken sentences upon which the allegation is made that the plaintiff voluntarily assumed the risk in the case, are printed in italics in the passage from the record in which they are given below with their context:

As to orders received on the morning the train started back to Bellaire:

Record, p. 40. "Question. Now, Mr. Baugh, do you know of any order that was received that morning by your train? Answer. Yes, sir.

"Q. What do you know of? A. All I know is an order thrown off while we were at Burr's Mills, and I gave it to the engineer, and he told me to let him out; that we would go.

"Q. What was that order? A. I don't know.

"Q. Do you know what it was? A. No, sir.

"Q. What happened immediately after you gave your engineer that order? A. He told me to let him out.

"Q. What did happen immediately after you gave that order to the engineer? A. He started to go.

"Q. Who opened the switch? A. I did it.

"Q. What did you do then? A. Shut the switch and got on the engine."

* * * * * * * * *

Record, p. 41. "Q. Do you know what time it was when you started out of the switch at Burr's? A. No, sir.

"Q. Did you know then what time of day it was? A. No, sir.

"Q. Did you pay any attention to that at all? A. No; I did not. It was not my business to pay attention.

"Q. Well, I was going to ask you was that any part of your duty? A. No, sir.

"Q. Whose direction were you under? A. Under my engineer's.

"Q. Did you receive any orders as you went west that morning at Lewis' Mills? A. I don't know.

"Q. On your helper, who received the orders? A. The engineer did. He received all the orders."

Record, p. 47. "Q. Now, Mr. Baugh, when you got up to Burr's Mills, to that turntable, just explain to the jury the process by which that engine would get back to Bellaire? A. We had all the trains on the road to contend with, and we had to run inside tracks when coming down to keep out of the way of them.

"Q. When did you first learn the fact that you had to keep out of the way,—out of the way of what trains? A. All the trains that was expected.

"Q. The schedule trains, would it not be? A. I reckon.

"Q. *What was the process,—what right had you to go back after you got to Burr's Mills on the turntable? You had no right to the track at all unless you had orders, had you?* A. *No, sir, didn't have no right without orders.*

"Q. And you proposed to get a right to the track by writing an order which you have said you did write? A. I was going to flag on the engine. I did not want to run them on my orders.

"Q. You had been running the length of time, whatever it was; you knew the time of this local train out of Bellaire? A. No, sir.

"Q. You were in the habit of meeting it? A. I did not know what time they left.

"Q. You knew where you met them always? A. No, sir; we would not meet them perhaps once in a month. We would not meet them once a month sometimes.

"Q. You knew the time of the local train? A. No, sir.

"Q. You knew there was a local train on

the road running out of Bellaire in the morning? Yes, sir.

"Q. You knew when you were running,—knew where you met them? A. I did not know anything about it that time.

"Q. Is it not a part of your duty to learn these things? I want to know if you did not know that there was a local train and has been for the last ten years running out of Bellaire about the same time,—about the same hour and the same minute. A. No, indeed; I did not.

"Q. And you were at work at—in the shops and yard, and did not know anything about it? A. No, sir; I did not.

"Q. You entirely overlooked that fact? No answer."

* * * * * * * * *

Record, p. 49. "Q. *Did you know that there was a local train coming out about that time?* A. I knew there was a local train on the road some place.

"Q. Between you and Bellaire? A. Yes, sir.

"Q. I wish you would explain to the jury what you mean by flagging. You say your intention was to flag down to Bellaire. How is that done? A. We make out an order and give it to the engineer on the train we want to follow; sign the engineer's name; and I went with this flag on the train, and our engine followed behind until we met another train, and then we would side track there and pass.

"Q. That is, you would keep far enough ahead so that if you met a train you would signal it and stop the train? A. I would go right on the train that had the right of way of the track, and our engine followed after."

(149 U. S. 605)

EVANS v. STETTNISCH et al.

(May 10, 1893.)

No. 279.

APPEAL—RECORD—AFFIDAVITS ON MOTIONS—REVIEW.

1. An affidavit filed for use on a motion in the trial court is not a part of the record, and can only become such by incorporation in a bill of exceptions.

2. An affidavit of an attorney filed in the trial court, that neither he nor his client, who was a party, had notice or opportunity to be present at the trial, is not sufficient on appeal to overcome the recital in the journal entry that the parties came "by their attorneys;" especially when the verity of the entry has been sustained by the judge of the trial court, who may be presumed to have personal knowledge; and when it appears that the complaining party had two attorneys, one of whom may have been present.

In error to the circuit court of the United States for the district of Nebraska. Affirmed.

Statement by Mr. Justice BREWER:

The facts in this case are these: On November 10, 1884, plaintiff, now plaintiff in error, filed in the circuit court of the United States for the district of Nebraska an "amended and reformed petition." Nothing seems to have been done thereafter until 1887, when at the May term, and on the 2d day of May, the case was "ordered continued." On August 18, 1887, the record recites:

"On motion of defendants, leave is granted by the court to answer herein in ten days. Plaintiff is ruled to reply in twenty days, and it is ordered by the court that the continuance heretofore entered herein be, and the same is hereby, set aside, and this cause stand for trial at the adjourned term of this court."

An answer was filed on August 20, 1887, and a reply on the 22d of September. On the 4th day of November appears an entry of a trial, with a verdict for the defendants, and judgment thereon. This entry opens with this recital: "Now come the parties herein, by their attorneys; and also come the following named persons as jurors, to wit." On November 12th, the plaintiff filed a motion to set aside the judgment, and for a new trial, on the ground that after the case had been continued the order of continuance had been vacated in the absence of his counsel, and without notice; and because he had no notice or information that the cause stood for trial at that term, and had thus been prevented from presenting his evidence to the jury. In support of this motion the affidavit of one of plaintiff's counsel was filed, which, after stating the fact of the continuance, and the order setting it aside, continued as follows:

"Said order was so obtained during the absence of plaintiff's counsel and without notice to plaintiff or to affiant that application would be made to the court for the vacation of said order of continuance, and no notice or information whatever was served upon or communicated to said plaintiff that said cause stood for trial at this term, until on the 11th day of November, 1887, and after judgment had been entered therein."

The motion having been overruled, plaintiff sued out a writ of error from this court.

John S. Gregory, for plaintiff in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The record of the trial shows that the parties appeared by their attorneys; discloses no application for a postponement, no objection to proceeding at the time, and no error in the course of the trial. As against this, there is an affidavit, which, as certified by the clerk, is among the files in the case. For several reasons this is insufficient.

In the first place, only errors apparent on the record can be considered; and an affidavit filed for use on a motion is not part of the record, any more than the deposition of a witness used on the trial, and only becomes a part of the record by being incorporated in a bill of exceptions. Stewart v. Ranche Co., 128 U. S. 383, 9 Sup. Ct. Rep. 101; Backus v. Clark, 1 Kan. 303; Altschiel v. Smith, 9 Kan. 90; Jenks v. School Dist., 18 Kan. 356; Tiffin v. Forrester, 8 Mo. 642; McDonald v. Arnout, 14 Ill. 58; Smith v. Wilson, 26 Ill. 186.

In the second place, there is nothing to show that this was the only affidavit. The certificate of the clerk is simply "that the foregoing folios, from 1 to 13, contain true

and faithful transcripts from the records and files of said court in the case of Moses Evans v. Anna Stettnisch et al." This certificate may be true, and yet a dozen affidavits contradicting the statements in this have been filed and used on the motion.

In the third place, if it were affirmatively shown that there was only the one affidavit, that is not sufficient to overthrow the recital in the record. The record imports absolute verity; an affidavit of a witness does not; and when the court, which, in addition, may be supposed to have personal knowledge of the fact, sustains the recital in the record as against the statement in the affidavit, its ruling cannot on review be adjudged erroneous.

In the fourth place, the statements in the affidavit are not necessarily a denial of the truth of the recital in the journal entry of the trial. The plaintiff was represented, as shown by the pleadings, by two counsel. This affidavit is by one only, and it is that no notice was given to plaintiff or affiant. The other counsel may have had notice and appeared, and consented to everything that was done. If so, plaintiff has no semblance of a cause for complaint. The judgment is affirmed.

(149 U. S. 586)

HOLLENDER et al. v. MAGONE, Collector.

(May 10, 1893.)

No. 172.

CUSTOMS DUTIES—ALLOWANCES—DAMAGE TO BEER—"LIQUORS"—SCHEDULE TITLES—EVIDENCE—PRESUMPTIONS.

1. The word "liquors," as used in the proviso of Schedule H of the tariff act of March 3, 1883, (22 Stat. 505,) prohibiting any allowance for breakage, leakage, or damage in respect to "wines, liquors, cordials, or distilled spirits," is simply a misspelling of the word "liqueurs," and does not include beer. 38 Fed. Rep. 912, reversed.

2. In the tariff act of March 3, 1883, (22 Stat. 505,) the titles prefixed to the several schedules were intended merely as general suggestions as to the character of the articles included therein, and not as technically accurate definitions of them.

3. In reviewing a judgment, entered in a suit against the collector of customs by an importer to recover allowances, under Rev. St. § 2927, for damage to certain beer, where it is objected that there was no evidence that the beer was sound when purchased, the court will apply the doctrine that a sound price implies a sound article; and it appearing that 17.70 cents per gallon was paid for the beer in Germany, and that here most of it was thrown in the streets as worthless, and a little sold for 3 cents per gallon, the court will assume that the article was sound when purchased.

In error to the circuit court of the United States for the southern district of New York. Reversed.

Statement by Mr. Justice BREWER:

The facts in this case are these: On October 19, 1886, the plaintiffs imported and entered at New York 226 casks, aggregating 2,861 gallons, of beer, on which the defendant, as collector of the port, exacted duty at 20 cents a gallon. This was paid by the plaintiffs under protest, they insisting that the beer had become sour and worthless on the voyage of importation. They applied, on October 26th, for a rebate on account and to the extent of this damage, under Rev. St. § 2927, which is as follows:

"Sec. 2927. In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty, either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged; and the rate of percentage of damage, so ascertained and certified, shall be deducted from the original amount, subject to a duty ad valorem, or from the actual or original number, weight, or measure, on which specific duties would have been computed."

But this application was refused on the ground that such an allowance was prohibited by a proviso in Schedule H, act of March 3, 1883, (22 Stat. 505,) which says: "There shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits." Thereafter this suit was brought, and on the trial thereof the court instructed the jury to find for the defendant. 38 Fed. Rep. 912. Judgment having been entered on such verdict, plaintiffs sued out a writ of error from this court.

E. B. Smith, for plaintiffs in error. Asst. Atty. Gen. Maury, for defendant in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The principal question in this case is whether beer is within the term "liquors," as found in the proviso quoted. The arguments in favor of such a conclusion are these: First. The word "liquors" is properly and often used in a generic sense, as including all intoxicating beverages, and it ought therefore to be construed as having that general meaning in this clause; for, if congress had intended only a certain kind of liquor, it would have coupled some word of limitation with it. Second. Schedule H, in which is found this proviso, and which in its various paragraphs specifically mentions different kinds of liquors, and among them beer, is entitled "Liquors;" and the schedule being thus, as it were, introduced by this term, used obviously in its generic sense, it must be presumed that wherever the word is found within the schedule it is also used in the same sense. Third. Unless "liquors" is given a meaning broad enough to include beer, it is superfluous, for "wines, cordials, and distilled spirits" are ample to cover all intoxicating beverages other than malt liquors, such as ale and beer. Granting that there is force in these arguments, we are constrained to hold that they are not so persuasive and convincing as those tending to show that the word is here used

in a narrower sense, and so as to exclude beer.

In the first place, the word "liquors" is frequently, if not generally, used to define spirits or distilled beverages, in contradistinction to those that are fermented. Thus, in the Century Dictionary, one of its definitions is: "An intoxicating beverage, especially a spirituous or distilled drink, as distinguished from fermented beverages, as wine and beer." See, also, State v. Brittain, 89 N. C. 574, 576, in which case the court said: "The proof was that the defendant sold liquors, and it must be taken that he sold spirituous liquors. Most generally the term 'liquors' implies spirituous liquors." The context indicates that it is here used in this narrower sense. The proviso names wines, liquors, cordials, and distilled spirits. If "liquors" is here used in its generic sense, the other terms are superfluous. That they are present emphasizes the fact that the word is not so used.

Again, in one paragraph in this section we find this combination: "Cordials, liquors, arrack, absynthe, kirschenwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits." Obviously the word "liquors" here means liqueurs, that being the name of the kind of drinks of the same general nature as those specially mentioned. This is obvious, not alone because of the rule noscitur a sociis, but by a reference to the language found in prior tariff acts. Thus, in that of 1842 is this language: "On cordials and liqueurs of all kinds, sixty cents per gallon; on arrack, absynthe, kirschenwasser, ratafia, and other similar spirituous beverages, not otherwise specified, sixty cents per gallon." 5 Stat. 560. In 1846 we find this: "Brandy and other spirits distilled from grain or other materials; cordials, absynthe, arrack, curacoa, kirschenwasser, liquers, maraschino, ratafia, and all other spirituous beverages of a similar character." 9 Stat. 44. In 1861 this is the language: "On cordials and liquors of all kinds, fifty cents per gallon; on arrack, absynthe, kirschenwasser, ratafia, and other similar spirituous beverages." 12 Stat. 180. In 1862, the following: "On cordials and liqueurs of all kinds, and
*932 arrack, absynthe, kirschenwasser, ratafia, and *other similar spirituous beverages, not otherwise provided for, twenty-five cents per gallon." Id. 544. While in 1870 this is the description: "On cordials, liqueurs, arrack, absynthe, kirshwasser, vermuth, ratafia, and other similar spirituous beverages, or bitters containing spirits, and not otherwise provided for, two dollars per proof gallon." 16 Stat. 263. And this language, omitting vermuth, was carried into the Revised Statutes. Rev. St. p. 464.

This retrospect of past legislation, as well as the character of the other beverages named in combination, indicates the meaning of the word "liquors" as found in this paragraph of the statute of 1883. It is simply a case of misspelling, and "liqueurs" was intended. The use of the word in one part of the body of the statute in conjunction with the term "cordials" and obviously misspelled, and as obviously meant for "liqueurs," is very persuasive that, when found in another part of this same schedule in like conjunction with the word "cordials," there is another case of misspelling, and "liqueurs" is also there intended.

But, further, the whole arrangement of Schedule H points to the fact that beer was not in the contemplation of congress in this proviso. The schedule is composed of 11 separate paragraphs. The first treats of champagnes, and all other sparkling wines, and names the duty thereon. The second provides for duties on still wines, and them alone. In that paragraph are two provisos: First, "Provided, that any wines imported, containing more than twenty-four per centum of alcohol, shall be forfeited to the United States;" and, second, the proviso in question. The third names vermuth alone. The fourth requires that "wines, brandy, and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package," and provides for an additional duty on each bottle. The fifth imposes a duty on "brandy and other spirits manufactured or distilled from grain or other materials, and not specially enumerated or provided for in this act," and declares the standard for determining the proof of brandy and other
*933 spirits or liquors; the sixth, on all com-
pounds or preparations of which distilled
*spirits are a component part of chief value, not specially enumerated, etc. The seventh is that heretofore mentioned in reference to cordials, liquors, etc. The eighth provides that no lower rate of duty shall be collected or paid on brandy, spirits, and other spirituous beverages than that fixed by law for the description of first proof, but it shall be increased, etc. The ninth imposes a duty on bay rum or bay water, whether distilled or compounded; the tenth, on ale, porter, and beer; and the eleventh, on ginger ale or ginger beer.

The facts that ginger ale and ginger beer are not intoxicating, and that bay rum and bay water would scarcely be called "beverages," show that there is little significance to be given to the use of the word "liquors" in the title of this schedule. The multitude of articles upon which duty was imposed by the tariff of 1883 are grouped in that act under 14 schedules, each with a different title, and all that was intended by those titles was a general suggestion as to the character of the articles within the particular schedule, and not any technically accurate definition of them. It evidently seemed to congress unnecessary to create and entitle a separate schedule for the matters named in these last three paragraphs, and they fall more naturally under the descrip-

tive title "liquors" than any other used in the act. This takes away largely the force of any argument that can be drawn from the word in the title.

Again, the proviso is found in the second paragraph. The natural limitation of a proviso is to those things that have been previously mentioned. Before the proviso, there are named only wines,—sparkling and still; so any word of general description used therein would, in the absence of satisfactory reasons to the contrary, be taken to refer to those articles, to wit, wines. But "wines" being used in this proviso, the subsequent terms, "liquors," "cordials," and "distilled spirits," must mean something else. As there are several words of description, apparently beverages of different character were intended by each. If, for instance, in any clause we should find the two terms "wines" and "distilled spirits," we should believe that some different article was intended by each term. So, if we should find the phrase "wines and liquors," or "wines or liquors," is it not a proper inference that some other kind of beverage than wine was intended by the word "liquors?" Obviously, as it seems to us, the word is used here in a special, rather than a general, sense; and, when so used in a special sense, it is almost invariably used to define spirituous, rather than malt, liquors. Seldom is it used alone to define malt liquors, as contradistinguished from those that are spirituous and distilled.

In short, we think it may be laid down, as a general proposition, that, where the term "liquors" is used in a special sense, spirituous and distilled beverages are intended, in contradistinction to fermented ones; that the use of the four words in this proviso, in the order in which they are arranged, and in the place in which the proviso is found in the schedule, indicates that "liquors" is used in a special, rather than in a general, sense; and the conjunction of the words "liquors" and "cordials," as found in another paragraph, and as interpreted by the past history of that particular part of the tariff legislation, shows that "liqueurs" was intended by "liquors" in this clause.

But it is further objected by counsel for the government that there was no proof that the beer was sound when purchased. Generally speaking, it may be said that a sound price implies a sound article. The bill of exceptions shows that "it further appeared from the invoices and the testimony of the liquidating clerk that the cost of this beer in Germany—the place of export—was equivalent to 17.70 cents per gallon in the money of account of the United States." How the invoices read, and what was the testimony given by the liquidating clerk, are not shown. The result only is stated when it said that it appeared that the cost of this beer was 17.70 cents per gallon. As most of the beer, on its arrival in New York, was thrown into the street as worthless, and only a little of it sold, and that at 3 cents per gallon, it may be assumed that that was a sound article for which the much greater price was paid at the place of export. Evidently the testimony in all these respects was considered sufficient; for the circuit judge, as appears from the report in the Federal Reporter, (38 Fed. Rep. 916,) disposed of the case by saying: "As this case turns upon the construction of the term 'liquors' in the proviso of schedule H, paragraph 308, I shall direct a verdict for the defendant."

The judgment will be reversed, and the case remanded for a new trial.

(149 U. S. 539)

LOEBER v. SCHROEDER et al.

(May 10, 1893.)

No. 1,280.

SUPREME COURT — JURISDICTION — FINAL JUDGMENTS — STATE COURTS — FEDERAL QUESTION — PRACTICE.

1. An order overruling a motion to quash an execution is not a final judgment, within the meaning of the federal judiciary acts, and a judgment of the highest court of a state, affirming such an order, is not reviewable in the United States supreme court on writ of error.

2. The court of appeals of Maryland affirmed a judgment which was rendered in favor of plaintiff on a different contract from that set up in his pleadings, holding that as no exceptions were filed below to the evidence proving the contract the court was bound, under the statute, (Code Pub. Gen. Laws, Md. art. 5, § 34,) to consider such evidence, and render judgment without regard to the variance. The court accordingly ordered the issuance of execution. In the court below, defendant moved to quash this writ on the ground—then for the first time urged—that it would deprive him of his property without due process of law, contrary to the provisions of the constitution of the United States. The motion was overruled, and this action was affirmed by the court of appeals, from which a writ of error was taken to the United States supreme court. *Held*, that the attempt to raise a federal question came too late, as it should have been raised in the court of appeals before the rendition of judgment.

3. But no federal question in fact existed, for the statute related merely to a matter of state practice, and was manifestly not in conflict with any provision of the constitution of the United States, or any law of congress, and its proper construction rested with the state courts alone.

In error to the court of appeals of the state of Maryland. Dismissed.

L. P. Hennighausen and M. R. Walter, for the motion. William Colton, opposed.

*Mr. Justice JACKSON delivered the opinion of the court.

This writ of error to the court of appeals of the state of Maryland is brought to review and reverse a judgment of that court affirming an order of circuit court No. 2, of Baltimore city, overruling a motion of the plaintiff in error to quash a writ of fi. fa. issued against him in pursuance of a decree entered in the court of appeals in April, 1892. The defendant in error moves to dismiss the

cause for want of jurisdiction. This motion is based on two grounds, viz.: First, that a writ of error will not lie to an order overruling a motion to quash an execution, because it is not a final judgment or decree, within the meaning of the federal statutes; secondly, that no federal question is involved in the case.

It appears from the record that the defendant in error J. Henry Schroeder, as administrator of Catherine Loeber, deceased, on July 12, 1890, filed his bill of complaint in circuit court No. 2, of Baltimore city, against the plaintiff in error, John Loeber, in which it was alleged that the plaintiff's intestate, in 1882, loaned to her husband the sum of $8,000, being a part of her separate estate, on condition that he should pay said sum of money, on her death, to her children, and that said John Loeber, who was the husband of the intestate, agreed to take said money, upon that condition, as a loan from his wife. The complaint further charged that the defendant, John Loeber, had never repaid said sum of money, and that he denied that the same was a part of the estate of his deceased wife, and prayed for an order of the court directing and requiring that he should bring said money into court, to be invested in the name of his deceased wife's children; that the same might be declared a lien upon property described in the bill, which had been improved with the fund borrowed; and for such further relief as the nature of complainant's case might require.

The defendant answered this bill, and denied that his wife had ever loaned him the amount stated in the bill, or any part thereof, and denied all indebtedness to the wife, or her estate. *He further set up in his answer that the complainant had failed to make proper parties to his bill, and that no case was stated therein of which the court could take jurisdiction.

On the issues thus presented, proofs were taken, and upon hearing of the case, May 21, 1891, circuit court No. 2, of Baltimore city, being of the opinion that the complainant had no interest whatever in the matter controversy, dismissed the bill without prejudice to any proceedings that proper parties might be advised to take. From this decree the complainant prosecuted an appeal to the court of appeals of the state, which, on January 28, 1892, reversed the decree of the circuit court, and entered a decree in favor of the complainant, as administrator of Mrs. Loeber, for $8,000 and costs, which amount said court found, from the testimony, Loeber had received from his wife, and undertook to invest for her benefit in certain houses which belonged to him. 23 Atl. Rep. 579. The court of appeals, while holding that the undertaking to invest the money in certain specified property was a contract within the fourth section of the statute of frauds, and for that reason could not be specifically performed, nevertheless a court of equity ought to give relief by decree for the amount of money which he had received from his wife. A decree was accordingly entered against Loeber for the sum of $8,000. Subsequently, after entry of that decree, Loeber moved the court of appeals for a reargument of the case on the grounds that the bill alleged a loan from Mrs. Loeber to him upon the undertaking and promise to pay the same to her children, but alleged no other contract or undertaking on his part; that the complainant failed to prove the alleged contract, but did prove, in the opinion of the court, another contract, viz. that "John Loeber undertook to invest his wife's money for her benefit in certain houses which belonged to him," and as that contract could not be enforced the court thereupon decreed, because of the statute of frauds, a repayment of the money received by him; and it was claimed that this latter contract, on which this decree was based, was not alleged in the bill, and that the bill stated no case within the jurisdiction of the court below, or of the court of appeals.

*This motion for reargument was overruled, the court of appeals holding that the case was within the jurisdiction of the court below, and that, whatever variance there may have been between the allegations of the bill and the proof in the case, the court of appeals was authorized, under the statutes and decisions of the state, which were specially cited and referred to, to enter a decree according to the testimony, without regard to the special averments of the bill. 24 Atl. Rep. 226. The court of appeals rested its action and decision mainly upon the fifth section of the act of 1832, forming the thirty-fourth section of article 5 of the Code, which provides that "on an appeal from a court of equity no objection to the competency of a witness, or to the admissibility of evidence, or to the sufficiency of the bill or petition, or to any account stated or reported in said cause, shall be made in the court of appeals, unless it shall appear by the record that such objection was made by exceptions filed in the court from which said appeal shall have been taken." The testimony in the case was not excepted to, and the appellate court, in its construction of this provision of the Code, held that it was bound to give effect to the testimony, the court saying: "It is no matter whether the averments of the bill cover the case proved in evidence or not. We are obliged to decree according to the matters established by the proofs. The statute [quoted] has been frequently construed, and the practice under it is well established." After citing various authorities construing said section, the court proceeds: "It is therefore very clear that it was our duty to consider the evidence, and make such a decree as it required, without regard to the averments of the bill." The court further held that the administrator succeeded to the right of ac-

tion on personal contracts made with his intestate, and had the right to sue upon the one in question before circuit court No. 2, of Baltimore city.

The court of appeals, having denied, for these reasons, a rehearing, on April 28, 1892, issued its order for a fieri facias against Loeber for the amount decreed, returnable to circuit court No. 2. On April 29, 1892, Loeber entered a motion before said circuit *594 court to quash this writ, for the following reasons: Because the decree on which the writ issued and the writ were void, because said writ would deprive the defendant of his property without due process of law, and because it was issued in violation of the constitution of the United States, and amendments thereto; because section 34 of article 5 of the Code of Public General Laws, in so far as it requires the court of appeals to make their decision on the evidence, without regard to the bill, or averments of the complaint, was contrary to the constitution of the United States, and amendments thereto, and laws passed in pursuance thereof, and was therefore void.

The circuit court No. 2, on May 21, 1892, dismissed this motion, and the petition of the defendant to quash the writ of fieri facias. From this order of dismissal, Loeber prosecuted an appeal to the court of appeals, which in November, 1892, affirmed the order of the circuit court, holding that section 34 of article 5 of the Code of Public General Laws, under and by virtue of which the court of appeals had made a decision on the evidence in the case, and had awarded the writ of fi. fa., was not in conflict with the constitution or laws of the United States. 25 Atl. Rep. 340. From the judgment of the court of appeals affirming the order of the lower court, Loeber has prosecuted the present writ of error, and assigned, substantially, as the grounds thereof, that section 33 of article 5 of the Code of Public General Laws of the State of Maryland is repugnant to the fourteenth amendment of the constitution of the United States, which declares that no state shall deprive any person of his property without due process of law; and, secondly, because said section 34, art. 5 of the Code of Public General Laws, is repugnant to the fourteenth amendment of the constitution, which declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

It is well settled that a writ of error will not lie except to review a final judgment or decree of the highest court of the state, and that it will not lie to an order overruling a motion to quash an execution, because a *595 decision upon the rule or motion is not such a final judgment or decree in any suit as is contemplated by the judiciary acts of the general government. Refusal to quash a writ is not a final judgment. Boyle v. Zacharie, 6 Pet. 657; McCargo v. Chapman, 20 How. 556; Early v. Rogers, 16 How. 599; Amis v. Smith, 16 Pet. 314; Evans v. Gee, 14 Pet. 2.

It is also well settled by the decisions of this court that the attempt to raise for the first time a federal question in a petition for rehearing, after judgment, comes too late. Texas & P. Ry. Co. v. Southern Pac. Co., 137 U. S. 48, 54, 11 Sup. Ct. Rep. 10; Butler v. Gage, 138 U. S. 52, 11 Sup. Ct. Rep. 235; Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 12 Sup. Ct. Rep. 530; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577; and Bushnell v. Smelting Co., 13 Sup. Ct. Rep. 771.

The motion to quash the fi. fa. in this case on the grounds that the order of the court of appeals, which directed it to be issued, was void for the reasons assigned, stood upon no better footing than a petition for rehearing would have done, and suggested federal questions for the first time, which, if they existed at all, should have been set up and interposed when the decree of the court of appeals was rendered, on January 28, 1892.

If any federal question existed in the case, the attempt to raise it came too late, but we are of opinion that no federal question really exists in the case. The provisions of the statute complained of by the plaintiff in error are manifestly not in conflict with any provision of the constitution of the United States, or of any law of congress passed in pursuance thereof. The said statute relates to a matter of state practice alone, and the proper construction of that statute, upon well-settled principles, rested with the state courts. The question as to whether the plaintiff's remedy was at law or in equity was a matter dependent entirely upon local law, and involved no federal right whatever.

We are therefore of opinion that the motion to dismiss for want of jurisdiction should be sustained, and it is accordingly so ordered.

(149 U. S. 574)

SHEFFIELD FURNACE CO. v. WITHEROW.

(May 10, 1893.)

No. 190.

PLEADING — DEMURRER — AMENDMENTS TO BILL — WITHDRAWAL — MECHANICS' LIENS — FORECLOSURE — EQUITY JURISDICTION.

1. A demurrer is fatally defective, and may be entirely disregarded, when it lacks the affidavit of defendant and the certificate of counsel required by equity rule 31.

2. After taking a decree pro confesso for want of proper pleadings by defendant, complainant, without leave of court, filed an amended bill, but withdrew the same, without furnishing defendant a copy thereof, free of expense, or paying him the costs occasioned to him thereby, as required by equity rule 28. *Held* that, as plaintiff was never in a position to claim any benefit from his amendment, the withdrawal thereof left the case as if no amendment had

been made, and plaintiff's right to a final decree was not prejudiced.

3. A defendant who has contracted with plaintiff to give a mechanic's lien on a certain lot of ground cannot have a decree pro confesso, foreclosing the same, set aside on the ground that the lot is the absolute property of a third person. If such be the fact the true owner alone is entitled to complain.

4. Defendant, in a contract for improvements, agreed to give plaintiff, at the latter's option, either a mortgage or a mechanic's lien on the 20 acres of land on which the improvements were placed. Plaintiff, having at the proper time filed in the probate court a statement for a lien as required by the Alabama statute, filed a bill to foreclose the same, attaching thereto the statement, which described the land as "contiguous to" the city of Sheffield. A foreclosure decree having been entered by default, defendant sought to have it set aside on the ground that under the Alabama statute the lien was limited to one acre, unless the land was situated within the limits of a city or town; that the bill did not show the property to be within such city or town, and did not describe any particular acre to which the decree could attach. *Held*, that this ground was untenable, as it was competent for the parties to extend by contract the area of the lien, and as the bill did not affirmatively show that the land was not within a city or town.

5. The fact that a state statute gives an action at law to enforce a mechanic's lien will not deprive the federal courts of jurisdiction to foreclose such liens by bill in equity, for the question whether legal or equitable remedies shall be adopted in the federal courts is determined, not by the state practice or legislation, but by the nature of the case, and the foreclosure of a mechanic's lien is essentially an equitable proceeding.

Appeal from the circuit court of the United States for the northern district of Alabama.

In equity. Bill by James P. Witherow against the Sheffield Furnace Company to foreclose a mechanic's lien. There was a decree for complainant, and defendant appeals. Affirmed.

Statement by Mr. Justice BREWER:

On May 27, 1886, the appellee, plaintiff below, made a proposition to defendant to construct on its premises a blast furnace, for the sum of $124,000; $80,000 to be paid on monthly estimates as the work progressed; the balance to be secured, "said security to be either a mechanic's lien or first mortgage on all the furnace company's interests in Sheffield, * * * at my option." This proposition was accepted on June 2d. The work was completed and accepted on April 24, 1888. On June 27, 1888, plaintiff filed in the office of the probate court of the proper county a statement for a mechanic's lien, in conformity with the provisions of the state statute. In this statement the furnace is stated to be situated at Sheffield, Colbert county, Ala., on a site containing about 20 acres, described as follows: "Twenty acres of land in fractional section 29, * * * contiguous to the city of Sheffield," etc. On September 5, 1888, plaintiff filed his bill in the circuit court of the United States for the northern district of Alabama to foreclose this mechanic's lien. The bill avers that a contract was entered into for the construction of the furnace, that the amount due was $63,279.43, that a statement of lien had been filed, and prayed for foreclosure and for general relief. In the bill the contract was not set out at length, but it was alleged that it was in writing, and would be produced at the hearing, if necessary. Attached to the bill of complaint was the statement filed in the probate court. A subpoena was duly served upon the defendant on September 6th. On October 1st the defendant applied for and received a copy of the bill. On October 3d it filed a paper which it called a demurrer, but which did not have the certificate of counsel or the affidavit of defendant essential to a demurrer, as required by equity rule 31. On the rule day in November (November 5th) a decree pro confesso was entered, and on December 19th a final decree was also entered, finding the amount due as claimed, the existence of a lien upon the twenty acres, and ordering a foreclosure and sale. At the final hearing the plaintiff produced the lien papers, which were filed in the office of the probate court, the contract between the parties, a certificate from the superintendent of the company defendant of compliance with the terms of the contract, and an affidavit of counsel for the plaintiff to the genuineness of these documents. At the next term, and on February 4, 1889, a motion and petition were filed by defendant in the circuit court to set aside the final decree, which was overruled on the 15th of February, 1889. An appeal to this court was duly perfected.

T. R. Roulhac, R. W. Walker, and H. C. Tompkins, for appellant. Henry B. Tompkins, Wayne MacVeagh, and A. H. Wintersteen, for appellee.

*575 *576 * Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

Inasmuch as the so-called "demurrer" was fatally defective, in lacking the affidavit of defendant and certificate of counsel required by rule 31, there was no error in disregarding it, and entering a decree pro confesso, at the November rules. Equity rule 18; National Bank v. Insurance Co., 104 U. S. 54, 76. And such decree after the November rules would entitle the plaintiff to a final decree, as taken on December 19th, (equity rule 19; Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. Rep. 788,) unless something had taken place intermediate to take away such right. It appears that on the 14th day of November the plaintiff filed an amendment to the original bill, which amendment consisted, substantially, of allegations that the 20-acre tract was within the limits of the city of Sheffield, and that the furnace and its appurtenances were in the middle of said tract, and occupied more than 1 acre of land, and required, for convenience and profit, the whole of the tract; upon which appears, after the indorsement of the clerk

of its filing, a further indorsement, as follows:

"The filing of this amended bill is erroneous, and the same is withdrawn; no order of the court having been obtained, ordering the filing thereof. Henry B. Tompkins, Sol. for Complainant."

This proceeding on the part of the plaintiff, it is insisted, destroyed his right to take the final decree, but this is a mistake. While, under equity rule 28, the plaintiff might, after a copy of the bill had been taken out of the office by the defendant, and before plea, answer, or demurrer, amend the bill without order of the court, yet, before he could claim any benefit of such amendment, he was required to pay to the defendant the costs occasioned thereby, and without delay furnish it a copy thereof free of expense, with full reference to the places where the amendments were to be inserted. As he had done neither of these things, he could claim no benefit from the filing of the amended bill, and when he entered upon it a withdrawal he left the case to stand as though no amendment had been attempted. Besides, the defendant, being in default, was in no position to take advantage of the plaintiff's action in withdrawing the amendment. There was therefore nothing erroneous in the matter of procedure,—nothing which would compel the court, at a subsequent term, to set aside the decree.

*577 While in this motion and petition there are stated many matters in which it is claimed there was error on account of which the decree should be set aside, and the defendant given leave to plead, and while there is a general allegation that it has a full, perfect, and meritorious defense to the demand set up in the bill, yet it is not alleged that the contract for the building of the furnace was not made as stated, or that the statement for lien was not filed, or that the amount claimed to be due was not due and unpaid; so that the case is presented of an effort on the part of defendant to avoid or delay the payment of a just debt. Of course, it need not be said that under such circumstances a court of equity will not strain a point to assist a defendant. It is insisted in this motion to set aside the decree that the 20 acres described in the bill and decree are the absolute property of some other person or persons than the defendant. Even if that be true, we do not see how the defendant is prejudiced. If the plaintiff has made a mistake, and is attempting to sell somebody else's land, the owner is the party who has the right to complain; and the defendant, whose property is not touched, has no ground to object.

But the two principal matters are these: First. It is insisted that this mechanic's lien depends for its validity and scope on the Alabama statutes; that under those statutes the lien is limited to 1 acre, to be selected by the party entitled to the lien, unless the premises are within a city, town, or village, in which case it may extend to the entire lot or parcel of land upon which the improvement is situated; that the bill refers for a description of the property to the statement filed with the probate court; that such statement describes the land as contiguous to the city of Sheffield, and does not show that it is within the limits of any city, town, or village; that therefore the limit to which the lien and decree could go was 1 acre of the tract, and that such acre was not described; that the amendment which was attempted to be made averred that this land was in the city of Sheffield, and was a single lot or piece of ground necessary for the operation of the furnace; and that only by a consideration of matters thus presented in the amendment could the decree properly extend to the 20 acres. It is a sufficient answer to this contention to say that the bill claimed a lien on the 20 acres; that nothing in the bill or statement affirmatively shows that the land was not within the limits of some city, town, or village; and that the contract which was produced stipulated for security by mechanic's lien or first mortgage on all the furnace company's interests in Sheffield. Surely, parties can contract to extend the area of property to be covered by a lien. Such a stipulation is tantamount to an equitable mortgage. Ketchum v. St. Louis, 101 U. S. 307, 316, 317; 3 Pom. Eq. Jur. § 1235; Pinch v. Anthony, 8 Allen, 536. The plaintiff, under his contract, was entitled to a written and express mortgage of the entire realty of the company at Sheffield, and when he demanded, in his bill, that the statutory lien which he had filed should be extended to the 20 acres, he was only relying upon the promise made by the defendant, that the lien should extend to that tract,—a promise which the defendant might lawfully make, although, as to the excess of ground over one acre, the contract may be only in the nature of an equitable mortgage. This objection to the decree cannot be sustained.

But the main reliance of the defendant is on the proposition that the statutes of Alabama provide for an action at law to enforce a mechanic's lien. This lien being a statutory right, it is insisted that the remedy prescribed by the statute is the one which must be pursued even in the federal courts, and that, as the plaintiff had therefore a right to maintain an action at law in the circuit court, he could not proceed by a suit in equity, which, in the federal courts, can only be maintained when there is no adequate remedy at law. While the Alabama statutes in force at the time of this suit, (Code Ala. 1886, § 3048,) in terms, authorize the foreclosure of a mechanic's lien by bill in equity, without alleging or proving any special ground of equitable jurisdiction, yet the contention is that the plaintiff cannot avail himself in the federal court

of this last statutory remedy, although he could pursue either in the state courts, because, as stated, if there be an action at law, there cannot, under the settled rules of federal procedure, be also a suit in equity. It certainly would be curious that state legislation which gives to a party the choice, in the state courts, between an action at law and a suit in equity to enforce his rights, enables him to maintain in the federal courts only an action at law, and forbids a suit in equity, when the latter is the ordinary and appropriate method for enforcing such rights; and the foreclosure of a mechanic's lien is essentially an equitable proceeding. As said by Mr. Justice Field, speaking for the court in Davis v. Alvord, 94 U. S. 545, 546: "It is essentially a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises." Improvement Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. Rep. 177. And it may well be affirmed that a state, by prescribing an action at law to enforce even statutory rights, cannot oust a federal court, sitting in equity, of its jurisdiction to enforce such rights, provided they are of an equitable nature. In Robinson v. Campbell, 3 Wheat. 212, 222, it was said: "A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, thinks that to effectuate the purposes of the legislature the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." Hooper v. Scheimer, 23 How. 235; Sheirburn v. Cordova, 24 How. 423; Whitehead v. Shattuck, 138 U. S. 146, 152, 11 Sup. Ct. Rep. 276; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. Rep. 712; Smyth v. Banking Co., 141 U. S. 656, 12 Sup. Ct. Rep. 113.

But, further, the defendant contends that by the state law the lien was limited to 1 acre of ground. The plaintiff claims that by virtue of his contract, and the filing of his statement of lien, he was entitled to a decree subjecting a tract of 20 acres to the satisfaction of his debt. He therefore claims rights of an equitable nature, arising from something more than the statute, and based partly upon his contract. Certainly, such a claim as that is one of an equitable nature, and to be adjudicated only in a court of equity.

These are all the matters of importance presented. We see no substantial error in the record, and the decree is affirmed.

(149 U. S. 557)

BRIGHAM v. COFFIN et al.

(May 10, 1893.)

No. 251.

PATENTS FOR INVENTIONS—NOVELTY—ORNAMENTED RUBBER GOODS.

Letters patent No. 283,057, granted August 14, 1883, to Frank E. Aldrich, for an improvement in rubber cloths or fabrics, cover as an article of manufacture a rubber cloth, or fabric composed wholly or in part of rubber, one or both of whose surfaces are to be printed or stamped with designs in an ink or printing compound of a different color or shade from the body of the fabric. The composition of the ink is described in some of the claims, but the patentee expressly declares that he does not claim the same in and of itself, because he proposes to make such ink the subject of another patent. *Held* that, in view of the prior art, as shown especially in the patents of December 14, 1875, to Dunbar and Lothrop, for improvements in floor cloths, and of March 30, 1880, to Brigham and others for a waterproof fabric for dress and others goods, the patent, as limited by this disclaimer, is void for want of novelty. 37 Fed. Rep. 688, affirmed.

Appeal from the circuit court of the United States for the district of Massachusetts.

This was a suit in equity by Wilbur F. Brigham against Judson H. Coffin and others for the infringement of a patent. The court below dismissed the bill, (37 Fed. Rep. 688,) and complainant appeals. Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity for the infringement of letters patent No. 283,057, issued August 14, 1883, to Frank E. Aldrich, for an improvement in rubber cloths or fabrics.

The patentee stated in his specification:

"My invention relates more especially to means for ornamenting the cloth or fabric, and it consists in a rubber cloth or fabric composed wholly or in part of rubber, having one or both of its surfaces provided with useful or ornamental designs or figures printed or stamped thereon with an ink or compound of a different color or shade from the body of the fabric by means of rollers, blocks, or in any other suitable manner, the ink or compound preferably containing rubber, caoutchouc, gutta percha, or some analogous material, as hereinafter more fully set forth and claimed.

"In carrying out my invention I take an ordinary rubber cloth, preferably gossamer rubber cloth, or any fabric composed wholly or in part of rubber, and print or stamp its finished surface or surfaces with an ink or compound of a different color or shade from the body of the goods by means of engraved rollers, blocks, types, dies, or in any other suitable manner. I deem it preferable, however, to use rollers, one or more being employed, according to the number of colors to be applied, and the cloth passed in cuts through the printing machine, after the manner of printing calico and similar goods.

"The ink or compound employed in printing the figures or designs on the cloth or fabric is prepared as follows: Take one-half

555 pound of rubber or caoutchouc, four quarts of naphtha, one-half pound of red lead, and one-eighth of an ounce of flowers of sulphur. Dissolve the gum in the naphtha, and then add and thoroughly mix the other ingredients therewith.

"I do not confine myself to the exact proportions given, as these may be varied considerably without materially changing the nature of the compound; and, instead of naphtha, some other solvent may be used for the rubber, if desired, although naphtha is deemed preferable. Also, instead of the lead, litharge, pigments, shellac, ocher, lampblack, or any other coloring matter, may be employed, according to the shade or color it is desired to give the ink.

* * * * * * * * *

"As I propose to make the ink or printing compound described the subject-matter of other letters patent, the same is not herein claimed when in and of itself considered."

His claims were as follows:

"(1) As an improved article of manufacture, a rubber cloth or fabric composed wholly or in part of rubber, having one or both of its surfaces printed or stamped with useful or ornamental designs or figures in an ink or printing compound of a different color or shade from the body of the cloth or fabric, substantially as set forth."

The second claim was like the first, except that the ink or compound is described as being "composed in part of rubber, caoutchouc, gutta percha, or some analogous substance, and a coloring material or materials, substantially as specified."

The third claim was like the second, except that, instead of the words, "and a coloring material or materials," there is substituted, "and containing sulphur, or an ingredient for rendering the ink vulcanizable."

The fourth claim was like the first, except that the cloth or fabric is described as "varnished."

The fifth claim was also like the first, except that the ink or printing compound is described as "analogous to the coating of the cloth or body of the fabric, and of a different color or shade therefrom."

556 The sixth claim was also like the first, except that the ink or compound was described as "containing rubber and sulphur, or an ingredient for vulcanizing the rubber when subjected to heat or the sun's rays."

The seventh claim was like the sixth, except that the words "the sun's rays" were omitted.

The answer denied that Aldrich was the inventor of any material or substantial part of the thing patented, and gave notice of prior patents; denied that the Aldrich patent described anything of value or importance; averred that it was practically worthless; denied that the invention was any advance upon the art of making rubber fabrics, or that such fabrics had ever been practically manufactured as described in the patent. The answer also denied infringement.

On a hearing upon pleadings and proofs in the court below, the bill was dismissed, (37 Fed. Rep. 688,) and the plaintiff appealed.

Thos. Wm. Clarke, for appellant. J. E. Maynadier, for appellees.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The bill was dismissed by the court below upon the ground that there was nothing novel in an article of manufacture which consisted in printing ornamental figures upon a rubber fabric with a colored ink composed in part of rubber.

The patent in question covers as an article of manufacture:

(1) A rubber cloth or fabric, which must be composed wholly or in part of rubber.

(2) One or both of the surfaces of such fabric must be printed or stamped with designs in an ink or printing compound of a different color or shade from the body of the fabric.

In these particulars all the claims agree. The last six claims differ from the first only in describing the ink or compound either as composed of rubber, caoutchouc, gutta percha, or some analogous substance, or, in addition thereto, as *containing sulphur* or other substance for rendering the ink vulcanizable when subjected to heat or the sun's rays.

At the same time, while giving the composition of the ink, the patentee expressly declares that he does not claim the same in and of itself considered, because he proposed to make such ink or printing compound the subject of another patent. The case then reduces itself to the single question whether there is any novelty in printing or stamping a rubber cloth with designs in an ink of a different color or shade. The prior patents put in evidence show very clearly that there is no novelty in printing or stamping upon a rubber fabric designs of various patterns.

In the patent of December 14, 1875, to Dunbar and Lothrop for improvement in the manufacture of floor cloths, the invention consists "of a product composed of a base or foundation of cheap compound of rubber, overlaid or inlaid with a series of strips, figures, or characters of a thin and more expensive material, which is capable of receiving any desired color or tint, these strips or figures being, in the final stage of the vulcanizing process, embedded in the foundation, so that a uniformly even surface exists over the whole." The claim of this patent is for "a floor cloth composed of a body of cheap material, with a series of parallel strips in colors or neutral tints composed of a finer quality of rubber compound,

substantially as and for the purposes stated."

In the later patent of March 30, 1880, to Brigham and others, the object of the invention was stated to be "to produce a light, thin, waterproof fabric for dress and similar goods, ornamented with figures and colors to resemble ordinary dress and similar goods which are not of the waterproof class." The invention consisted "of a light, thin fabric, woven or otherwise formed, covered with a waterproofing of rubber composition, or a composition in all respects equivalent thereto, printed with ornamental colors and figures (embossed or plain) to resemble ordinary dress or similar goods." The composition described in the patent "is spread upon the cloth in the manner well known in the art, and forms a basis for receiving the colors and holding them in sharp, clear lines without running or blurring, and so as to make well-defined and ornamental figures. * * * The product is a desirable imitation of figured goods in ordinary colors, and having what may be called a 'cloth surface,' * * * and all the colors and beauty of appearance of such ordinary dress and similar goods, with the valuable quality, in addition, of capacity to resist or repel moisture." The claim was for "a waterproof fabric for dress and other goods, having a surface of the described waterproof composition, and impressed with figures and colors, as set forth."

It is difficult to see wherein the invention of Aldrich differed in any important or patentable feature from these prior devices. Aldrich may be entitled to a patent for his composition, but the patent in question is not for a rubber fabric printed or stamped with designs in any particular ink or compound, but in any ink composed in whole or in part of rubber, etc., with or without sulphur or other vulcanizing material. While the patent is for a manufacture or product, it is for a product resulting from a specified process of printing or stamping in an ink of this general description. The composition used by Brigham is described as made up of 10 pounds of India rubber in its natural condition, and 30 pounds of whiting as a basis. For black goods, lampblack is added; for white goods, two pounds of zinc white; for a red color, vermillion is used; and for other colors, other mineral pigments. But in all cases the rubber and whiting constitute the bulk of the mass, though other known equivalents for rubber may be used; and the ingredients are ground together, and then dissolved in benzine.

The ink or compound of Aldrich is composed of different ingredients, of which, however, rubber and naphtha appear to constitute the basis, and the alleged patentable feature consists in printing or stamping ornamental designs with this compound upon a rubber cloth or fabric. There does not seem to be any essential difference in the two patents, the main difference being in the composition used by Aldrich, which is not made the subject of his patent. If, as is claimed by the plaintiff, the invention of Brigham was a practical failure, and abandoned, the evidence is equally clear that Aldrich, after putting the goods upon the market for a year and a half, abandoned the business, and has not resumed it. There does not seem to be much to choose between them in this particular.

This case is substantially like that of Underwood v. Gerber, 13 Sup. Ct. Rep. 854, (decided at the present term,) in which the patentee claimed a fabric coated with a composition composed of precipitate of dye matter, in composition with oil, wax, or oleaginous matter, without claiming the composition of this matter. The patent was treated as one for applying the composition to paper, and was found to be without novelty.

The decree of the court below will therefore be affirmed.

(149 U. S. 550)

IDE v. BALL ENGINE CO. et al.

(May 10, 1893.)

No. 227.

PATENTS FOR INVENTIONS — NOVELTY — STEAM-ENGINE GOVERNORS.

Letters patent No. 301,720, granted July 8, 1884, to Albert L. Ide, for an improvement in that class of steam-engine governors known as shaft or shifting eccentric governors, claimed, "in a fly-wheel governor, the combination, with relatively movable parts, of a dashpot;" the object of the dashpot being to overcome certain temporarily disturbing forces that tended to vary the poise of the eccentric, and interfere with the action of the valve when the load on the engine was suddenly increased or diminished. It was shown that governors similar in arrangement of parts, and having dashpots, were used as early as 1880 to accomplish the same purpose; but they were attached to wheels on the opposite end of the driving shafts, instead of to the fly wheel, as described in the patent. *Held* that, as no new function was obtained by combining the governor and the fly wheel, the change did not involve invention, and the patent is void. 39 Fed. Rep. 548, affirmed.

Appeal from the circuit court of the United States for the northern district of Illinois.

This was a suit in equity by Albert L. Ide against the Ball Engine Company and others for the infringement of a patent. The court below dismissed the bill, (39 Fed. Rep. 548,) and complainant appeals. Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity for the infringement of letters patent No. 301,720, issued July 8, 1884, to the plaintiff, Ide, for a steam-engine governor. Another patent, No. 308,498, issued to the same party November 25, 1884, was originally embraced in the bill, but upon the trial in the court below the charge relative to this patent was not pressed, and the case was rested wholly upon No. 301,720.

"This invention," said the patentee, in his

specification, "relates to that class of steam-engine governors known as 'fly-wheel governors,' and has for its primary object to provide means for holding the eccentric steadily in its proper poised position, in opposition to the tendency of certain extraneous forces which are calculated to disturb the movements of the valve, as sought to be determined by the balanced forces of weights and springs when the engine is in motion.

"To this end the invention consists in the combination of a dashpot with the governor and pulley, said dashpot connected with a fixed and movable part, or with two relatively or unequally movable parts,—as, for example, with the extremity of a weight lever and the pulley hub. In this class of governors the position of the eccentric is variably determined by the opposing and self-balancing forces exerted by the centripetally acting spring or springs, and the centrifugally acting weight or weights connected with said springs, the tendency being to hold the eccentric permanently in a certain poised position for a given speed of the wheel to which the governor is applied, and to vary the position of the eccentric exactly as the speed of said wheel is varied. There are, however, certain temporarily acting causes of disturbance, calculated to change the position of the eccentric independently of the speed of the wheel. * * * At a regular and very high speed of the governor wheel or pulley these disturbing forces operate but slightly, owing to the momentum of the weights, which serve to prevent their deflection from a regular course, but at lower speeds than that at which the apparatus is adjusted to run, and particularly in accelerating or retarding the engine, as in starting up or slowing down, these incidental disturbing forces interfere materially with the valve action, and give an objectionable irregularity to the movements of the weights. In the case of an engine used for running a dynamo for electric lighting purposes and subject to sudden and wide changes in requisitions of power and speed, the effects of the disturbances referred to manifest themselves also in the quality or intensity of the lights. A dashpot constructed and attached to the apparatus in such a manner as to prevent sudden movements of the weight levers or of the eccentric is found in practice to wholly overcome the defects indicated, and to give a desirable steadiness and regularity to the movements of the movable parts of the governor, as well as accuracy and reliability to the cut-off action of the valve."

After giving a description of the device by reference to the drawings, the patentee added: "The cylinder of the dashpot is filled with glycerine or some other noncompressible liquid, preferably one that is also not congealable at a temperature to which the engine is likely to be exposed. By means of the dashpot applied to the relatively movable and stationary parts or to the unequally moving parts, as described, wide and sudden radial movements of the weights, E', are prevented, and, as a consequence, the governor will have a steady and efficient action at all speeds of the pulley or wheel to which said governor is applied. * * * The dashpot, while preferably connected with the end of the lever, E, may obviously be attached to the eccentric itself, and to a fixed or less movable part of the apparatus."

The single claim of the patent was as follows: "In a fly-wheel governor, the combination, with relatively moving parts, of a dashpot, substantially as described."

The defendants set up in their answer the invalidity of the patent by reason of prior use, and also noninfringement. Upon a hearing in the court below upon pleadings and proofs the bill was dismissed upon the ground of want of novelty, (39 Fed. Rep. 548,) and plaintiff appealed to this court.

Chas. K. Offield, for appellant. John K. Hallock, J. G. D. Gallaher, and J. C. Sturgeon, for appellees.

*Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The stress of this case is upon the novelty of the invention covered by the patent of July 8, 1884, to the plaintiff, Albert L. Ide.

Both the plaintiff and defendant are manufacturers and dealers in a particular type of steam engines known as "electric lighting engines," and used for generating and controlling the electric lighting circuits now in common use, principally under the incandescent system.

The governors used upon these engines are not the old and familiar fly-ball governors, but consist of weights, whose centrifugal action is counterbalanced by centripetally acting springs, attached to the lever by which the weights are suspended, the object of which is to hold the eccentric constantly in a fixed position for a given speed of the wheel, and to vary the position of the eccentric exactly as the speed of the wheel is varied. This style of governor is inclosed either within the fly wheel or some other wheel connected and revolving with the shaft. It was found, however, that when the burden of the engine was suddenly lifted by the extinguishment of a large number of lights, there was a tendency on the part of the governor to "race," as it is termed, causing an unsteadiness and irregularity in the speed of the engine, which, in its turn, produced an objectionable pulsation and variation in the intensity of the lights. It was also found to operate destructively upon the carbon filaments of which the illuminants are composed. For the purpose of obviating this difficulty and producing a perfectly isoch-

ronous movement of the engine under extreme changes of load, plaintiff atached to the governor what it called a "dashpot,"—a device in common use for easing the shutting of spring doors, and preventing slamming. As used upon doors, it consists simply of a closed cylinder filled with air and a piston having a passage or leak through or around it. When used in connection with the governor of a steam engine, the cylinder is filled with glycerine or other similar fluid. *554 A dashpot thus constructed and attached to the apparatus in such manner as to prevent sudden movement of the weight levers, or of the eccentric, is found in practice to overcome the defect indicated, and to give a desirable steadiness and regularity to the movements of the governor as well as accuracy to the cut-off action of the valve.

Mr. Ide was not, however, the first to discover the value of a dashpot in connection with the governor of a steam engine As early as 1880, the Buckeye Engine Company of Salem, Ohio, one of the largest manufacturers of steam engines in the country, constructed engines in which the governor consisted of a metal disk clamped upon the driving shaft, such disk being about 40 inches in diameter, and weighing in the neighborhood of 200 pounds. These disks were used simply as a casing to inclose the governor, which was equipped with arms arranged to swing by centrifugal force as the shaft revolved, and kept from swinging too freely by springs acting centripetally. In this connection the superintendent of the Hartford Engineering Company testified that he had a case of what is called the "racing" of a governor on a pair of engines running in the Hartford Carpet Company, in Thompsonville, Conn. To use his own words: "I took the foreman of the engine shop with me to the factory, and attempted to correct the trouble. We were unsuccessful. We then determined to put on dashpots filled with oil or similar fluid, as the Buckeye people had done in similar cases. Within a short time the dashpots were made, sent to the Hartford Carpet Co., and attached to the governor by their men. Mr. Steele, the engineer in chief, came to the shop a few days later, and reported most excellent results from the application of the dashpots." This testimony was corroborated by that of Steele, the engineer, who swore the dashpots were applied in 1881, had been constantly in use since, and had performed their work satisfactorily.

It also appeared that a similar dashpot had been attached to an engine run by the Hartford Manilla Company of Burnside, Conn., and that the results there were equally satisfactory. *555 There was also evidence of the employment of Buckeye engines at the Pacific Elevator in Brooklyn, to the governors of which was attached a dashpot to prevent any sudden, violent fluctuation of the governor. These governors were located upon the opposite ends of the main shaft but not in the fly wheels. A similar dashpot was attached to the governor of a Buckeye engine at the Syracuse Iron Works. None of these governors, however, were attached to the fly wheels of the engine, but upon a separate wheel, mounted upon the shaft, and revolving with it.

There was some testimony that the Buckeye engines were defective in their construction or operation, and that the dashpots were put into the governors to prevent the engines from wrecking themselves, and to avoid suits for damages. But, however this may be, the testimony is uncontradicted that the addition of the dashpots had the desired effect of steadying the action of the governor.

As the testimony, then, demonstrates that governors without dashpots had been attached indiscriminately, not only to the old fly-ball governor, but to the shaft governors, whether connected with the fly wheel or the pulley wheel, or a separate wheel of their own, connected with the shaft, and that a governor with a dashpot had also been attached to a separate wheel revolving with the shaft, the invention of Ide consists only in removing the governor, with the dashpot, from a separate wheel to the fly wheel. If the dashpot performed any new function when attached to a governor in the fly wheel, such change in location might be the basis of a patent; but the testimony is that it was attached to the Buckeye governors for the very purpose for which Mr. Ide attached it to his governor, and that it accomplished that purpose to the entire satisfaction of the parties interested.

It is true that plaintiff claims certain advantages from locating his governor in the fly wheel of the engine, which is very much larger than the special wheel used for the governor in the Buckeye engines, but these advantages seem to be largely fanciful, such as existed before the dashpot was added, and, in any event, are not such as rise to the dignity of invention. They were advantages which a governor placed in a fly wheel has *556 over a governor placed in any other wheel, *but to which the addition of the dashpot contributed nothing new. It is evident that plaintiff, in taking out his patent, supposed that he had first discovered the advantage of attaching a dashpot to the class of governors known as shaft or shifting eccentric governors, and, when confronted with the Buckeye governors, sought to limit his patent to a dashpot connected with a governor located in the fly wheel, and to discover some special advantage to be gained by locating it there instead of in any other wheel revolving upon the shaft.

The introduction of these governors seems to have resulted in a large increase in plaintiff's business, and in the establishment of agencies in all the principal cities for selling engines containing this improvement. While this may have been occasioned by his intro-

duction of the dashpot, he has no right to a monopoly of this feature, since he had been anticipated in this particular by the Buckeye engines. The only novelty he has any possible right to claim is in the application of this style of governor, with the dashpot, to an electric lighting engine, which seems to have been the thing needed to obviate the difficulty of a variable intensity of light and to secure the requisite steadiness; but this is not what is claimed in the patent. There can be no doubt that, if the attachment of a dashpot to a shaft governor had been a novelty at the time his patent was taken out, the Buckeye governors would have been an infringement. This being so, it is equally clear that, existing as they did before his patent, they are an anticipation.

The decree of the court below dismissing the bill is therefore affirmed.

(149 U. S. 436)

METROPOLITAN NAT. BANK OF NEW YORK v. ST. LOUIS DISPATCH CO. et al.

(May 10, 1893.)

No. 224.

CHATTEL MORTGAGES—LIEN—GOOD WILL—LACHES.

1. Where a newspaper, whose entire plant and good will have been mortgaged, is consolidated with another, the name of the paper changed, and a new corporation formed to publish it, which, in the course of business, entirely uses up the mortgaged plant, the lien of the mortgage does not apply to the existing plant, substituted for that so consumed, nor to the good will of the newspaper, even though the new corporation occupied for some years the old place of business, and paid interest for 10 months on the mortgage debt. Affirming 36 Fed. Rep. 722.

2. A delay, on the part of the mortgagee, of eight years after the new corporation refused to pay the debt, or the interest accruing thereon, constitutes laches, which will bar his right to assert an equitable claim to have the lien of the mortgage extended to the new plant, or a claim as for wrongful conversion of the mortgaged property.

3. Since a membership in the Western Associated Press can, under its by-laws, only be sold to publishers of newspapers, and a transfer of such membership would not entitle the transferee to the privileges of a member, unless voluntarily accorded him by the association, a bill will not be entertained to foreclose a mortgage on a certificate of membership in such association unless the association is made a party defendant. Affirming 36 Fed. Rep. 722.

Appeal from the circuit court of the United States for the eastern district of Missouri.

This was a suit by the Metropolitan National Bank of New York against the St. Louis Dispatch Company, the Dispatch Publishing Company, and Henry L. Sutton, trustee, to foreclose a mortgage. The court below dismissed the bill, (36 Fed. Rep. 722,) and complainant appeals. Affirmed.

Statement by Mr. Chief Justice FULLER:

The Metropolitan National Bank of New York filed its bill of complaint against the St. Louis Dispatch Company, a corporation organized under the laws of the state of Missouri; the Dispatch Publishing Company, a corporation likewise organized under the laws of that state; and H. L. Sutton, trustee, a citizen of Missouri,—July 1, 1887, and an amended bill April 21, 1888, which averred:

"That on or about the 1st day of June, A. D. 1877, the said the St. Louis Dispatch Company owned a certain daily evening newspaper in the city of St. Louis, known as the 'St. Louis Dispatch,' and no other property whatsoever, unconnected with, and not appurtenant to the publication and operation of, said newspaper. That the said the St. Louis Dispatch, a newspaper, had been published continuously and daily for many years, to wit, since on or about the year 1852, and continued to be published daily, excepting Sundays, up to the date hereinafter mentioned. That the said the St. Louis Dispatch, a newspaper, was on the 1st day of June, A. D. 1877, a fully-equipped journal, having a building under lease; all the machinery, type, presses, cases, forms, paper, furniture, and tools useful or necessary for the printing and publishing of the same; a good circulation and advertising patronage, (known as its good will;) and a share of stock in the Western Associated Press, under which it was entitled to receive telegraphic news and dispatches collected from all parts of the world, as hereinafter more particularly set forth."

That on said 1st day of June the St. Louis Dispatch Company, by deed of trust in the nature of a mortgage, duly recorded, conveyed to Henry L. Sutton, as trustee, the following described property: The machinery, type, presses, cases, furniture, paper, forms, and tools, together with the good will of the St. Louis Dispatch Company, and its franchises, of every kind and description, rights, privileges, and property, including its interest in the Western Associated Press, and any and all shares by it owned in the Western Associated Press, as also all accounts and choses in action or other valuable things by it owned, or to it belonging, wherever situated; as "also all other property, of every other nature and character, which the said party of the first part may acquire during the existence of this deed of trust," to secure the payment of a note dated that day, to the order of Frank J. Bowman, for the sum of $15,000, payable two years and six months after date, with interest at 9 per cent. per annum, payable 1½ per cent. on the 1st days of August, October, December, February, April, and June of each year until the payment of the principal sum, which note, so secured, was negotiated for value, and complainant became the legal holder thereof, for value, before maturity.

That at the time of the execution of said mortgage the Western Associated Press was a corporation organized under the laws of the state of Michigan, the sole purpose and object of its existence being "to procure intel-

ligence for the newspaper press from all parts of the world, by telegraph, express, mail, or otherwise; and membership in said association was and is limited generally and specifically to owners and proprietors of newspapers and publishers of periodicals."

That at that date, and prior thereto, the St. Louis Dispatch Company was the legal owner, on the books of the Western Associated Press, of one share of stock, so called, in said association, which was of great value, represented by a certificate of membership, No. 38, which was, upon the execution of the mortgage, placed in the possession of the trustee, with the following indorsement: "The within certificate of stock is hereby assigned and transferred to Henry L. Sutton, trustee in deed of trust bearing date June 1st, 1877, for like purposes as other property therein named is transferred, being the certificate of stock in the Western Associated Press therein referred to."

The bill then stated that on February 2, 1878, the St. Louis Dispatch Company made a second mortgage, conveying all of the property described in the first, and other property subsequently acquired, to a trustee in trust to secure another loan made by it, which was duly recorded, and under which a sale of the property took place December 9, 1878, (the sale so made being subject to the first mortgage;) one Arnold being the purchaser, who on the same day transferred it to Joseph Pulitzer.

That, at the time of the sale, John A. Dillon was the owner and publisher of a certain newspaper known as the "Evening Post," and was printing and publishing the same in the city of St. Louis. That the Post was the rival and competing newspaper with the Dispatch, and did not, nor did Dillon, own a membership in the Western Associated Press, nor any right to the telegraphic news and dispatches thereof. That neither the Post nor Dillon, in the business of carrying on and publishing the Post, had any presses, type, or paraphernalia for the printing or publication of a newspaper. That the Post had been established but a few months before the said sale of the Dispatch newspaper, and had nothing of value, nor had the said Dillon, in connection with said publication, excepting a small circulation and advertising patronage, and the name of the "Post."

That on December 10, 1878, the said Dillon and the said Pulitzer consolidated the Post and the Dispatch, and on that day published a consolidated paper under the name of the "Post-Dispatch," and that Dillon acquired whatever interest in the Dispatch property came to him with full notice of the lien of the first mortgage, and subject thereto.

It was further averred that on December 11, 1878, the Dispatch Publishing Company was organized as a corporation under the laws of Missouri, the object of which was the publication of a newspaper to be known and called the "Post and Dispatch." That, on that day, Pulitzer and Dillon, having consolidated the two papers, transferred the same to the Dispatch Publishing Company, which took the same subject to the mortgage on all the property of the St. Louis Dispatch Company, and with full knowledge thereof. That thereupon, on the same day, the defendant the Dispatch Publishing Company entered into the possession of the building theretofore occupied by the St. Louis Dispatch Company in the publication of the St. Louis Dispatch, and of the good will of that newspaper, with the presses, type, etc., and all the rights, property, and franchises thereof, including the membership in the Western Associated Press represented then by certificate No. 38. That the Dispatch Publishing Company has ever since had the good will of the Dispatch Company, and the name "Dispatch," and used the same building formerly occupied by the St. Louis Dispatch Company. The bill further alleges that the Dispatch Publishing Company paid the interest on the Bowman note on the 1st days of February, April, June, and October, 1879, but the remaining installment, payable on December 1, 1879, being the date on which the principal became due, they refused to pay, as also the principal. That upon such refusal the trustee, Sutton, demanded of the Dispatch Publishing Company the property of the St. Louis Dispatch Company, including its good will, and all the property recited in the first mortgage, which the Dispatch Publishing Company wholly refused to surrender. That at that time the Dispatch Publishing Company had alienated, destroyed, or gradually used up all the machinery, type, presses, and property of a perishable nature, of the St. Louis Dispatch Company.

The bill also averred that the good will of the St. Louis Dispatch newspaper was its chief element of value. That the good will so acquired by the Dispatch Publishing Company of the St. Louis Dispatch Company has been in the constant use and control of the first-named company, and has never been alienated. That the name of a newspaper is valuable and salable, and that the Dispatch Publishing Company acquired its name under the second mortgage, subject to the lien existing upon it, and still retains the name "Dispatch" in the publication of its newspaper.

That the machinery, presses, etc., acquired by the purchase under the second mortgage by the Dispatch Publishing Company, it continued to use for a long time, but substituted new paraphernalia for publication from time to time, and that on the date of the maturity of the note the Dispatch Publishing Company had none of the original paraphernalia described in the first deed of mortgage. That the effect of the acquisition

of the two properties known as the "Evening Post" and the "St. Louis Dispatch" was that the lien of the first mortgage attached to all the property of the Dispatch Publishing Company, and that the latter recognized the validity of the mortgage lien by paying *441 the interest on the mortgage debt, and the assessment on the membership in the Western Associated Press. That the complainant and the trustee were induced by its conduct to believe that the Dispatch Publishing Company would pay the debt or surrender the property in case of a failure of compliance with the conditions of the trust deed. That the Dispatch Company continued to recognize the mortgage as a lien on said property, including the membership, up to the maturity of the note, when it refused to pay the same, or surrender the property. That for the reason that the good will and other property of the mortgagors was confused and intermingled with the property of the Dispatch Publishing Company, so as to be incapable of separation or distinction therefrom, the property and good will of the latter ought, in equity, to be charged with the lien of the mortgage debt, and that at the time of the acquisition of said mortgaged good will, etc., the Dispatch Publishing Company agreed and assumed to pay said debt.

The bill further averred "that a membership in the Western Associated Press is always represented by a certificate of a share of stock therein, and that, under the by-laws and constitution of said Western Associated Press, said membership is tenable and vendible only in connection with the publication of a newspaper or periodical, and in the manner laid down in the said constitution and by-laws, which are herewith filed, and made a part of this complaint, and marked 'Exhibits F & G.'" And, further, "that under the by-laws and articles of incorporation aforesaid the legal title to said certificate of membership aforesaid could never have vested fully in any individual, firm, or corporation until and after said individual, firm, or corporation should have become the purchaser of the good will and property of said St. Louis Dispatch Company, and as successor in right and liability to said company; and if, after any sale, whether of foreclosure or otherwise, the purchaser of said property did not continue a publication in connection therewith, the said membership would become lifeless and valueless, because a publication in connection with it was and is necessary to the sustenance of its life and value. That the *442 said trustee and complainant herein have no rights in respect to said membership, except under said deed of trust, and can acquire no title thereto until a sale of the good will of the St. Louis Dispatch Company, now in possession of the defendant Dispatch Publishing Company, at which time the title intended to be conveyed to the complainant herein by said deed of trust would be effectuated to the purchaser of the good will and property of said St. Louis Dispatch Company."

That, one year after the Dispatch Publishing Company had been in the use and enjoyment of the membership in the Western Associated Press represented by certificate No. 38, it applied to the association for the issue of a new certificate, and the association issued to the Dispatch Publishing Company a new certificate, and placed the name of that company upon its books as a member in virtue of the right acquired as successor to the St. Louis Dispatch Company, which membership was represented by certificate No. 64, but was the same membership as that represented by certificate No. 38. That the assessments on the membership had always been paid by the Dispatch Publishing Company, and that said company, by using the membership for one year without applying for a new certificate, or to have its name placed on the books of the Western Associated Press as the successor of the St. Louis Dispatch Company, acknowledged the title of the latter.

The prayer was that the Dispatch Publishing Company be decreed to pay the complainant $15,000, with interest at the rate of 9 per cent. per annum since October 1, 1879, and that to make that sum the good will of the Dispatch Publishing Company be sold, also the personal property used by it in connection with its business, and certificate No. 64 in the Western Associated Press. To this amended bill a demurrer was filed and sustained, and a final decree of dismissal rendered. Among other exhibits, the by-laws of the Western Associated Press were filed with the bill, and made a part thereof, and these provided, among other things, as follows:

"(1) Membership. Any proprietor of a daily newspaper, who has heretofore signed the articles of association, and is now an active member of the same, and his lawful *443 assigns, and any such person or firm or corporation within the territory of the Western Associated Press who shall hereafter be admitted in accordance with these by-laws, shall be a member of the association: provided, that no new member shall be elected except upon the terms prescribed by article 15.

"(2) Stock. The evidence of membership shall consist of a certificate of one share of the capital stock of the association, which certificate shall be transferable only on the books of the association as hereinafter provided."

"(12) Transfers. Any member selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper, and it shall be the duty of the secretary, upon request, to transfer the same on the books of the association to such purchaser or successor, who shall then sign the articles

of association and by-laws, and become a member, with the same rights and privileges as the original member. If any member shall discontinue the publication of a nwspaper, or shall sell his newspaper to another member, his membership shall cease, and his certificate of stock shall be canceled on the books of the association, and the treasurer shall refund to him the money paid to the association for the same."

"(14) Assessments. The board of directors shall have power to make assessments upon the members to defray the expenses incurred in collecting and transmitting intelligence, and for other purposes not inconsistent with the charter and by-laws, and the board may discontinue the use of the news so collected to any member failing to pay promptly his assessment. Any member to whom the use of the news has been so discontinued may be readmitted to the use of the same, within six months of the time of such discontinuance, upon his refunding to the other members of the association in the same city or town such increased assessment as they may have paid in consequence of said discontinuance.

"(15) Admission of New Members. Applications for membership in this association shall be made in writing to the board of directors, and, if a majority of said board shall vote for the admission of the applicant, he shall sign the articles of association and by-laws, and pay into the treasury the sum of ten dollars, or an additional amount equal to what would be his pro rata share in the property of the association. It shall then be the duty of the secretary to issue to him a certificate of one share of stock, and to enroll his name in the list of membership: provided, that no new members shall be admitted without the unanimous consent of the members in the city or town where his business is carried on."

The opinion of the court, by Judge Thayer, will be found reported in 36 Fed. Rep. 722.

From the decree dismissing the bill an appeal was taken to this court, and while pending here a stipulation was filed, setting forth the dissolution, by decree of court, of the Dispatch Publishing Company and the successorship thereto of the Pulitzer Publishing Company, as the owner and publisher of the newspaper and of the membership in the Western Associated Press, which had issued to said company a certificate April 2, 1892, numbered 93. The appearance of the new corporation, and of two directors of the dissolved company, as parties defendant, was entered.

John M. Dickson, for appellant. Chas. Gibson and C. E. Gibson, for appellees.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

In the language of counsel for appellant, this bill "was filed for the foreclosure of a mortgage upon a certain newspaper, a newspaper plant, and a membership in the Western Associated Press." The contention is that the newspaper, plant, and membership were subject to the lien of the Sutton mortgage, as one homogeneous property, and that any property of like kind, substituted for any portion lost or destroyed, became subject to this lien; that the identity of the newspaper, the membership, and the plant remained up to July 1, 1887, when the bill was filed, and that the defendant was estopped to deny such identity because of the similarity of the names, the willful confusion of the good wills, the obtaining of the second certificate in lieu of the first, and because, from the character of the plant, all the changes made were in the nature of repairs,—parts being replaced from time to time by reason of constant wear and tear, from which resulted a confusion of chattels, making the identification of the several parts of the plant impossible.

On December 1, 1879, when the note matured, and the defendant the Dispatch Publishing Company refused to pay it, or to surrender the property on the demand of the trustee, the bill stated that none of the original presses, type, and paraphernalia for printing a newspaper, described in the mortgage, was in existence. The bill was not framed on the theory of holding the defendant for the value of the mortgaged chattels on the ground of wrongful conversion, nor was it charged that there was any wrongful intermingling of the original plant with that subsequently acquired, either by the St. Louis Dispatch Company, or the purchaser under the second mortgage, or his grantee, the Dispatch Publishing Company. The allegation was that the machinery, type, presses, and property of a perishable nature, had been alienated or destroyed, or gradually used up. This was done in the course of business, and as the plant on hand at the maturity of the note was an entirely new plant, not described in the mortgage, we think the mortgage could not be extended to it upon the theory of willful intermingling. The clause in the Sutton mortgage in relation to after-acquired property was an executory agreement, for the nonperformance of which the mortgagee might recover compensation in damages as against the mortgagor; but, as against the grantee of the purchaser at the sale, the lien of the mortgage could not embrace what had no existence when it was given, and was not acquired by the mortgagor, and, if such grantee were liable at all, it would be for the conversion of the existing property, and no foundation for such a charge is laid here, irrespective of the objection that the remedy would be at law.

Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included un-

der the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined "good will" to be "the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices." Story, Partn. § 99.

As applied to a newspaper, the good will usually ataches to its name, rather than to the place of publication. The probability of the title continuing to attract custom in the way of circulation and advertising patronage gives a value which may be protected and disposed of, and constitutes property.

On the 9th of December, 1878, the St. Louis Dispatch Company ceased business as the publisher of a newspaper, and on that day another newspaper was published under the name of the "Post-Dispatch." If the Dispatch Publishing Company acquired the good will of the St. Louis Dispatch Company, it also acquired the good will of the Post. The Sutton mortgage covered the good will of the St. Louis Dispatch, but it did not embrace the good will of the Dispatch Publishing Company or of the newspaper known as the "Post-Dispatch," as existing July 1, 1887. Indeed, if there had been no consolidation with any other paper, and the good will that the St. Louis Dispatch had in 1878 had been conveyed to a separate concern, it could hardly be held that the good will of the latter, eight years afterwards, was the same good will which had been conveyed. Moreover, the good will of the Dispatch Publishing Company was from the first different from the good will named in the *447 mortgage. * The paper was of a different name, and issued by a different company, and the good will was the joint good will, as we have said, of two papers; and if the Dispatch Publishing Company acquired on the 10th day of December, 1878, the good will belonging to the St. Louis Dispatch, for which it should have accounted, but refused to account, then it would be only liable as for a conversion, for the lien of the mortgage certainly could not extend to a good will which there was no pretense was ever embraced in it.

However, it is urged that the Dispatch Publishing Company did in fact acquire the place of business of the St. Louis Dispatch Company and the existing plant, with the good will attached thereto, subject to the lien of the first mortgage; that, when it consolidated the property and good will so acquired with the property and good will of the other newspaper, it retained the word "Dispatch" as part of the name; that it paid the interest up to October 1, 1879; and that its conduct was such as to amount to a direct representation to the mortgagee that it had agreed to put itself in the shoes of the mortgagor. Hence it is contended that the averment of the bill that the Dispatch Publishing Company agreed and assumed to pay the mortgage debt was justified, as a legal conclusion, upon the principle of estoppel. We do not concur in this view. It is admitted that there was no express or direct promise on the part of the defendant to pay the mortgage debt; and it cannot be held that the mere purchase of premises subject to a mortgage renders the purchaser personally liable to the mortgagee, as having assumed to pay it, or that the mere payment of interest, in itself, imposes that liability. Elliott v. Sackett, 108 U. S. 132, 2 Sup. Ct. Rep. 375; Drury v. Hayden, 111 U. S. 223, 4 Sup. Ct. Rep. 405; Hall v. Morgan, 79 Mo. 52.

There was no personal connection between the Dispatch Publishing Company and the complainant, and it is not charged that there was any representation that that company would be personally responsible for the debt, or that property acquired by it from other sources, and not embraced in the mortgage, should be subject to the mortgage lien. No fraud is alleged, but, in effect, only that the complainant was misled *448 by the payment of interest. What beneficial course the complainant was prevented from pursuing by reliance on the conduct of the Dispatch Publishing Company prior to the maturity of the note does not appear; but it does appear that on December 1, 1879, the Dispatch Publishing Company refused to pay the note and the last installment of interest, and refused to surrender the property. Yet the complainant did not file this bill until nearly eight years afterwards. Clearly that delay is not attributable to the payment of interest, nor to any conduct of the Dispatch Publishing Company prior to December 1, 1879. After that date the latter company, confessedly, held adversely to complainant, and it is difficult to see why any claim in respect of either the plant or the good will of the St. Louis Dispatch is not barred.

Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law. In many other cases they act upon the analogy of cases at law; but, even when there is no such statute governing a case, a defense founded upon the lapse of time and the staleness of the claim is available in equity. Godden v. Kimmell, 99 U. S. 201; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. Rep. 610.

Under the statute of limitations of Missouri, actions upon any writing, whether sealed or unsealed, for the payment of money

or property, must be commenced within ten years, and actions for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract, must be brought within five years. Rev. St. Mo. 1879, §§ 3229, 3230.

If the original plant were wrongfully used up, or by the consolidation the good will of the St. Louis Dispatch Company was wrongfully appropriated, the Dispatch Publishing Company became responsible as for a conversion. The rule in relation to wrongful admixture of property had no application, and it is not perceived how the act of appropriation in relation to either the plant or the good will could be made to operate, nearly eight years after adverse possession commenced, to extend the lien of the mortgage *449 over property not embraced in it. If the use of the word "Dispatch" in the title of the new newspaper became wrongful after the Dispatch Publishing Company refused to pay the note, or to surrender the property, then the complainant should have made its objections promptly known, and sought the appropriate remedy; but this it did not do, and it would be inequitable to accord relief by injunction after the lapse of so many years, and the inevitable changes in the condition of the property. Such relief, however, is not invoked in this case; and the right to it, if it existed, would furnish no aid to the application to foreclose. It is very clear that the circuit court was right in holding that there was no plant or good will, the sale of which could be decreed.

The case stands on no different ground in respect of the membership in the Western Associated Press. As averred in the bill, and as shown by the articles and by-laws, such membership was always represented by a certificate of a share of stock, and could be held and sold only in connection with the publication of a newspaper or periodical, and in the manner prescribed. The object of the association was "the procuring of intelligence for the newspaper press from all parts of the world by telegraph," and the holders of certificates of membership were entitled thereby to receive the news thus collected. Applications for admission were obliged to be made in writing to the board of directors, and, if a majority of the board voted for the admission of the applicant, he then signed the articles of association and by-laws, and paid into the treasury the sum of $10 and an additional amount equal to what would be his pro rata share in the property of the association; but no new member could be admitted without the unanimous consent of all the members in the town or city where his business was carried on. The twelfth by-law provided, among other things, that "if any member shall discontinue the publication of a newspaper, or shall sell his newspaper to another member, his membership shall cease, and his certificate of stock shall be canceled on the books of the association, and the treasurer shall refund to him the money paid to the association for the same."

*450 The St. Louis Dispatch Company ceased publication December 9, 1878, and it was averred that about one year thereafter the Dispatch Publishing Company, which during that year had been in the use and enjoyment of the membership, without apparent change of ownership, procured the issue of a new certificate, numbered 64. If, as alleged, the Dispatch Publishing Company acknowledged the title of the St. Louis Dispatch Company to the membership by continuing to use it, while standing in the name of the St. Louis Dispatch Company, it certainly disavowed it when it applied for a new certificate, and to have its name placed upon the books of the association. The Associated Press, in issuing that certificate, admitted a new corporation to its membership, and that membership was not the same membership which was hypothecated to secure the Bowman note. It does not appear that the old certificate was canceled, but as the publication of the St. Louis Dispatch had been discontinued, and the membership, in that sense, had ceased, by the terms of the by-laws, it is perhaps to be inferred that that had been done. Apparently, the association had the right to accord or deny the privileges of membership as it saw fit, and whether its action in the admission of the new corporation to membership was wholly independent of certificate No. 38, or based upon the substitution of one share for the other, it would seem to follow, upon the assumption that a membership could be pledged or mortgaged without its consent, that the association was directly interested in the contention raised by the complainant in respect of that action, and that the circuit court was right in holding that the question ought not to be determined in the absence of the association as a party.

But, in any view, the membership of the Dispatch Publishing Company was held adversely to the complainant. At the time the bill was filed, it had been so held for nearly eight years in the name of the Dispatch Publishing Company, which had paid all the assessments upon it, and enjoyed all its privileges, as the owner. If it obtained that membership under the by-laws, without reference to certificate No. 38, then, of course, the bill, as framed, would fail; and, if it had *452 been allowed to avail itself of the old membership, still its liability, if any, would be for a conversion, and the defenses of laches and limitations would apply.

Viewed as an action for conversion, recovery was clearly barred as to the plant and the good will, and also as to this certificate, which was issued independently of the mortgage, and not embraced within it. And so far as the bill proceeds upon the theory that the plant, the good will, and the membership ought, on equitable principles, to be held

subject to the lien of the mortgage, the court properly declined to assist a complainant that had slept upon its alleged rights for nearly eight years, and shown no excuse for its laches in asserting them. Cases sustaining the proposition that a mortgage may be foreclosed even after the debt has become barred by limitation have no application, nor does the fact that the Bowman note was still alive when the suit was instituted, since the question, in this aspect, is whether either or any of these alleged properties should, on equitable grounds, be brought within the operation of the mortgage, and upon that question we regard the delay of the complainant as an insuperable obstacle to a decree in its favor. Decree affirmed.

(149 U. S. 481)

BIBB v. ALLEN et al.

(May 10, 1893.)

No. 269.

DEPOSITION—GAMBLING CONTRACTS—FACTORS AND BROKERS—STATUTE OF FRAUDS—PARTNERSHIP.

1. Defendants were duly notified that plaintiffs purposed to take the deposition of a named witness on a specified date, before one Corey as commissioner; and defendants, after making certain untenable objections, which they abandoned, filed cross interrogatories, and the deposition was actually taken in accordance with the notice. The clerk, in issuing the commission, however, addressed it to Carey, instead of Corey. *Held* that, as defendants were not misled by the mistake, it furnished no ground for suppressing the deposition.

2. The commission to take the deposition was issued April 18th, was executed May 17th, and the deposition published by the clerk under a general order of the court on May 29th. The court was then in session, and so continued until July 8th. Its next term began in November, but during all this time defendants gave no notice of a motion to suppress the deposition, and only moved for that purpose on January 10th, the day set for the trial. *Held*, that the motion came too late.

3. In an action by cotton factors for commissions earned and advances made by them for defendants in the execution of contracts made by them on behalf of defendants upon the New York Cotton Exchange, and under its rules and regulations, evidence is admissible of the statutes of New York under which the exchange was organized, and of the rules under which its business was conducted.

4. The defense to such action was that the contracts from which the claims accrued were wagering contracts, and hence were void; but the evidence failed to show that either plaintiffs or defendants had any understanding that the goods sold were not to be delivered, and it was shown that the rules of the exchange recognized no contracts except for the purchase and sale of cotton that was to be actually delivered. *Held*, that the defense was not sustained by the evidence.

5. Defendants also alleged that the contracts were void under the statute of frauds. It was shown that defendants directed plaintiffs by telegraph to sell specified quantities of cotton for the account of certain fictitious names, which were intended and understood to represent defendants. Plaintiffs executed these orders by making "slip contracts" in duplicate, one copy being signed by plaintiffs and delivered to the purchaser, and the other signed by the purchaser and delivered to plaintiffs. These memoranda showed the quantity sold, the price, the name of the purchaser, and the seller, who was designated by the said fictitious name. *Held*, that such memoranda was sufficient to satisfy the statute of frauds, as parol evidence was admissible to show whom such fictitious name represented as the seller.

6. Even if the memoranda showing the transactions in question were not sufficient under the statute of frauds, this will not affect plaintiffs' right to commissions and to the recovery of advancements made, where the contracts have been duly executed by them according to their terms.

7. Where plaintiffs were compelled by the rules of the exchange, of which defendants had full notice, to go into the market and buy cotton to cover their contracts for sales for future delivery on defendants' account, by reason of the latter's failure to furnish sufficient margins to make good the increase in price, they are entitled to recover of defendants, as for advances made, the difference between the price at which the cotton was to be sold and the increased price they were compelled to pay for cotton to cover the contracts. Irwin v. Williar, 4 Sup. Ct. Rep. 160, 110 U. S. 499, distinguished.

8. Defendants were sued as partners, and did not deny the partnership, but the proof showed that one of them was not a partner, but only a clerk, and that the business carried on in the firm name was that of the other defendant alone. The jury accordingly found that there was no partnership. *Held*, that under the laws of Alabama, where the suit was brought, judgment might be entered against that defendant alone who was the owner of the business. Walker v. Insurance Co., 31 Ala. 529, distinguished.

In error to the circuit court of the United States for the middle district of Alabama.

This was an action by Thomas H. Allen, Thomas H. Allen, Jr., Richard H. Allen, and Harry Allen, trading as Richard H. Allen & Co., against Benajah S. Bibb and one Hopkins, as partners under the name of B. S. Bibb & Co. There was judgment below in favor of plaintiffs against defendant Bibb, and he brings error. Affirmed.

Geo. H. Craig and E. W. Pettus, for plaintiff in error. A. A. Wiley, for defendants in error.

*Mr. Justice JACKSON delivered the opinion of the court.

The defendants in error, citizens of the states of New York and Tennessee, and doing business in the city of New York as brokers, commission merchants, and cotton factors, under the firm name and style of Richard H. Allen & Co., brought this action of assumpsit in February, 1887, against the plaintiff in error and one Hopkins, citizens of Alabama, as partners under the name of B. S. Bibb & Co., to recover the sum of $20,023.50 with interest, which was claimed as commissions for services rendered, and money paid and advanced by them for and at the request of the defendants in selling, for their account, and as their agents, cotton for future delivery, according to the rules and regulations of the New York Cotton Exchange, in the city of New York.

The declaration or complaint was in the usual form, and contained but a single count for work and labor done, services rendered,

and money paid out and expended by the plaintiffs during the month of December, 1886, at the instance and request of the defendants, to the amount of $20,023.50, which, with interest thereon, was averred to be *483 past due and unpaid. The defendants answered separately. Neither of them denied the existence of a partnership betwen them, but both defended upon the merits. The answer of the defendant Hopkins consisted of two pleas: (1) Nonassumpsit; (2) that the plaintiffs did not do the work and labor or pay the money mentioned in the complaint at his instance or request. The defendant Bibb filed an answer containing five pleas, the first two of which were the same as those interposed by Hopkins. His third plea was a general denial of the allegations of the complaint, while the fourth and fifth averred that the work and labor performed by the plaintiffs, as set forth in their declaration, was the making of 11 wagers for him on the price of cotton, and that the money paid by the plaintiffs for him was in the settlement of the losses of those wagers, and in each of these pleas the statute of the state of New York against wagers, bets, and gambling transactions was set out.

After issue joined on the pleas, the defendant Bibb, by leave of the court, filed a sixth plea, setting up that on November 10, 1886, the plaintiffs, as special agents for him, sold 10,000 bales of cotton by various contracts, as a speculation, and for future delivery in New York, and averred that the plaintiffs, by their gross negligence and unskillfulness, made said contracts in such forms that all of said contracts, under the laws of the state of New York, were unlawful and void, and not binding on any one of the parties to said contracts, or either of them, in this: that in and by the statute law of New York in force at the time said contracts were made it is declared that "every contract for the sale of any goods, chattels, or things in action, for the price of $50 or more, shall be void unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive a part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase money." It was further averred that no note or memorandum of any of the contracts of sale made by plaintiffs for defendant was made in writing and *484 signed by the parties to be charged thereby; that no part of said cotton was accepted by the buyer, and no part of the purchase money was paid therefor. The plea further alleged that on December 30, 1886, the plaintiffs, without the request of the defendants, but voluntarily, settled said void contracts, and paid to the buyers of the cotton under such contracts large sums of money, and concluded with the averment that, without this, the plaintiffs never did any work, or paid any money, for the defendant.

Upon the trial of the cause before the court and a jury, the court, after stating to the jury that there was no evidence in the case upon which a verdict for the defendant Bibb could rest, on the ground that the contract sued on was a gambling contract, and therefore void, further instructed them that "the defendant Bibb did not in his testimony deny the correctness of the account sued on, but did say that the plaintiffs were liable to him for their failure to execute his subsequent orders to them to sell, for future delivery, some twenty-two thousand bales of cotton, as shown in the evidence in this cause; but, there being no claims by him in this suit against the plaintiffs on account of such failure to execute such orders, 'I charge you that, if you believe the evidence, you should find a verdict for the plaintiffs against the defendant Bibb for the amount of the account and interest.'" The court further charged the jury: "This case is made out as to defendant B. S. Bibb, and it is your duty to find a verdict against him for the account sued on and interest."

To the instruction that if they believed the evidence they should find a verdict for the plaintiffs against him for the account sued on and interest, the defendant Bibb excepted. The jury returned the following verdict: "We, the jury, find for the plaintiffs against the defendant Bibb, and assess the damages at $22,476.38; and we find for the defendant T. H. Hopkins on the ground that we find he was not a partner of B. S. Bibb." Upon a return of this verdict the defendant Bibb objected to a judgment being rendered against him thereon, for the reason that the complaint and pleadings and said verdict did not authorize a judgment against him. No other ground of objection was *485 stated or interposed. The court overruled his objection, and entered judgment against him for the amount found by the jury, to which Bibb excepted. The present writ of error is prosecuted by him to reverse that *486 judgment.

He has filed 19 assignments of error, which may be grouped under 5 heads or propositions, viz.: (1) That the court erred in overruling the motion to suppress the deposition of the witness Richard H. Allen; (2) that the court erred in admitting as evidence the statutes of New York, under which the New York Cotton Exchange was incorporated, and the rules and regulations of the exchange, together with the parol testimony *487 that the transactions in question between the parties were conducted in accordance with those rules and regulations; (3) that the contracts for the sale of cotton for future delivery were gambling contracts within the meaning of the New York statute against wagers, bets, etc.; (4) that said con-

tracts were invalid under the statute of frauds of the state of New York; and (5) that under the pleadings no judgment could be rendered against the defendant Bibb alone.

The questions thus presented may be properly considered in the order stated, under the facts disclosed by the bill of exceptions. The motion to suppress the deposition of the witness Richard H. Allen was based on the ground that no commission was issued out of the court, or by the clerk thereof, authorizing George H. Corey, as commissioner, to take the deposition; and, secondly, that neither of the defendants or their attorneys received any notice of the time and place of taking the deposition, or of the residence of either the witness or the commissioner by whom the deposition was taken. These objections to the deposition are clearly not well taken, for several reasons: It is shown by the record that on April 7, 1888, a notice was issued and served on the defendants that plaintiffs would take the deposition of the witness Allen, whose place of business was stated in the notice to be 31 and 33 Broad street, New York city; and that George H. Corey, whose place of business was 60 Wall street, in that city, would be suggested as commissioner to take such deposition; and that a copy of the interrogatories to be propounded to the witness was attached to the notice. It further appears that at that time the defendant Bibb objected to a commission being issued to take the deposition on the interrogatories to be propounded by the plaintiffs, basing his objection on the ground that the notice did not give the residence of the witness and of the commissioner, and on the further ground that no sufficient affidavit for the taking of the deposition had been filed, which objections were manifestly insufficient, inasmuch as the place of business of both the witness and the commissioner was stated, and an affidavit was filed by the attorney for the plaintiffs which showed *proper ground for taking the deposition. Without invoking the action of the court upon these objections, the defendant Bibb filed cross interrogatories to those propounded by the plaintiffs, and on April 18, 1888, a commission was regularly issued to said George H. Corey, as commissioner, to take the deposition on the interrogatories and cross interrogatories filed, in accordance with the terms of the notice served upon the defendants. The record further shows that the deposition was actually taken in pursuance of the commission thus issued, and was in all respects regular and in proper legal form. The clerk of the court, in issuing the commission, addressed it, however, to George H. Carey, Esq., 60 Wall street, New York city, instead of to George H. Corey, but that was purely a clerical mistake in making out the commission, and in no way misled the defendant or affected his rights. He had been notified of the place of taking the deposition, and had been given the true name of the commissioner, and the slight variance in the commission which issued was not material, and furnished no valid ground for the suppression of the deposition. Keene v. Meade, 3 Pet. 1, 6.

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But, aside from this, the motion to suppress the deposition came too late. As already said, the commission to take the deposition of said Allen was issued April 18, 1888. The deposition was taken before the proper commissioner on May 17, 1888, and, after transmission to the clerk of the court, was by him published, under a general order of the court, May 29, 1888. The May term of the court was then in session, and continued in session until July 8, 1888. The November term commenced on the first Monday of that month. During all that time the defendant Bibb made no objection to the deposition, and gave no notice that he would move to suppress it, but waited until January 10, 1889, the day set for the trial of the cause, when, after a motion for a continuance, then made, had been overruled, he for the first time moved to suppress the deposition. If the deposition was in any respect open to irregularities, the motion to suppress it, under the circumstances, came too late. Such motions should be made before the case is called for trial, so as to afford opportunity to retake the testimony or correct defects in the taking of the deposition. Howard v. Manufacturing Co., 139 U. S. 199, 205, 11 Sup. Ct. Rep. 500, and cases cited. The same rule of practice prevails in Alabama. De Vendal v. Malone, 25 Ala. 272, 278; Railway Co. v. Alexander, (Ala.) 9 South. Rep. 525. This assignment of error is, therefore, without merit.

The next assignment of error relied on is in the action of the court admitting in evidence the statutes of New York under which the New York Cotton Exchange was organized, together with the rules and regulations of that body under and in pursuance of which the transactions in question were conducted. This evidence was clearly competent and relevant, because the contracts entered into between Bibb & Co. and the plaintiffs contemplated that the business which the plaintiffs would transact for their principals would be under and in accordance with the rules and regulations of the New York Cotton Exchange. It was proper, therefore, to show that this cotton exchange was a lawful body, organized for lawful business purposes, and had power to make such rules and regulations as might be deemed necessary and proper to carry out the purpose of its organization. It is clearly shown that B. S. Bibb & Co. knew that the plaintiffs did business as cotton factors in that exchange, and in accordance with those rules and regulations, and that, in acting as their

agents in the sale of cotton for future delivery, they would transact the business through that exchange, and in accordance with its rules and regulations. It was, therefore, germane to the issues in the case, and was both competent and relevant to prove that the contract between the parties had been carried out on the part of the plaintiffs in the mode and according to the methods contemplated by the parties. Peabody v. Speyers, 56 N. Y. 230, 236; Nickalls v. Merry, L. R. 7 H. L. 530, 542.

It is settled by the weight of authority that, where a principal sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal, provided the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals, or public policy. We are of opinion, therefore, that the assignment of error based upon the admission of this testimony is not well taken.

Upon the third assignment of error, which presents the question whether the transactions in which the parties were engaged were illegal, because they were wagering contracts, under the New York statute against wagers, bets, etc., the evidence in the case clearly fails to make out such a defense. In entering into their arrangement, it is shown by the correspondence and by other testimony in the case that there was no agreement or understanding between the plaintiffs and defendants that the cottton sold for future delivery was not in fact to be actually delivered. In their correspondence as to the terms on which the agency was to be undertaken the plaintiffs were distinctly informed that the defendants did a large business for the best and most reliable people of their locality; that they would hold themselves personally responsible for all orders sent, and hold their correspondents responsible for all orders executed as to margins; that they handled sometimes from 3,000 to 5,000 bales of cotton a day; and that their customers dealt in orders for from 500 to 1,000 bales at a time, and were entirely responsible. It was also testified by both the plaintiffs and defendant Bibb that there was no understanding or agreement, either express or implied, between them at the time of entering upon the transactions or during their progress, that the cotton sold for account of the principals was not to be delivered at the time stipulated in the contracts of sale made for their account. It is not questioned that, if the transactions in which the parties are engaged are illegal, the agent cannot recover either commissions for services rendered therein or for advances and disbursements by him for his principal, (Story, Ag. §§ 330, 344, and authorites cited;) the reason for this rule being that in such illegal transactions of which the agent has knowledge he is regarded as particeps criminis, which precludes him from the recovery of either commissions or advances. Irwin v. Williar, 110 U. S. 499, 510, 4 Sup. Ct. Rep. 160. 491

But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions fails to show that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. In addition to this, it is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases, which have no application to the present case.

These rules, which were authorized to be made by the statute of the state of New York under which the exchange was incorporated, enter into and form part of the contracts of sale in this case. The defendants, in one of their earliest communications to the plaintiffs, informed them that they would use in their telegraphic correspondence what was known as "Shepperson's Code," which provided that, "unless otherwise stated as agreed, it is distinctly understood that all orders sent by this chapter are to be subject in every respect to the by-laws and rules of the market where executed;" and, further, that "with every telegram sent by this table the following sentence will be read as a part of the message, viz.: 'This sale has been made subject to all the by-laws and rules of our cotton exchange in reference to contracts for the future delivery of cotton.'"

It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. 2 Kent, Comm. 468, and authorities cited in notes;

Benj. Sales, (Amer. Ed.) §§ 81, 82. It is further well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality. Roundtree v. Smith, 108 U. S. 269, 2 Sup. Ct. Rep. 630; Dykers v. Townsend, 24 N. Y. 57; Irwin v. Williar, 110 U. S. 499, 507, 508, 4 Sup. Ct. Rep. 160. In this latter case the trial court charged the jury that the burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. "A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further, and show that this understanding was mutual,—that both parties so understood the transaction. If, however, at the time of entering into a contract for the sale of personal property for future delivery, it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. * * * It is not sufficient for the defendant to prove that Irwin & Davis never understood that they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is that the plaintiffs expected Irwin & Davis to execute their contracts,—expected them to *deliver the amount of grain sold; and before you can find that the sales were gambling transactions, and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. If the plaintiffs made sales of wheat for Irwin & Davis for future delivery, understanding that these contracts would be filled by the delivery of grain at the time agreed upon, Irwin & Davis were liable to the plaintiffs, even though they meant to gamble, and nothing more."

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This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract. It is directly in point here, for the evidence fails to show not only that Bibb & Co. intended it as a wagering contract, but it fails to show also that the plaintiffs so understood it. The testimony establishes that the plaintiffs did not, in fact, so understand it.

It further appears that in the memorandum or "slip contracts" of sale actually made by the plaintiffs for the account of Bibb & Co., the sales were described as made "subject to the rules and regulations of the New York Cotton Exchange." Under these circumstances, we are of opinion that the testimony fails to establish that the contracts in question were wagering transactions, and therefore void. The testimony is so clear to the contrary that the court below, under the settled rules of this court, was certainly justifiable in not submitting that question to the jury; for, if it had been submitted, and the jury had found that the contracts were wagers, it would have been the duty of the court to set aside their verdict. There is no merit in this assignment of error.

It is next urged on behalf of the plaintiff in error that the contracts for the sale of the cotton were void under the statute of frauds of the state of New York, because there was no sufficient note or memorandum in writing of the transactions, signed by the parties to be charged thereby. We are of opinion that this contention cannot be sustained under the facts of the case.

*After agreeing upon the terms in which the business should be transacted, and the use of Shepperson's code of cipher, B. S. Bibb & Co., on November 9, 10, and 11, 1886, telegraphed orders to the plaintiffs to sell for them in the aggregate 10,000 bales of cotton for January and February delivery. These dispatches were sent according to the form of Shepperson's code, and directed the sales for delivery for account of designated names such as "Albert," "Alfred," "Alexander," "Amanda," "Andrew," "Winston," etc., which names were intended and understood to represent the firm name of B. S. Bibb & Co. Thus, under date of November 9, 1886, B. S. Bibb & Co. telegraphed to plaintiffs: "If bureau report is considered favorable to-morrow sell for January delivery 1,000 bales cotton account Albert. Sell for February delivery 1,000 bales account Alfred. Sell for January delivery 1,000 bales account Alexander. Sell for January delivery 500 bales cotton account Andrew. Act promptly if favorable." So, under date of November 10, 1886, they telegraphed: "If market opens as high or higher to-morrow sell for January delivery 1,500 bales cotton account Winston. Keep us thoroughly posted."

These dispatches, as well as others of a similar character of later dates, meant "sell for January or February delivery the designated number of bales on account of B. S. Bibb & Company," and had attached to them, by the express terms of Shepperson's code, the understanding and agreement, already quoted, that the orders were to be subject in every respect to the by-laws and rules of the cotton exchange of New York, with the additional terms read into the telegrams, and as a part thereof, the stipulation that the sales were to be subject to

said by-laws and rules in reference to the future delivery of cotton.

The plaintiffs executed these orders promptly as they were received. In the execution of the orders they made what are called "slip contracts" in duplicate, one copy, signed by the purchaser, being delivered to the plaintiffs, and the other, signed by the plaintiffs as brokers, being given to the purchaser. There were 19 sales of cotton to various persons named in these "slip contracts," which were in the following form:

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"New York, Nov. 10, 1886.

"B 10, ac. Albert.
10 " Alexander.
5 " Andrew.
Seller, —— ——.
Buyer, Zerega & White.
On contract, subject to rules and regulations of New York Cotton Exchange.
Twenty-five hundred bales cotton.
Jan. 1 delivery.
Price, 8.99.
× Per Z. & White, seventy-five."

These contracts differed only in date, in the name of the purchaser, in the quantity of cotton sold, and the price thereof. As each sale was thus made, it was reported promptly by the plaintiffs to the defendants, both by letter and by telegram, giving price, and stating that the orders to sell were executed. So that the defendants were kept accurately advised of each transaction made in pursuance of their order.

In addition to the "slip contracts" in the form described above delivered by the plaintiffs to the purchasers of the cotton sold, and received by them from the buyers of cotton, the sales were entered upon the books of the plaintiffs in conformity with such contracts. These "slip contracts" show upon their face that the purchaser named therein bought cotton, sold for account of the name adopted to represent B. S. Bibb & Co. They gave the price, and the number of bales, and the time of delivery. They were in the form prescribed by the rules and regulations of the cotton exchange, and constitute bought and sold notes, which, taken together, as they should be, constitute a sufficient memorandum in writing of the contract between the brokers, or their principal, and the purchasers of the cotton, to meet the requirements of the statute of frauds. Peabody v. Speyers, 56 N. Y. 230, 236, 237; Newberry v. Wall, 84 N. Y. 576, 580; Butler v. Thomson, 92 U. S. 412; Beckwith v. Talbot, 95 U. S. 289; Ryan v. U. S., 136 U. S. 68, 83, 10 Sup. Ct. Rep. 913; Bayne v. Wiggins, 139 U. S. 210, 11 Sup. Ct. Rep. 521.

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In this latter case this court, speaking by Mr. Justice Harlan, said: "The principle is well established that a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract." So in Benjamin on Sales, (Amer. Ed. § 296,) after a review of the authorities, both English and American, it is stated: "The bought and sold notes, when they correspond and state all of the terms of the bargain, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's books, or, what is equivalent, only an unsigned entry." Goom v. Afialo, 6 Barn. & C. 117; Sievewright v. Archibald, 17 Q. B. 115; Thompson v. Gardiner, 1 C. P. Div. 777. Such, too, is the rule in New York, as shown by the earlier cases of Peltier v. Collins, 3 Wend. 459; Davis v. Shields, 26 Wend. 341.

The bought and sold notes in question in this case, called "slip contracts," when read in the light of the rules and regulations of the cotton exchange, and considered in connection with the letters and telegrams between the parties, constitute a sufficient note or memorandum in writing of the transactions to satisfy the requirements of the statute of frauds. It is no valid objection to these "slip contracts," executed in duplicate, that the sales purported to be made on account of "Albert," "Alfred," "Alexander," "Amanda," and "Winston," etc., which names were adopted by the defendants, and which represented them and their account. Parol evidence was clearly competent to show that these fictitious names, which defendants had adopted, represented them as the parties for whose account the sales were made.

But, aside from this, and independent of the question whether the bought and sold notes, called the "slip contracts," constitute a compliance with the statute of frauds, the contracts were fully executed, and the transactions closed, before the plaintiffs commenced the present suit. It is well settled by the authorities that the defense of the statute of frauds cannot be set up against an executed contract. Dodge v. Crandall, 30 N. Y. 304; Brown v. Trust Co., 117 N. Y. 273, 22 N. E. Rep. 952; Madden v. Floyd, 69 Ala. 221, 225; Gordon v. Tweedy, 71 Ala. 202, 214; Huntley v. Huntley, 114 U. S. 394, 400, 5 Sup. Ct. Rep. 884; Browne, St. Frauds, § 116. This rule proceeds and rests upon the principle that there is "no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally, but not legally, bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not, by reason of some technical rule of law, have been enforced by action." Newman v. Nellis, 97 N. Y. 285, 291.

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We know of no principle on which the agent can be deprived of a right to his

commissions and advances in the execution of his agency for a principal on the ground that he has not avoided a contract which was not in strict conformity with the statute of frauds, in the absence of any instruction or instructions from the principal not to comply therewith. Contracts not in conformity with the statute are only voidable and not illegal, and an agent may therefore execute such voidable contracts without being chargeable with either fraud, misconduct, or disregard of the principal's rights. If the statute of frauds was not complied with in making the sale contracts in the present case, we do not see that the defendant was in a position to take advantage thereof, or that such want of compliance with the statute, after the contracts were executed, would constitute any defense to the action. The suit was not brought on these contracts of sale, which the plaintiff in error claims were voidable under the New York statute of frauds. It is an action by the agents against their principal to recover for work and labor performed, and money paid out at the principal's instance and request, and in the settlement of the principal's business, in which the agent had authority to make disbursements for him. In the present case the plaintiffs had, by their contract, rendered themselves personally responsible for the losses which might and did occur under the contracts of sale made for account of the defendant, and as such agents they are entitled to recover against their principal the full amount expended by them for him in the transactions. If, in closing out the contracts of sale, profits had been realized on the transactions, whether by reason of decline in the price of cotton, or by the purchases "to cover" the cotton sold, the brokers would, upon well-settled principles, have been liable to their principal for the same. They could not have set up or interposed as a valid defense to such liability that the contracts of sale out of which the profits were realized were not enforceable under the statute of frauds, or were voidable by the agents or the purchaser with whom they contracted. Neither can the principal interpose such an objection as against the agent's right to commission or to reimbursement for his outlays, after the execution of contracts merely voidable for want of writing. Coward v. Clanton, 79 Cal. 23, 21 Pac. Rep. 359; Morrill v. Colehour, 82 Ill. 619. It is a well-established principle, which pervades the whole law of principal and agent, that the principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency, or in pursuance of the authority conferred upon him, when the actions or transactions are not illegal. Speaking generally, the agent has the right to be reimbursed for all his advances, expenses, and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses, and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent. If, in obeying the instructions or orders of the principal, the agent does acts which he does not know at the time to be illegal, the principal is bound to indemnify him, not only for expenses incurred, but also for damages which he may be compelled to pay to third parties. The exception to this rule is where the transaction for which the agent is employed is illegal, or contrary to good morals and public policy. Add. Cont. § 636; Story, Ag. §§ 339, 340, and cases cited in notes. Thus in Beach v. Branch, 57 Ga. 362, where an agent had sold cotton for account of another, and was obliged to refund the purchase money to the purchaser on account of false packing by the principal, he was allowed to recover the amount so paid from the principal.

It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to incur such expenditure, but also as a promise to repay it. So that the employment of a broker to sell property for future delivery implies not only an undertaking to indemnify the broker in respect to the execution of his agency, but likewise implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary or may result from the performance of his agency. Bayley v. Wilkins, 7 C. B. 886; Smith v. Lindo, 5 C. B. (N. S.) 587. Where a special contract remains executory, the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue upon the contract or in indebitatus assumpsit, and rely upon the common counts. In either case the contract will determine the rights of the parties. Dermont v. Jones, 2 Wall. 9. These general principles have a direct application to the case under consideration upon the facts disclosed by the record.

The decision in Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160, cited by plaintiff in error, is not in conflict with the views above expressed, nor does that decision properly apply to the facts in this case. The judgment of the court below in that case was reversed for error in the charge of the court upon the point that the act of one partner in buying and selling grain for future delivery was binding upon the other partner, who had not authorized, sanctioned, or known of the transactions; and for the further reason that the court permitted

proof of the custom of the Chicago exchange, when there was no evidence that the defendant below had knowledge of it. In the present case it is shown that the plaintiff in error had full knowledge of the rules and regulations of the New York Cotton Exchange, and of the course of business that had to be and would be adopted by the defendants in error in executing his orders to sell. It is further shown by the testimony that it was expressly understood and agreed in writing, under date of November 3, 1886, between the parties, at the commencement of these transactions, that, "if a call for margins (which the plaintiff in error was to put up) is not responded to promptly, there is to be no carrying on our part, (Richard H. Allen & Co.,) but that the cotton is to be closed out at our discretion;" to which agreement the plaintiff in error assented. When the cotton advanced beyond the price at which it was sold for delivery, the plaintiffs below, in pursuance of the terms of the contract with Bibb & Co., called upon the latter to put up margins covering the advance in price. This Bibb & Co. failed to do, and the demand was repeated on several occasions. While they were in default in putting up margins, Bibb & Co. gave orders to sell about 22,000 bales of cotton for future delivery. These orders R. H. Allen & Co. declined to execute until proper margins were put up on the past transactions and on the orders to sell, and so notified Bibb & Co. That firm continued in default in putting up margins, and a member of the firm of R. H. Allen & Co., on December 29, 1886, asked the defendant below for instructions about the contracts made with his firm by the plaintiffs, but Bibb refused to give any instructions, or to put up margins. He was then informed that the plaintiffs below would close out the contracts they had made for Bibb & Co., to which he made no objection or dissent, and in pursuance of this notice R. H. Allen & Co., on December 30, 1886, went into the market, and bought cotton "to cover" that which they had sold for account of B. S. Bibb & Co., and to make *501 good their contracts. This they were required to do, both by the terms of their contracts with the parties to whom the cotton had been sold, and by the rules and regulations of the exchange, of which they were members. If they had failed "to cover," or to comply with such contracts, they would have been liable to expulsion from the exchange. The cotton which they bought "to cover" these contracts was purchased at the market price, and the difference between that price and the price of 10,000 bales previously sold for Bibb & Co. amounted to $19,273.50, which, with the plaintiff's commissions of $750, constituted their claim against B. S. Bibb & Co., for the recovery of which the suit was brought. Under these facts, which are uncontroverted, it is clear that the rule laid down in Irwin v. Williar has no application to this case.

In the case of Perin v. Parker, 126 Ill. 201, 211, 18 N. E. Rep. 747, where the transactions were similar to those in question here, it was said by the supreme court of Illinois: "Parker, as agent for Perin, and acting under his orders, sold the corn for Perin, and, under the rules of the board of trade and the custom of the Chicago market, he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom, with which they were both perfectly familiar. The rules of the board of trade provided that on time contracts purchasers should have the right to require of sellers ten per cent. margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited margins upon the contracts, or was liable to be called on for the ten per cent. and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also, within that time, deposit with the secretary of the board, or *502 the parties calling for such deposits, duplicate certificates of deposit, signed by the treasurer of the board, or an authorized bank."

This brings us to the consideration of the last assignment of error, viz. whether, under the pleadings and proofs, a judgment was properly rendered against the defendant Bibb alone, after a verdict had been given finding that Hopkins was not a partner. On this question we entertain no doubt whatever. The action was against the partnership carried on under the name of B. S. Bibb & Co., the complaint alleging that B. S. Bibb and Thomas H. Hopkins were the partners composing that firm. The proof showed, however, that Hopkins was not a partner, but only a clerk, and that the business done in the name of the firm of B. S. Bibb & Co. was that of B. S. Bibb alone. In support of this objection to the judgment against him, counsel for Bibb rely upon the case of Walker v. Insurance Co., 31 Ala. 529, 531. That was an action against three defendants as the joint owners of a steamboat. They made no objection to the complaint, but interposed a plea of the general issue. On the trial the proof showed that but two of the defendants were owners of the boat, and a verdict and judgment was accordingly rendered against those two and

in favor of the other defendant. On a writ of error, the two defendants against whom the judgment was rendered sought a reversal on the ground that under the pleadings no judgment could be rendered against only two of them; and that, inasmuch as the proof disclosed a liability on the part of only two, when the complaint was made against three, the action should have been discontinued; but the supreme court ruled otherwise, and held, as stated in the headnote or syllabus of the case, that "when the complaint shows a substantial cause of action, and no objection was interposed to it in the primary court, a misjoinder of causes of action is not available on error." It is true that, in the opinion of the court in that case, reference is made to section 2156 of the then Code of the state, which allowed plaintiff to recover against one or more defendants, and it was stated that that section should not be so construed as to authorize a recovery upon a cause of action not embraced in the pleadings, or which was inconsistent with the complaint; but that it authorized a judgment in favor of some of the defendants, where the proof did not show the absence of a right to recover against the remaining defendants upon the pleadings.

In the present case there is no variance because of the fact that Hopkins was not a member of the firm against whom the plaintiffs below were seeking relief, especially when no objection was made to any misjoinder; and in the objection to the entry of judgment upon the verdict which he interposed Bibb did not state any ground on which he rested the objection. But, whatever may be said of the case of Walker v. Insurance Co., which was decided in 1858, since that time new codes have been adopted, (1876 and 1886,) under the provisions of which, as construed by the later decisions of the supreme court of Alabama, it admits of little or no question that in a suit, like the present, against an alleged partnership, in respect to which the liability is both joint and several, the failure to recover against one of the alleged partners cannot defeat a right to recover against the other, who did business alone in the firm name.

In the case of Clark v. Jones, 87 Ala. 474, 482, 6 South. Rep. 362, it was said by the supreme court of the state: "It is further objected that proof of demand against a partnership, of which defendant is a member, does not authorize recovery on a complaint which counts on an account stated between plaintiffs and defendant individually, and for goods sold to him alone. This question should be regarded as res adjudicata in this state. Under the statute, which declares 'any one of the associates, or his legal representatives, may also be sued for the obligations of all,' it has been uniformly held that a partnership creditor may sue one of the members of a firm for a debt contracted in the partnership name, whether by account or otherwise, and declare upon the demand as his individual liability;" citing Code 1886, § 2605; Duramus v. Harrison, 28 Ala. 326; Hall v. Cook, 69 Ala. 87.

In Smith v. Straub, 20 Pac. Rep. 516, the supreme court of Kansas sustained a judgment in a case almost identical with the present. That was a suit for the price of merchandise against three persons as partners under the firm name of D. I. Ross & Co. They denied the partnership on oath, and on the trial of the case it was found as a fact that there was no partnership, but that only one of the defendants was the owner of the business; that one of the others was an agent, and the other only a clerk in the store. It was contended that no judgment could be rendered in the action against the one who purchased the goods and owned the store, as it was brought against her only as a partner; but the court ruled otherwise, and said: "It may be true, under the common-law practice, that in a suit against a partnership firm no judgment could be rendered against an individual member of that firm, but our statute provides that all contracts shall be construed as joint and several; and it also provides that in all cases of joint obligations and joint assumptions of copartners or others suits may be brought or prosecuted against any one or more who are so liable. This action was instituted under the theory that there was a partnership. The plaintiff in error filed her answer under oath denying the partnership, and, if the proof fixed a liability on any one of the parties, judgment could be rendered against such party individually."

In Rutenberg v. Main, 47 Cal. 213, it was held, in an action against several partners, where the complaint averred a joint contract made by all the defendants, and the answer denied the contract, but did not set up a misjoinder of parties defendant, that the plaintiff should not fail as against all of the defendants, but should have judgment against those who the proof showed had joined in the contract, while the others should have judgment in their favor. Gillam v. Sigman, 29 Cal. 637; Gruhn v. Stanley, 92 Cal. 86, 28 Pac. Rep. 56; Pom. Rem. & Rem. Rights, §§ 433, 434.

At common law the objection for misjoinder should be made by answer or plea in a way so as to give the plaintiff a better writ, but at common law, where two or more parties are sued as partners, and there is no denial of the partnership, and no plea alleging a misjoinder, it is doubtful whether, after verdict, such an objection could be taken. But, however that may be, under the modern codes, including that of Alabama, no such objection can be made after verdict. In this case the plaintiff in error did business under the name of B. S. Bibb & Co., and he should not be heard, when sued as a partner of that firm, to say that

he alone composed the firm, and was, therefore, not liable, because joined with another defendant who was not a member.

The several errors assigned for reversal of the judgment below are, in our opinion, not well taken, and that judgment is accordingly affirmed.

(149 U. S. 645)

McNULTY v. PEOPLE OF STATE OF CALIFORNIA.

(May 15, 1893.)

No. 1,253.

SUPREME COURT—JURISDICTION—ERROR TO STATE COURTS—FEDERAL QUESTION—CRIMINAL LAW—DUE PROCESS OF LAW.

1. Pending an appeal to the supreme court of California from a sentence of death, the provision of the Penal Code directing execution in not less than 30 nor more than 60 days after judgment was amended so as to require execution in not less than 60 nor more than 90 days. After hearing the appeal the supreme court held that, although this act contained no exceptions, and was therefore apparently ex post facto in its operation, yet that a saving clause was to be read into it from section 329 of the Political Code, which declares that the repeal of a criminal law shall not constitute a bar to a prosecution and punishment thereunder for offenses committed before the repeal; and the court held that the prior law was therefore still in force, so as to justify execution thereunder, and accordingly affirmed the judgment. *Held*, that this decision involved no federal question, as the construction of the state laws was for the state courts alone, and a writ of error from the supreme court of the United States could not be sustained on the theory that the amendment repealed the prior law, but was itself unconstitutional, and that, therefore, there was no law in existence under which the execution could be had, whence it followed that the execution would be without due process of law, and in violation of the fourteenth amendment to the federal constitution.

2. Where the prosecution of a capital offense by information, instead of indictment, is authorized by a state constitution, a prosecution and conviction in accordance therewith in the state courts is not without "due process of law." Hurtado v. People of California, 4 Sup. Ct. Rep. 111, 292, 110 U. S. 516, followed.

In error to the supreme court of the state of California. Writ dismissed.

W. H. H. Hart, Atty. Gen. Cal., for the motion. Carroll Cook, opposed.

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

Plaintiff in error was tried for the murder of one Collins on March 25, 1888, convicted, and sentenced to be hanged. From the judgment of conviction he prosecuted an appeal to the supreme court of the state of California, which on May 1, 1891, affirmed the judgment of the court below. On May 27th the supreme court, of its own motion, set aside the judgment of affirmance solely on the ground, as shown by the record, that the cause might "be argued upon the question of effect and operation of the recent amendment to the Penal Code respecting the execution of a sentence of death." 26 Pac. Rep. 597. The cause having been reargued, the judgment below was again affirmed on December 12, 1891. 28 Pac. Rep. 816. On December 31st a petition for a rehearing was filed, and on January 11, 1892, a rehearing was granted, and thereafter the cause was again argued. On February 19, 1892, the judgment appealed from was again affirmed, (29 Pac. Rep. 61,) and plaintiff in error applied to the supreme court of California to allow a writ of error from this court, which application was denied. Subsequently a writ of error was allowed by one of the justices of this court, and a motion is now made to dismiss that writ or affirm the judgment.

At the time of the commission of the alleged crime, the conviction, and the judgment, the laws of California prescribed the penalty of death for such crime, and that execution should be had not less than 30 nor more than 60 days after judgment, by the sheriff, within the walls or yard of a jail, or some convenient private place in the county. Pending the appeal to the supreme court a statute was passed, amending the Penal Code so as to provide that the judgment should be executed in not less than 60 nor more than 90 days from the time of judgment, by the warden of one of the state prisons, within the walls thereof, and that the defendant should be delivered to such warden within 10 days from the judgment. St. Cal. 1891, p. 272.

As is stated in the majority opinion of the supreme court of the state, (93 Cal. 427, 26 Pac. Rep. 597, and 29 Pac. Rep. 61,) the case, when first heard in that court, was determined without reference to the amendment of the law concerning the execution of the death penalty.

Upon a suggestion of a difficulty arising in view of the amendments, which had been enacted after McNulty was convicted and sentenced, a reargument was ordered, and a majority of the court reached the conclusion that the amendments were, under the rule laid down in Medley's Case, 134 U. S. 160, 10 Sup. Ct. Rep. 384, unconstitutional in toto, and that, therefore, the former law was not thereby repealed. On that argument it was assumed, and the opinion of the court proceeded upon the assumption, that the amendments stood entirely without a saving clause, either in the amendments themselves, or in the general statutory law. Subsequently the attention of the court was called to section 329 of the Political Code as constituting a saving clause fully covering the amendments, and the court held that such was the effect of that section. The section read as follows: "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

It was therefore concluded that McNulty

was to be punished under the law as it existed at the time of the commission of the crime of which he was convicted, and that under this view the act of 1891 was constitutional, because not intended to apply to past offenses, but to be prospective only in its operation, and the judgment was accordingly affirmed.

It is clear that this writ of error cannot be sustained. If the affirmance based upon the conclusion reached by the court on the first reargument had stood, a writ of error could not have issued, since that decision of the court did not sustain the validity of the act of 1891, but on the contrary held it to be wholly void, as in contravention of the constitution of the United States. The final affirmance of the judgment reached upon the second reargument rested upon the conclusion that a saving clause existed in the statutes of California, which retained the prior law in force, and justified the execution of the sentence thereunder.

The contention of counsel is that the execution of plaintiff in error as ordered would be without due process, because the amendments of 1891 repealed the former law, and left no law under which he could be executed, since the amendments could not be enforced because of their being in violation of the constitution. But this argument amounts to no more than the assertion that the supreme court of the state erred as to the proper construction of the statutes of California,—an inquiry it is not within our province to enter upon,—or that that court committed an *648 error so gross as to amount in law to a denial by the state of due process of law, or of some right secured to the plaintiff in error by the constitution of the United States,—a proposition not open to discussion upon the record before us. In our judgment the decision of the supreme court of California, that he should be punished under the law as it existed at the time of the commission of the crime of which he was convicted, involved no federal question whatever.

It may be added that McNulty was proceeded against by information, and by 3 of the 22 assignments of error the legality of so proceeding is questioned; and it is also claimed that the judgment was erroneous because it did not appear from the record that McNulty had had a legal or any examination before the filing of the information, or had been lawfully or at all committed by any magistrate.

It was settled in Hurtado v. People of California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292, that the words "due process of law" in the fourteenth amendment do not necessarily require an indictment by a grand jury in a prosecution by a state for murder, whose constitution authorizes such prosecution by information, and no point appears to have been made or decided in the state court as to the previous examination and commitment. So far as the record shows, no right, privilege, or immunity in respect of these matters was set up or claimed and denied, as required by section 709 of the Revised Statutes. Spies v. State of Illinois, 123 U. S. 181, 8 Sup. Ct. Rep. 21.

We perceive no ground upon which this writ of error can be sustained. In re Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930; Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. Rep. 224; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577.

Writ of error dismissed.

(149 U. S. 648)

VINCENT v. PEOPLE OF STATE OF CALIFORNIA.

(May 15, 1893.)

No. 1,316.

In error to the supreme court of the state of California.

W. H. H. Hart, Atty. Gen. Cal., for the motion. Carroll Cook and G. R. B. Hayes, opposed.

Mr. Chief Justice FULLER. This case, which will be found reported in 95 Cal. 425, 30 Pac. Rep. 581, differs in no essential respect from that of McNulty, just considered. 13 Sup. Ct. Rep. 959. For the reasons given in the foregoing opinion, the writ of error must be dismissed.

(149 U. S. 649)

SHUTE, Sheriff, et al. v. KEYSER.

(May 15, 1893.)

No. 1,187.

SUPREME COURT—APPELLATE JURISDICTION—APPEALS FROM TERRITORIAL SUPREME COURTS—DEFECTIVE CITATION—DISMISSAL.

1. The appellate jurisdiction of the supreme court over the judgments and decrees of the supreme courts of the territories was not affected by the judiciary act of March 3, 1891, except in the classes of cases in which the judgments of the circuit courts of appeal are made "final" by section 6, the appellate jurisdiction in such cases being transferred to those courts by section 15; and hence an appeal will still lie to the supreme court in a suit brought by a private individual against a sheriff and others to enjoin a threatened sale of certain property claimed by plaintiff under an execution issued on a judgment against a third party, when the matter in dispute exceeds $5,000.

2. The fact that on an appeal to the supreme court of the United States the citation, which was signed March 12th, was made returnable on the first day of the ensuing October term, instead of within 60 days, as required by Rule 8, § 5, and Rule 9, § 4, of the supreme court, is an error which is not jurisdictional, and will not require a dismissal of the appeal, or even the taking out of a new citation, after the appellees have appeared generally.

Appeal from the supreme court of the territory of Arizona.

On motion to dismiss the appeal. Denied.

R. F. Brent, for the motion. Wm. Allen Butler and John Notman, opposed.

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

This was an action brought in the district

court of Gila county, Ariz., by William Keyser against George E. Shute, sheriff of that county, and certain judgment creditors of the Old Dominion Copper Mining Company, to enjoin the threatened sale, under an execution against that company, of mining property of which Keyser claimed to be the owner, which resulted in a decree in favor of Keyser according to the prayer of the complaint. The case was carried by appeal to the supreme court of the territory, and the judgment affirmed, (29 Pac. Rep. 386,) whereupon an appeal to this court was allowed, and
650 the case, having been duly docketed, now comes before us on motion to dismiss.

The citation was signed March 12, 1892, and made returnable on the first day of the ensuing October term; and one of the two grounds relied on in support of the motion is that the citation should have been returnable within 60 days from the signing of the same, under section 5 of rule 8 and section 4 of rule 9 of this court. It is true that the rules so provide, but, as the purpose of the citation is notice, so that the appellant may appear and be heard, any defect in that regard is not jurisdictional, and a new citation might be taken out, if necessary, which, however, it is not, as the appellees have appeared generally.

The second ground of the motion is that by reason of the provisions of the judiciary act of March 3, 1891, the appeal was improperly allowed, and cannot be maintained.

By section 702 of the Revised Statutes and the act of March 3, 1885, (23 Stat. 443, c. 355,) the final judgments and decrees of the supreme courts of the territories, where the matter in dispute, exclusive of costs, exceeded the sum of $5,000, might be reviewed or reversed or affirmed in this court upon a writ of error or appeal in the same manner and under the same regulations as the final judgments and decrees of a circuit court. By the fifth section of the judiciary act of March 3, 1891, it was provided that appeals or writs of error might be taken directly to the supreme court from the district and circuit courts in six classes of cases therein enumerated, neither of which classes includes the pending case. By the sixth section the circuit courts of appeals, established by the act, were to exercise appellate jurisdiction to review by appeal or writ of error final decisions of the district and circuit courts in all cases other than those provided for in the fifth section, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals were made final in all cases in which the jurisdiction was dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different states, in all cases
651 arising under the patent laws, the revenue laws, the criminal laws, and in admiralty cases. The case at bar falls under none of these heads.

By the fifteenth section it was provided that the circuit courts of appeals in cases in which the judgments or decrees of those courts were made final by the act should have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders, and decrees of the supreme courts of the several territories as by the act they might have to review the judgments, orders, and decrees of the district and circuit courts. This section does not apply to this case, because it is not one of the cases in which the judgments or decrees of the circuit courts of appeals are made final by the act.

By the fourteenth section, section 691 of the Revised Statutes, and section 3 of the act of February 16, 1875, (18 Stat. 315, c. 77,) were expressly repealed, and also "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceeding sections five and six of this act."

There was no provision for appeals or writs of error in cases not made final by section 6 from the supreme courts of the territories to the circuit courts of appeals, and there was no express repeal of the provisions of the prior acts regulating appeals or writs of error in such other cases from those courts to this. There is nothing to indicate an intention that the judgments and decrees of the supreme courts of the territories should not be susceptible of review in the class of cases in which there was no appeal or writ of error to the circuit courts of appeals.

The result is that, as the acts regulating appeals or writs of error from or to the supreme courts of the territories to or from this court were not repealed, except to the extent specified, an appeal or writ of error lies to this court from the judgments or decrees of those courts, except in cases where the judgments of the circuit courts of appeals are made final.

The motion to dismiss the appeal will therefore be denied.

(149 U. S. 652)

CARR v. QUIGLEY.

(May 15, 1893.)

No. 259.

PUBLIC LANDS—RAILROAD GRANTS—RESERVATIONS—MEXICAN GRANTS.

1. A Mexican grant of quantity—as of a certain number of leagues of land lying within a larger tract, whose boundaries are given—is a float, subject to location within the tract by the government before it can attach to any specific lands; and hence the grant does not operate, before such location, to exclude the whole tract from pre-emption or sale, or to except it from the operation of the Union Pacific Railroad grants, (12 Stat. 489, c. 120; 13 Stat. 356, c. 216;) and under those acts, if the land lay within the granted sections, all but enough to satisfy the Mexican grant would pass to the railroad company. U. S. v. McLaughlin, 8 Sup. Ct. Rep. 1177, 127 U. S. 428, followed.

2. A Mexican grant, after giving the boundaries of the land, described it as containing, in all, two square leagues,—a little more or

less; and the confirmation was of that quantity, if contained within the boundaries named; and, if a less quantity were found to be within the boundaries, then the confirmation was for the less quantity, and for all the tract described. By actual survey the boundaries were found to contain nearly 10 square leagues. *Held*, that this was a grant of quantity, constituting a float, to be located at the pleasure of the government within the boundaries described, and hence did not operate to withdraw the whole tract from sale, pre-emption, or grant pending the location of the two square leagues.

In error to the supreme court of the state of California. Reversed.

Statement by Mr. Justice FIELD:

This was an action of ejectment brought by W. B. Carr against John Quigley for the possession of 160 acres of land situated in the county of Alameda, state of California. The land is a portion of an unnumbered odd section granted to the Central Pacific Railroad Company of California by the act of congress of July 1, 1862, as amended by the act of July 2, 1864, and which, by the consolidation of the Western Pacific Railroad Company with the Central Pacific Railroad Company, under the laws of California, in June, 1870, inured to the latter company, and to it a patent of the United States for the land mentioned was issued, bearing date on the 17th day of May, 1874.

The plaintiff claimed title to the demanded premises under a conveyance to him by the Central Pacific Railroad Company on the 10th of June, 1871.

The complaint alleges that the plaintiff was the owner in fee, and entitled to the possession, of the premises, on the 22d of December, 1877, and that on that day the defendant, without right or title, against the will of the plaintiff, entered upon the premises, and ejected the plaintiff therefrom, and has ever since withheld the possession from him, to his damage of $1,000, and that the value of the annual rent of the premises is $320. He therefore prays judgment for the restitution of the premises, for the damages sustained, and for the rents and profits.

*053 *The defendant, in his amended answer, in addition to a general denial of the allegations of the complaint, sets up (1) that at the date of the patent to the railroad company the land patented was not subject to the disposal of congress, but was land reserved to answer the calls for land of a grant from the Mexican government to Jose Noriega and Robert Livermore, bearing date the 10th of April, 1839, and that by reason of such reservation the patent was issued without authority of law, and consequently was void; that since October, 1877, the defendant has been in rightful possession of the land as a preemptor under the laws of the United States; and (2) that the land was not sold by the grantee, the railroad company, within three years after the completion of its road.

A demurrer to this last defense was sustained by the court, and its ruling was acquiesced in.

It was agreed that the annual value of the rents and profits of the land was $50.

The case was tried twice. On the first trial, in the district court of Alameda county, the plaintiff put in evidence the patent of the United States of the land to the Central Pacific Railroad, and a conveyance of the same by that company to the plaintiff. The defendant then offered to prove that the land was within the exterior boundaries of the Mexican grant mentioned, and therefore reserved from the congressional grant to the railroad company. The plaintiff objected to the offered proof on the ground that the land was not subject to pre-emption when the defendant entered upon it, the patent of the United States having been previously issued, which was conclusive in an action of ejectment. The objection was sustained, to which the defendant excepted, and judgment was rendered for the plaintiff. Thereupon an appeal was taken by the defendant to the supreme court of California, and in January, 1881, the judgment was reversed, and the cause remanded for a new trial. 57 Cal. 395. In April, 1883, the case again came on for trial in the superior court of Alameda county, the successor to the district court of that county, under the new constitution of California, which went into operation on the 1st of January, 1880. On that trial the evidence offered by the defendant, which was excluded on the previous trial, was admitted, and new testimony given bearing upon the question of the reservation of the land in controversy. The defendant obtained a judgment, the court holding that the land was claimed as a part of the Mexican grant mentioned, and was reserved for its satisfaction. A motion for a new trial was denied. An appeal was then taken from the order denying the motion, and also from the judgment, to the supreme court of the state, which affirmed both the order denying a new trial, and the judgment for the defendant, (16 Pac. Rep. 9, and 21 Pac. Rep. 607,) and for a review of the judgment the case is brought here on writ of error.

A. T. Britton and A. B. Browne, for plaintiff in error. Mich. Mullany, for defendant in error.

Mr. Justice FIELD, after stating the facts in the foregoing language, delivered the opinion of the court.

The defense upon which the defendant below relied on both trials was that the land patented to the railroad company was within the boundaries of a Mexican grant, the validity of which was at the time under consideration by the federal tribunals, and was therefore reserved from sale when the patent was issued. Evidence to establish this fact was offered on the first trial, but rejected by the court, and for this alleged error the judgment recovered by the plaintiff was reversed.

On the second trial the evidence rejected on the first trial was received, and it was shown that the land patented to the railroad company was within the exterior bounds of the Mexican grant, and that its validity was then under consideration by the tribunals of the United States; and the court held that it was for that reason reserved from sale, and that the patent therefor was unauthorized and void. The defendant having taken up a pre-emption claim on the land, *955 judgment was rendered in his favor.

*The supreme court of the state sustained this view of the reservation of the land from sale, and consequent appropriation to the satisfaction of the congressional grant to the railroad company. The question for our determination is whether, at the time of the issue of the patent, the land was thus reserved.

The act of July 1, 1862, (12 Stat. p. 489, c. 120,) provided for the incorporation of the Union Pacific Railroad Company, and made a grant of land to that company to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean. Its provisions apply, in terms, to that company, but the construction of other railroads is included within the objects contemplated by the act, and the clauses relating to the Union Pacific Railroad Company are made applicable to them. The ninth section authorizes the Central Pacific Railroad Company, a corporation of California, to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of the state, upon the same terms and conditions which were provided for the construction of the railroad and telegraph line of the Union Pacific. A similar grant of land, of the same extent, and upon like conditions, was made to the Central Pacific, and the rights and obligations of the company were determined by the same law.

By the provisions of the third section, thus applied, there was granted to that company, to aid in the construction of its road and telegraph line, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of its road on the line thereof, and within the limits of ten miles on each side, "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of the road is definitely fixed:" provided, that all mineral lands were excepted from the operation of the act, but where they contained timber that timber was granted to the company.

By the fourth section of the act, as amended by section 6 of the act of 1864, it was *956 provided "that whenever said company shall have completed not less than twenty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be of American manufacture, of the best quality, the president of the United States shall appoint three commissioners to examine the same, and report to him in relation thereto; and if it shall appear to him that not less than twenty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue, conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each twenty miles of said railroad and telegraph line are completed, upon certificate of said commissioners."

The definite location of the road was fixed in January, 1865, and the road was completed, in all respects, as required by the act of congress, and accepted by the president, prior to the 1st of June, 1869. The Mexican grant to Jose Noriega and Robert Livermore was known by the name of "Las Pocitas,' and, as confirmed, was described and bounded as follows, viz.: On the north, by the Lomas de las Cuevas; on the east, by the Sierra de Buenos Ayres; on the south, by the dividing line of the establishment of San Jose; and on the west, by the rancho of Don Jose Dolores Pacheco,—containing, in all, two square leagues, a little more or less. The confirmation was of that quantity, if contained within the boundaries named; and, if less than that quantity was found to be contained therein, then the confirmation was for the less quantity, and for all of the described tract.

The grantees in February, 1852, petitioned the board of land commissioners, created by the act of congress of March 3, 1851, for a confirmation of the grant, and in February, *957 1854, it was confirmed, with the description and condition mentioned.

On appeal the decree was affirmed by the United States district court for the northern district of California in February 1859, to the same extent, and for the same quantity, and under the same condition. On appeal the decree of the district court was affirmed by the supreme court of the United States in January, 1861, and its mandate was filed in the district court in February, 1865, upon which an order was entered in that court that the claimants, the grantees named, have leave to proceed upon the decree of the district court as a final decree.

Two official surveys were made of the land confirmed,—one in 1865, by the deputy

United States surveyor general of the district. This survey, as appears on the maps, embraced within the exterior boundaries nearly ten square leagues. It was disapproved by the secretary of the interior, because it embraced more than two square leagues, and he directed that a new survey be made. A new survey was accordingly made, which was approved by the surveyor general and the commissioner of the land office, and on the 6th of June, 1871, by the secretary of the interior. On the 20th of August, 1872, a patent of the United States for the land, the survey of which was thus approved, was issued to the grantees. The land in controversy in this case is not included in the land thus surveyed and patented.

In Newhall v. Sanger, 92 U. S. 761, it was held that land within the boundaries of a Mexican grant, while proceedings were pending in the tribunals of the United States to determine its validity, was exempt from sale and pre-emption, and therefore from appropriation under the land grant acts of the United States in aid of the construction of railroads and telegraph lines. Those acts declared that the sections of land granted were to be public lands of the *658 United States, and by public lands were meant lands of the United States which were open for sale and pre-emption, and that of these public lands there should be excepted such portions as had been sold or reserved from sale, or otherwise disposed of, by the United States, or to which a pre-emption or homestead right had attached at the time of the definite location of the roads.

For some years after the decision in Newhall v. Sanger it was supposed that the reservation from such appropriation was extended to all lands within the outboundaries of a Mexican grant, without reference to the actual quantity granted. The interpretation given to the term "boundaries," used in the opinion in that case, led to this conclusion.

But the case of U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, where it was attempted to extend the reservation from sale to lands nearly 100 miles square upon the ground that that amount was within the exterior boundaries designated, although the amount intended to be granted was only 11 leagues, led to a consideration of the facts in Newhall v. Sanger, and to a better understanding of the import of its decision. It then appeared that there was no allegation in the pleadings of that case that the boundaries of the grant designated exceeded the actual amount intended to be granted. As appeared by them, it was a grant of a specific quantity within boundaries which embraced no greater amount. The language used with reference to the exemption of a grant of that character evidently presented a different question from that of a grant with boundaries embracing an area exceeding many times the quantity actually granted. So in U. S. v. McLaughlin the court considered the different kinds of grants of the Mexican government, which were (1) grants by specific boundaries, where the donee was entitled to the whole tract; (2) grants of quantity, as of one or more leagues within a larger tract, described by what were called "outboundaries," where the donee was entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name, where the donee was entitled to the whole tract, according to the boundaries given, or, if not given, according to its extent as shown by previous possession. In the second class, where the grant was of quantity within boundaries embracing a much larger quantity, the grant was a float, to be located by the action of the government before it could attach to any specific tract, like the land warrants, as the court said, of the United States. The grant in the McLaughlin Case was a float, and, according to the different interpretations of the outside boundaries, the region embraced within them was 50 square leagues, in the one case, and over 80 in the other; and the court pertinently asked whether such an extensive region could be under an interdict as reserved land, absolutely exempt from disposition even by congress, during the whole period covered by the litigation respecting the validity of the grant, which, if found valid, was only for the quantity of 11 square leagues.

In that particular case the grant was found to be a wretched fraud, but the court said: "Laying all this aside, however, and looking at the claim as one fairly sub judice, we may repeat our question, whether it can be possible that so great a region of country was to be regarded as reserved from alienation for so small a cause,—an ordinary eleven-league grant."

The grant of 11 square leagues out of a country 70 or 80 miles in length, and from 6 to 10 in width, containing over 80 square leagues, was, upon the theory of reservation advanced, deemed to have the effect of retiring from the supposed public domain the whole 80 leagues, and more, for a period of years,—no one could state how long. The court did not consider that this view of the reservation intended was reasonable, and observed that it was at the "option of the government, not of the grantee, to locate the quantity granted, and of course a grant by the government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the government," added the court, "has the right to say where it shall be located, it certainly has the right to say where it shall not be located; and, if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In

other words, if the territory comprehended in the outside limits and bounds of a Mexican grant are eighty leagues, and the quantity granted is only ten leagues, the government may dispose of seventy leagues without doing any wrong to the original grantee." It observed, it is true, that it was the practice, in administering the public lands, to allow the original grantee to make his own selection of the place where he would have the quantity located, provided it could be located in one tract; but that was a matter of favor, and not of right.

In illustrating the serious, if not absurd, results which would follow from a different view, the court referred to the grant made by the Mexican government to President Yturbide, in 1822, of 20 leagues square, or 400 square leagues, of land, to be located in Texas. In 1835 the Mexican congress authorized his heirs to locate the land in New Mexico, or in Upper or Lower California. In 1841 it was decreed that it should be located in Upper California,—that is, the present state of California; and the claim was actually presented to the board of land commissioners, and appealed to the district court, and thence to the supreme court. So, observed the court, "according to the contention of the complainant in the present case, all California was interdicted territory during the pendency of that claim before the board and in the courts." "We can well understand," the court added, "that Indian reservations, and reservations for military and other public purposes of the government, should be considered as absolutely reserved and withdrawn from that portion of the public lands which are disposable to purchasers and settlers, for, in those cases the use to which they are devoted, and for which they are deemed to be reserved, extends to every foot of the reservation. The same reason applies to Mexican grants of specific tracts, such as a grant for all the land within certain definite boundaries named, or all the land comprised in a certain rancho or estate. But this reason does not apply to grants of a certain quantity of land within a territory named or described, containing a much larger area than the amount granted, and where, as in the present case, the right of location within the larger territory is in the government, and not in the grantee. In such case the use does not attach to the whole territory, but only to a part of it, and to such part as the government chooses to designate, provided the requisite quantity be appropriated."

So the court held that where a Mexican grant was for a specific quantity, within an area containing a much larger quantity, it was only the quantity actually granted which was reserved from disposition by the government during the examination of the validity of the grant. The remainder was at its disposal as a part of the public domain. And in considering Newhall v. Sanger the court said that "the opinion in that case took no notice of the fact [which did not appear in the record] that the grant was one of that class in which the quantity granted was but a small part of the territory embraced within the boundaries named. It proceeded throughout as it would have done on the supposition that the grant covered and filled up the whole territory described. It simply dealt with and affirmed the general proposition that a Mexican grant, while under judicial investigation, was not public land open for disposal and sale, but was reserved territory, within the meaning of the law,—a proposition not seriously disputed."

So, in the present case, there was only reserved from sale and appropriation by the government within the exterior boundaries of the Mexican grant to Jose Noriega and Robert Livermore so much land as would satisfy the quantity actually granted to them, which was two leagues, and it was competent for the government to grant the remainder of the land within the exterior boundaries to whomsoever it might choose. It was land open to sale by the government, and could have been appropriated to the railroad company, and its patent to that company passed the land.

The supreme court of California acted upon the theory that the exemption from sale extended to all lands within the exterior boundaries of the grant, instead of merely to the amount specifically granted; but, as we have shown, this was an erroneous view to be taken of the case, after the decision of U. S. v. McLaughlin. And Doolan v. Carr, 125 U. S. 632, 8 Sup. Ct. Rep. 1228, recognizes the doctrine of that decision. If, therefore, the Mexican grant in this case was valid, and it has been so adjudged, there was reserved from sale only two leagues, to be selected, under the direction and control of the government, out of any lands within those boundaries. It was for the government itself to prescribe the limits from which the quantity granted by the Mexican government should be selected, and, having reserved sufficient from the exterior boundaries to satisfy that amount, it was perfectly competent for it to grant any surplus remaining; and it appears from the actual survey of the specific quantity granted by Mexico that the congressional grant to the railroad company was outside of any of the land thus appropriated.

It follows that the judgment of the supreme court must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion, and it is so ordered.

(149 U. S. 563)

COATS et al. v. MERRICK THREAD CO. et al.

(May 10, 1893.)

No. 261.

TRADE-MARKS—INFRINGEMENTS—FRAUDULENT IMITATION—EVIDENCE.

Plaintiffs sell their six-cord sewing thread on wooden spools containing 200 yards each, upon the head of which appears a circular label having a gold border, on which are the firm name, and the words "Best Six Cord," and a dark center on which appear the figures and words "200 Yds," in light gold color. Since 1873 they have embossed on the space surrounding the label, which is the color of the natural wood, the number of the thread, with intervening spaces filled with crossed lines. A patent was granted for this embossed design in 1870, which expired in seven years. Defendants sold their thread on similar spools, having a similar label, on the border of which appears only the firm name, while the words "Best Six Cord" appear in the center of the label, inclosing a star, with the number of the thread below. The number of the thread was also embossed on the edge of the head surrounding the label, with stars in the intervening spaces. It was shown that black and gilt labels had been used by other makers for many years on six-cord thread, without objection from plaintiffs, and to such an extent that the public would not accept as six-cord thread any otherwise labeled; and it was also shown that defendants' general advertising devices, and the packages in which their spools were packed, were so different from those used by plaintiffs that it would be impossible to mistake the one for the other. *Held*, that defendants' label does not amount to a representation that their thread is that of the plaintiffs, so as to entitle the latter to an injunction, and that after the expiration of the patent the use of the embossed numbers became common to all, and plaintiffs are not entitled to any relief on the ground of their prior monopoly. 36 Fed. Rep. 324, affirmed.

Appeal from the circuit court of the United States for the southern district of New York.

Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity by the firm of J. & P. Coats, of Paisley, Scotland, to enjoin the defendants, the Merrick Thread Company, a Massachusetts corporation, and Herbert F. Palmer, its managing agent in New York, from infringing plaintiffs' trade-mark, and unfairly competing with them, by simu-
*563 lating certain labels and symbols used by the plaintiffs upon the ends of wooden spools upon which sewing thread is wound.

The bill set forth, in substance, that plaintiffs had, since 1830, been engaged in the manufacture and sale of sewing threads on spools, and since the year 1840 the thread made by them had been, and still was, sold largely in the United States; that since about the year 1869 said firm had also been engaged in the manufacture of thread at Pawtucket, in the state of Rhode Island; that their business was very large and valuable, and their thread was well known to the trade as "J. & P. Coats' thread;" that all the thread manufactured by plaintiffs, which is wound on spools of 200-yard lengths, had been and still was composed of six separate strands twisted together, known as "Six-Cord Thread," and was designated upon their labels and wrappers as "Best Six Cord." That about the year 1842 the name "J. & P. Coats," with the quantity reeled on each spool, and the words "Best Six Cord," with a designating number, were placed upon a circular black and gilt label upon the end of every spool, and had always been one of the designating trade-marks of the plaintiffs in the United States; that in 1869 they adopted the idea of embossing upon the natural wood, and upon the outer edge of the heads of the spools, numerals corresponding with those upon the paper labels pasted upon the center of said spool heads, the object of such embossing being to show the number of the thread in case the paper label showing such number should be defaced or removed, and also to give a distinctive appearance to the plaintiffs' spools, and to indicate the origin and manufacture of the thread. The bill further averred that on the 9th of February, 1875, plaintiffs registered as a trade-mark at the patent office the central label of paper, and the peripheral band of natural wood, embossed with an ornamental design of crossed lines and central stars, with intermediate spaces, in which were embossed numerals corresponding to those in the center of the label.

The bill further charged the defendant the Merrick Thread Company with being the manufacturer of both the three-cord thread,
*564 —a thread of inferior grade,—and also of six-cord thread, on spools in length of 200 yards; that for the three-cord thread the defendant used paper labels wholly unlike in color or design, to any labels used by the plaintiffs, but that in selling, in competition with the plaintiffs, the six-cord thread, it used labels upon the spools made in colorable imitation of the plaintiffs', and intended as a counterfeit of their designs and trade-mark, the object being to so imitate the general appearance of plaintiffs' thread that the same may pass into the hands of tailors, illiterate men, and others buying at retail, and using sewing thread, as the genuine thread of plaintiffs.

In their answer the defendants denied the material allegations of the bill, and that the marks, embossment, and labels used by the Merrick Thread Company were a simulation or infringement upon the plaintiff's labels and trade-marks, but, upon the contrary, averred that they had endeavored to mark their goods so that no one could mistake their origin, and that their labels were so different from those of the plaintiffs and other manufacturers that they were plainly distinguishable from them by ordinary purchasers. They further averred that the use of embossing the number of the spool thread on the wood of the spool head around the paper label was on April 5, 1870, patented as a design to one Hezekiah Conant, which patent had long since expired, and alleged that since such expiration

the defendants had the free right to use such design, including any paper label which was not in and by itself an infringement of any lawful trade-mark of the plaintiffs.

On a hearing in the court below upon pleadings and proofs, the bill was dismissed (36 Fed. Rep. 324) on the ground that defendants were not shown to have made an unlawful use of the plaintiffs' labels. Plaintiffs thereupon appealed to this court.

Frederic H. Betts, for appellants. W. C. Witter and W. H. Kenyon, for appellees.

*565 *Mr. Justice BROWN, after stating the facts in the following language, delivered the opinion of the court.

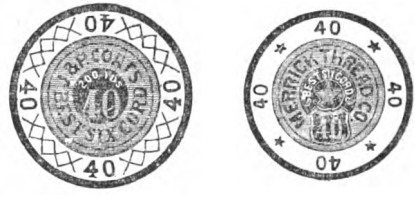
The gravamen of the plaintiffs' bill is contained in the allegation that the defendants have been guilty of an unlawful and unfair competition in business, in that they have been infringing the rights of plaintiffs in and to certain marks, symbols, and labels, by selling in competition with the plaintiffs a spool thread of "six cords" put up on spools of 200 yards length, which thread is not manufactured by these plaintiffs, but is put upon the market and sold among retailers and customers, as well in the city of New York as in other and distant parts of the United States, as and for the thread of the plaintiffs, by reason of the labels, marks, and devices upon the spools whereon the said thread is wound.

It will be observed in this connection that no complaint is made of the conduct of the defendants with respect to any other thread than that of six cords, put up in spools of 200 yards in length, notwithstanding that both plaintiffs and defendants have been long engaged in the manufacture of thread of several different sizes and lengths. Nor is it alleged that defendants have used any other means of imposing their thread upon the public as that of the plaintiffs, except by the imitation of their device upon one end of the spool. The dissimilarity between the labels on the other end of the spool is so great that it is not, and could not be, claimed that any intent to imitate existed.

It is admitted, however, that six-cord spool cotton is the thread most largely used for domestic consumption, and, put up on spools of 200 yards length, in numbers from 8 to 100, is best known and purchased by the great mass of consumers, and that it is as manufacturers of this description of thread that the plaintiffs are, and have for a long time been, known throughout the country.

The controversy between the two parties, then, is reduced to the single question whether, comparing the two designs upon the main or upper end of the spool, there is such resemblance as to indicate an intent on the *566 part of defendants to put off their thread upon the public as that of the plaintiffs, and thus to trade upon their reputation. There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals. Perry v. Truefitt, 6 Beav. 66; Croft v. Day, 7 Beav. 84; Lee v. Haley, L. R. 5 Ch. App. 155; Wotherspoon v. Currie, L. R. 5 H. L. 508; Johnston v. Ewing, L. R. 7 App. Cas. 219; Thompson v. Montgomery, 41 Ch. Div. 35; Taylor v. Carpenter, 2 Sandf. Ch. 603; Manufacturing Co. v. Spear, 2 Sandf. 599; McLean v. Fleming, 96 U. S. 245; Boardman v Meriden Britannia Co., 35 Conn. 402; Gilman v. Hunnewell, 122 Mass. 139.

For the better understanding of the question in this case, the respective devices of the plaintiffs and defendants are here given in juxtaposition:



It will be seen that in both devices there is a paper label, circular in form, much smaller than the head of the spool, containing, in black letters upon a gilt ground, the name of the manufacturer, the number of the thread, and the words "Best Six Cord," arranged in circular form to correspond with the shape of the label. Around this label, *567 in each case, is a peripheral border of natural wood, having the number of the thread embossed upon such periphery. The differences are less conspicuous than the general resemblance between the two. At the same time, they are such as could not fail to impress themselves upon a person who examined them with a view to ascertain who was the real manufacturer of the thread. Plaintiffs' label contains the words " J. & P. Coats, Best Six Cord," in a gilt band around the border, and, in the center, the symbol "200 Yds," and the number of the thread. Defendants' label contains the words "Merrick Thread Co.," and the number of their thread in the gilt band upon the border, and, in the center, the words "Best Six Cord," inclosing a star. The periphery of defendants' spool is also embossed with four stars,

instead of the loops of the plaintiffs, as well as the number of the thread.

As bearing upon the question of fraudulent intent, the history of these labels is pertinent. Since 1830, plaintiffs have been engaged in the manufacture of thread at Paisley, Scotland, in the name of J. & P. Coats. About 1840, their thread was first put upon the market in this country, and for more than 25 years past they have been manufacturing thread at Pawtucket, R. I., in the name of the Conant Thread Company. Prior to this time, six-cord thread was not made in this country,—a kind of thread known as "glace," and composed of three cords, being the only thing made prior to 1865. At about the same time the manufacture of this thread was also begun by the Willimantic Linen Company, George A. Clark & Co., and the defendants. From the time plaintiffs' thread began to be exported to this country to the present time, their spools have borne the black and gold label represented above, and still in use. For the past thirty years they have been, by far, the largest manufacturers and dealers in spool thread in this country. On April 5, 1870, Mr. Conant, the treasurer of the company, obtained a design patent "for embossing the ends of sewing-thread spools," which was subsequently assigned to the plaintiffs, and which covered a "design for ornamenting the ends of the sewing-thread spools, which consists of a chain of loops, a a, within which loops is a number expressive of the number of the thread wound on the spool, substantially as shown and described." The purpose of the design was stated to be "to preserve the number of the thread with which the spool is wound after the label has been destroyed by the act of setting the spool upon the spool-stand of a sewing-machine." This patent expired in 1877. In 1875, (February 9th,) plaintiffs registered a trade-mark consisting of "a central label of paper formed of concentric circles of black on a light ground, containing on one of the light bands the words 'J. & P. Coats, Best Six Cord,' and on the central black circle the figures and letters '200 Yds,' and a numeral. * * * On the end of the spool, surrounding the label, is a peripheral band of the natural wood, embossed with an ornamental design of crossed lines and central stars, with intermediate spaces, in which are embossed numerals corresponding to that on the center of the label." The essential features of this trade-mark were declared to be "the label of concentric rings, having in the central spot a numeral, and an embossed peripheral border of the natural wood, including among its ornamental designs the same numeral as that displayed in the center." This trade-mark has been in use by the plaintiffs from its date to the present time.

*568 Upon the part of the defendants it was shown that the Merrick Thread Company was organized under that name in 1865, soon after which it began and has ever since continued to make at its mills at Holyoke, Mass., 200-yard spools of six-cord thread, and to designate it on one head of the spool with a black and gold label of concentric rings, bearing thereon the name, size, and quality of the thread, following in this particular the method of designating such thread which has been in vogue for more than 50 years, and without which it is claimed to be impossible to market such thread. About the same time, plaintiffs began to manufacture at Pawtucket, R. I, the same article, and to designate it with the usual black and gold label,—the same label they had used abroad upon a thread marketed here. For a dozen years or more the defendants continued this method of designating their thread without objection from the plaintiffs; but after the expiration of plaintiffs' design patent, and in 1878, defendants embossed this numerical design, somewhat changed, upon their own spool heads, in connection with their own label. Whereupon, plaintiffs notified them of their claim to an exclusive use of this combination, and some time thereafter brought this suit, claiming that defendants were guilty of unfair competition in business.

In disproof of any intention upon their part to impose their thread upon the public as that of the plaintiffs, defendants show that their thread was expressly advertised through the country as that of the "Merrick Thread Company," or the "Star Thread," and also put in evidence the cabinets furnished by the defendants for the exhibition of their threads in the retail shops, upon which is conspicuously labeled, in large gilt letters, the words, "Merrick's Six Cord Spool Cotton," as well as their advertising or show cards, of which several specimens were shown, which were also lettered conspicuously in the same manner. Their wrappers and boxes are also so clearly distinguishable from those of the plaintiffs that it would be hardly possible to mistake one for the other. We think the defendants have clearly disproved any intention on their part to mislead the dealers who purchase of them. Indeed, such dealers could not possibly fail to know what they were buying; and the fraud, if any, was practiced on the buyer of a single or a small number of spools, who might be induced to purchase the thread of the defendants for that of the plaintiffs.

In answer to the question whether the defendants have been guilty of a fraudulent imitation of the plaintiffs' marks and symbols, it is also pertinent to consider to what extent the black and gold label, which constitutes an important feature of this device, had been used by others with their consent, and to what extent it has become recognized as a means of identifying the best six-cord thread. If the plaintiffs had been the first

and only ones to make use of this label, another person seizing upon and appropriating a black and gold label of the same size, and for the same purpose, might be held guilty of infringement, when, if the plaintiffs had no *570 exclusive right thereto, and defendants had done only what others had done before, they would not be so considered. In this connection it appears that the Willimantic Linen Company, which now seems to be in combination with the plaintiffs, began the use of the black and gold label of concentric rings as early as 1865, as a designation of six-cord 200-yard spool thread, and that other firms, both before and after that, made use of similar labels for the same purpose, including those of Orrs & McNaught, (from 1855 to 1870,) George A. Clark, J. & J. Clark, the Williston Mills, the Semples, the firm of Kerr & Co., the Hadley Co., E. Ashworth & Sons, and others, at different times from 1850 to the present, who have made use of black and gold labels bearing nearly, though it must be admitted not quite, as close a resemblance to plaintiffs as do those of defendants. There was also evidence that as early as 1821 the thread of John Clark, Jr., or of J. & J. Clark, was imported into this country with labels in black and gold in concentric rings, with the makers' name upon them. Indeed, the testimony indicates that the black and gold labels have become so identified with this quality of thread by immemorial usage that it would be impossible to introduce or sell a new manufacture of such thread without making use of that character of label, and that a six-cord thread attempted to be put upon the market with a label of any other general color would be suspected of being a three-cord or basting cotton, and practically unsalable as six-cord. In fact, the defendants produced testimony tending to show that in two instances attempts had been made to put a six-cord thread upon the market without a black and gold label, but in one case, at least, the project had to be abandoned, and the manufacturer was obliged to return to the usual black and gold label. In addition to this it appeared that the Merrick Thread Company began to make and put upon the market 200-yard six-cord thread in the early part of 1868, and made use of a black and gold label bearing the name of the American Thread Company, which in 1877 was changed to the Merrick Thread Company, the word "American" being placed upon the other end of the spool to preserve the identity of the thread.

Regarding it, then, as established that other manufacturers had by long practice, and with the acquiescence of the plaintiffs, acquired the right to make use of the black and gold label, it is difficult to see how the defendants could have advertised more clearly the fact that it was their own thread, or better accentuated the distinction between its own and Coats', than it did by the alleged infringing label. Of course, a person seeking to distinguish his label from that of another labors under certain disadvantages, in the fact that the shape of the head almost necessarily requires the label to be round, and the size of the spool demands that it shall be small. In the defendants' spool, not only did the words "Merrick Thread Co." clearly and distinctly appear, but the number of the thread is placed conspicuously in the margin, and the center is ornamented with a star, which does not appear upon the plaintiffs'. As already observed, the label upon the reverse end of the spool is wholly different from that of the plaintiffs. It is clear that neither the words "Best Six Cord," nor "200 Yds" are capable of exclusive appropriation, as they are descriptive, and indicative only of quality and length.

The propriety of the employment of the embossed periphery depends upon somewhat different considerations. In 1870, Hezekiah Conant, of Pawtucket, R. I., the manager of plaintiffs' American manufactory, took out the design patent for this embossed periphery. This patent seems to have been respected until 1877, when it expired, shortly after which the defendants introduced upon the periphery of their spool corresponding numerals, but with stars substituted for plaintiffs' loops. Defendants were guilty of no wrong to the plaintiffs in making use of corresponding designs for their own spool heads after the expiration of plaintiff's patent. There was no attempt to imitate the peculiar chain or loop characteristic of this design; but the embossed numerals were made use of for the same purpose for which they had been originally designed, namely, to preserve the number of the thread when the label became defaced or lost or destroyed by the use of the spool in the sewing machine. Indeed, the idea of stamping the numeral upon the periphery of *572 the spool does not seem to have been original with Conant, but appears to have been used by the defendants as early as 1867.

However this may be, plaintiffs' right to the use of the embossed periphery expired with their patent, and the public had the same right to make use of it as if it had never been patented. Without deciding whether, if the embossed periphery had contained a word which was capable of being appropriated as a trade-mark, defendants could have appropriated the same upon the expiration of their patent, it is clear that no such monopoly could be claimed of mere numerals, used descriptively, and therefore not capable of exclusive appropriation because they represent the number of the thread, and are therefore of value as information to the public. Manufacturing Co. v. Trainer, 101 U. S. 51. Clearly, the plaintiffs cannot, as patentees, claim a monopoly of these numerals beyond the life of the patent; and it is equally clear that, where used for the purpose of imparting informa-

tion, they are not susceptible of exclusive appropriation as a trade-mark, but are the common property of all mankind. The patent being, not simply for the embossed number, but for embossing the same upon the periphery of the spool head, defendants were entitled, upon the expiration of such patent, to use them for a like purpose. Neither was there anything misleading to the public in such use of them, as the testimony is clear and uncontradicted that thread is bought and sold, not by its distinctive marks, but by the name of the maker.

Plaintiffs, however, claim that, being the first to use the combination of a black and gold label with an embossed periphery, they should be protected against any such imitation by others as would mislead an ordinary purchaser of thread in small quantities. A large number of witnesses were sworn upon this subject, whose testimony tended to show that they had either purchased themselves, or seen others purchase, defendants' thread, supposing it to be Coats'. This testimony was not, however, wholly satisfactory, and threw but little light upon the controversy.

*573 There is no doubt a general resemblance between the heads of all spools containing a black and gold label which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the right to use the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label; to rearrange the number by placing it in the border, instead of the center of the label; and to omit the loops of the plaintiffs' periphery, and substitute their own star, between the numerals. Having done this, we think they are relieved from further responsibility. If the purchaser of such thread desires a particular make, he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering upon the spools. He is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer. Indeed, the intent to imitate plaintiffs' spool heads, if any such intent existed, is manifest rather in the label than in the periphery; but plaintiffs, having submitted to this, without protest, for 12 years, have waived their right to relief upon this ground. McLaughlin v. Railway Co., 21 Fed. Rep. 574; Ladd v. Cameron, 25 Fed. Rep. 37; Green v. French, 4 Ban. & A. 169; 3 Rob. Pat. § 1194. Having already held that defendants had a right to make use of the embossed numeral in the periphery, their union of the two devices upon the same spool head, —both being originally designed to be used in conjunction,—cannot be made the basis of a suit.

Upon the whole, we think the plaintiffs have failed to prove a case of unfair competition, or any illegal attempt of the defendants to impose their thread upon the public as that of the plaintiffs; that with the right to use the black and gold label as other manufacturers have used and continue to use it, and with the same right to use the embossed numerals which the plaintiffs have, we think they have taken all the precautions which they were bound to take to prevent a fraudulent imposition of their thread upon the public, and that the decree of the court below, dismissing the bill, should therefore be affirmed.

(149 U. S. 680)

UNION PAC. RY. CO. v. GOODRIDGE et al.

(May 15, 1893.)

No. 211.

CARRIERS OF GOODS—UNLAWFUL DISCRIMINATIONS—DEFENSES—EVIDENCE—DAMAGES.

1. In an action by a shipper to recover damages under a statute forbidding discrimination in freight rates, the railroad company cannot set up in justification of the lower rates a contract with the party in whose favor they were made, whereby, in consideration of the lower rates, such party releases the railroad company from an unexplained, indefinite, and unadjusted claim for damages arising from a tort; for to allow such a defense would practically emasculate the law.

2. A discriminating rate on shipments of coal cannot be justified on the ground of the cost of mining coal to the company in whose favor the rate is made, and any evidence as to the cost of mining is irrelevant.

3. In an action by a shipper of coal to recover damages from a railroad company for unlawful discrimination in rates, the railroad company pleaded in defense a certain contract between itself and the coal company in whose favor discrimination was alleged, whereby, in consideration of the release by such company of a certain claim against defendant for damages, and its agreement to furnish coal to defendant for use in its locomotives at cost, or at a maximum price, (which was alleged to have proved less than cost,) defendant agreed to allow a rebate of 40 cents per ton in case the coal company's shipments of coal exceeded 200,000 tons annually. *Held* that, in the absence of any allegations that the shipments of coal exceeded 200,000 tons annually, this answer constituted no defense.

4. A demurrer to the answer setting up this contract having been properly sustained, all defenses based on the contract were disposed of, and although on the trial of the case the court, without sufficient reason, and against objection, permitted a witness to give oral evidence as to some of the terms of the contract, it was at liberty to put an end to this line of inquiry at any time; and there was no error, therefore, in refusing to allow the witness to state the cost to the favored company of mining coal,—the evident purpose being to show that under the contract coal was furnished to the railroad company for its own use at less

than cost, whereby the rebate allowed on shipments was more than overbalanced.

5. The measure of damages to a shipper of coal for unlawful discriminations by a railroad company in favor of another coal shipper, similarly circumstanced as to place and distance, is the amount which the complaining party would have received if he had been allowed the same rebate per ton as the favored shipper. The questions whether profits were lost in the sale of coal by reason of the non-allowance of such rebates is too remote to be considered.

In error to the circuit court of the United States for the district of Colorado. Affirmed.

Statement by Mr. Justice BROWN:

This was an action at law by the firm of Goodridge & Marfell, coal merchants, carrying on the business of mining coal at Erie, Colo., and of selling the same at Denver, against the Union Pacific Railway Company, to recover triple damages, under a statute of Colorado, for an alleged unjust discrimination in freights upon coal from Erie to Denver.

The statute which was the basis of this action, together with a corresponding clause of the state constitution of Colorado, so far as the same are material to this case, are set forth in the margin.[1]

*651 *The amended complaint alleged the defendant to be a common carrier, chartered by an act of congress, and operating a line of railroad from Erie and Marshall, at both of which were located certain coal mines, about 35 miles, to Denver; that if there *652 were any difference in distance it was in favor of Erie, by about 2 miles, and that the * published *schedule of freights for coal was the same, namely, $1 per ton from each place; that plaintiffs, while operating their coal mines from Erie, between October 31, 1885, and August 12, 1887, shipped to Denver 12,960 tons and 1,625 pounds of coal, for which they paid defendant $12,960 and a fraction, being at the rate of $1 a ton, believing that such was the regular schedule rate charged the general public and all parties similarly situated for such service, there being no difference or discrimination between such rates as between Erie and Marshall to Denver; that the Marshall Consolidated Coal-Mining Company at the same time operated coal mines at Marshall, and was engaged in shipping coal over defendant's road to Denver under the same circumstances as the plaintiffs, except as to rates, and was a competitor with the plaintiffs; that the amount of such shipments was about 145,833 tons, the defendant charging such company 60 cents per ton, and allowing a rebate of 40 cents from its schedule rates; that plaintiffs are informed such rebates amounted to upwards of $58,000, and that the defendant in this manner, without the approval of the railroad commissioner, demanded and received from the plaintiffs the sum of $5,184.30 more than it received from the Marshall Consolidated Coal Mining Company, (hereinafter called the Marshall Company,) for like services, upon like conditions and under similar circumstances, without the knowledge or consent of the plaintiffs; that the defendant in this manner, and to this extent, allowed the Marshall Company drawbacks or rebates for carrying its coal, which were not open to and allowed all companies and corporations alike, at the same rate per ton per mile; that these rebates were made secretly and clandestinely in favor of the Marshall Company, with the design to deceive and mislead the plaintiffs, and fraudulently conceal from them the facts relating to such rebates, and did so conceal them until about

[1]Const. art. 15, § 6: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employe thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

Sess. Laws Colo. 1885, p. 309: "Sec. 7. Unjust Discrimination. No railroad corporation shall, without the written approval of said commissioner, charge, demand, or receive from any person, company, or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company, or corporation for a like service from the same place, or upon like conditions and under similar circumstances; and all concessions of rates, drawbacks, and contracts for special rates shall be open to and allowed all persons, companies, and corporations alike, at the same rate per ton per mile, upon like conditions, and under similar circumstances, except in special cases designed to promote the development of the resources of this state, when the approval of said commissioner shall be obtained in writing," etc.

"Sec. 8. Extortion. No railroad corporation shall charge, demand, or receive from any person, company, or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation, and not specified in the classification and schedule prepared and published by such railroad corporation. The superintendent, or other chief executive officer of each railroad in this state, shall cause to be kept posted up, in a conspicuous place in the passenger depot in each station where passenger tickets are kept for sale, a printed copy of the classification and schedule of rates of freight charges then in force on each railroad, for the use of the patrons of the road. Any railroad company violating any of the provisions of this section shall be deemed guilty of extortion, and be subject to the penalties hereinafter prescribed.

"Sec. 9. Penalty. Any railroad corporation that shall violate any of the provisions of this act as to loading points, freight cars, unjust discrimination, or extortion, shall forfeit, in every such case, to the person, company, or corporation aggrieved thereby, three times the actual damage sustained or overcharges paid by the party aggrieved, which triple damages shall be adjudged to be paid, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court, and taxed with the costs."

August 12, 1887; and that the plaintiffs were misled and deceived by these devices and practices, and remained in ignorance of the same, until such date.

The plaintiffs further alleged that defendant had granted other parties, similarly *683 situated, the same rebates for the *carrying of coal over its road from Marshall, and further charged that all the coal shipped by the plaintiffs and the Marshall Company was about the same quality, and cost the defendant the same amount to handle and ship over its lines, and that the charges made by the defendant were unreasonable, unjust, and extortionate; that plaintiffs had demanded of defendant reimbursement of the overcharges, which had been refused, by reason of which they asked judgment in the sum of $15,552.90, being three times the amount alleged to have been extorted, at the rate of 40 cents per ton on all coal shipped by them.

The answer set up a general denial of each and every material allegation in the complaint, and special denials that defendant had allowed the Marshall Company a rebate of 40 cents per ton, or that it had charged plaintiffs more than it had charged the Marshall Company for like services. For a second defense the defendant alleged that in January, 1880, the Denver, Western & Pacific Railway Company, a Colorado corporation, was engaged in building a railroad from Denver to Boulder, and in so doing passed over certain coal lands belonging to one Langford and others, known as the "Marshall Coal Mine;" that in constructing its line it negligently broke into the mine, in consequence of which it was claimed the mine took fire, and destroyed large amounts of coal, and continued to burn for several months, to recover which damages suits were instituted by the owners of the mine against the railroad company, which were litigated for several years; that in addition to such damages the company had failed to obtain a right of way across the mining lands; that in January, 1882, a judgment was also obtained against the company, in the sum of $64,000, upon a mechanic's lien, of which judgment the Union Pacific subsequently became the owner, as well as of a large number of the bonds of the said company; that the road was subsequently sold, and came into the hands of the Union Pacific, and in 1885 a corporation was formed under the name of Denver, Marshall & Boulder Railway Company, which was owned and controlled by *684 the Union Pacific, and which proceeded to construct its road from *Denver to Boulder, and that the claim against the Denver, Western & Pacific had become, and still remained, a lien upon the property in the hands of the Denver, Marshall & Boulder Company; that in 1885 the said Langford and others sold the Marshall coal mine to the Marshall Company, which thus became the owner of the mine, and also, by assignment, the owner of the claim for damages done to it by the Denver, Western & Pacific Railway Company; that in 1885 the Union Pacific was the owner of a certain coal mine at or near Louisville, Boulder county; that in addition to the liens above stated there was also a bonded indebtedness of about $1,000,000 upon the Denver, Western & Pacific, secured by a mortgage, which was foreclosed in 1883, and upon such foreclosure the owners of the Marshall coal mine answered, setting up their claim for damages to the extent of $81,000; that the property was subsequently put up, and sold at master's sale, under decree of foreclosure, the rights of Langford and others not being adjudicated at that time, and that upon such sale the title was acquired by parties acting in behalf of the Union Pacific, which had become the owner of a large number of the mortgage bonds; that for some time prior to October 13, 1885, defendant was receiving coal for its locomotives from the Union Coal-Mining Company, which was the owner or lessee of certain coal mines at Erie and at Louisville, and had been engaged in working the mines, and furnishing the defendant with coal; that about the same time the Marshall Company had become the owner of the coal lands formerly owned by Langford and others, and that on account of complaints that had been made by the owners of other mines the defendant concluded that it was for its best interest to discontinue its connection with the Union Coal Company, and for that purpose it entered into negotiations with the Marshall Company for the purpose of inducing this company to take off its hands the mines of the Union Coal Company; that it was further induced to enter into this contract by the fact that the Marshall Company had succeeded to the rights of the former owners of the Marshall coal mines, and to their claim for damages against the Denver, *685 Western & Pacific, and for the purpose of getting rid of the operation of the Union coal mines, and of settling this claim for damages, it entered into a contract with the Marshall Company on the 13th day of October, 1885, in which it was recited that, it being for the interest of the Union Pacific to discontinue the working of the Union coal mine, and to contract with the Marshall Company for all the coal needed for its own consumption on its road and branches, not to exceed 50,000 tons for the first year, and 100,000 tons for every year thereafter, therefore, in consideration of the Union Coal Company going out of the coal business, and the purchase from the Marshall Company by the defendant of the coal used for its own consumption at the rate mentioned therein, and in consideration of the rates for the transportation of coal therein agreed upon, the coal company agreed to furnish from the Marshall mine

all coal ordered by the railway company for its own use and consumption, and the use of its branches, not exceeding 50,000 tons the first year and 100,000 tons per annum thereafter, and to deliver all coal on board of the cars of the Union Pacific at the mouth of the mine, at a price not to exceed $1.25 per ton, delivered and loaded on the cars, and, if such cost was less than $1.25 per ton, then at actual cost.

It was further agreed that the defendant should give to the Marshall Company for the transportation of its coal the regular tariff rate, not exceeding $1 per ton, unless 200,000 tons should be mined and furnished for transportation yearly, in which case a rate of 60 cents per ton should be paid for all coal transported over defendant's line to Denver, and, if the rate were reduced below $1, then the 60-cent rate should be reduced in the same proportion. It was also provided that, if the railway company should order coal in excess of the amounts of 50,000 and 100,000 tons per annum, then the railroad company should pay the cost of mining and putting such coal on the cars, plus 50 cents per ton, except that in no case should the price for mining and loading such coal exceed $1.40 per ton; and it was further agreed that, as part consideration of the contract, the majority of the capital stock of such coal company should for two years be held, in case the company desired to sell it, and should first be offered to the Union Pacific in preference to any other purchaser. This contract was to remain in force for five years.

It was further alleged that from the fact that Mr. Adams, the president of the defendant company, was not intimately acquainted with the claim for damages made by the former owners of the Marshall mines, the contract failed to mention anything about the settlement of said claim, but that the contract was sent to the general attorney of the defendant, with instructions to look it over, and if anything further was needed to settle the controversy that might grow out of anything theretofore existing it should be provided for in a separate instrument, and thereupon the attorney prepared a bond of indemnity for execution by the coal company, reciting the claim for damages against the Denver, Western & Pacific, and agreeing to indemnify the railway company against any damages which might accrue to it by reason of such claim, and upon the execution of such bond, and as part of the transaction, the contract was delivered to the Marshall Company, and afterwards the former owners of said Marshall mines executed and delivered a receipt in full, discharging the defendant from all suits and causes of action existing by reason of any matter or thing pertaining to the construction of the Denver, Western & Pacific Railway Company. The answer further alleged that the defendant was informed and believed that it cost the Marshall Company, and would have cost the defendant if it had continued to operate through the Union Coal Company, at least $1.60 per ton to mine their coal, and that on account of the settlement of the aforesaid claims, and of the coal necessarily used by it, the Marshall Company has paid the defendant a higher rate, as a matter of fact, than $1 per ton, although it was not intended that the rate should exceed the schedule price.

To this second defense, which was elaborately set forth in the answer, a demurrer was interposed by the plaintiffs, and sustained by the court, (37 Fed. Rep. 182,) to which the defendant duly excepted. Defendant thereupon, for a third defense, pleaded the statute of limitations, plaintiffs replied, and the case went to trial before a jury, which returned a verdict for the plaintiffs in the sum of $5,184.30, for which amount judgment was entered, and defendant sued out this writ of error.

John F. Dillon, Harry Hubbard, Willard Teller, and H. M. Orahood, for plaintiff in error. A. J. Sampson, for defendants in error.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves the construction of an act of the legislature of Colorado passed in 1885, prohibiting railroads from charging one person or corporation a greater sum than it charges any other for a like service, upon like conditions, and under similar circumstances. The statute is of the same nature as the interstate commerce act, and, like that, was designed to prevent unjust discrimination and extortion in rates for the carriage of persons and property.

1. The first assignment of error is taken to the ruling of the court sustaining the demurrer to the second answer of the defendant, in which it set up certain contracts with the Marshall Consolidated Coal Company, which were claimed to justify the rebate of 40 cents per ton allowed to that company from the regular schedule rates, which the plaintiffs were compelled to pay. This defense set forth a very complicated series of facts, which, however, are susceptible of a condensed statement. It seems that the defendant, the Union Pacific, was the owner of a large part of the capital stock of the Union Coal Company, and had been for some time receiving from it coal for consumption upon its locomotives, when, on account of certain complaints made by the owners of other mines, it concluded that it was for its best interests to discontinue its connection with this company, and to enter into negotiations with the Marshall Company for its supply of coal. These negotiations resulted in the contract of October 13, 1885, wherein the coal company agreed, on its part—First, to

furnish the railroad with all coal needed for its consumption, not exceeding 50,000 tons the first year, and 100,000 tons yearly thereafter, and to deliver the same on its cars at the mouth of the mine at cost, but in no case to exceed $1.25 per ton; second, that in case the railroad should order in excess of the above amount the same should be furnished at cost, plus 50 cents per ton, but in no case should such cost exceed $1.40 per ton; third, that the railroad company should have the option for two years of taking a majority of the capital stock of the coal company, in preference to any other purchaser, should the coal company desire to sell the same.

The railway company, upon its part, agreed to go out of the business of mining coal, and to give the coal company the regular tariff rate to Denver of $1 per ton, unless 200,000 tons were furnished for transportation each year, in which case a rebate of 40 cents should be given, with a corresponding reduction in case the regular tariff was reduced below $1.

There were other subordinate covenants upon both sides, but they are not material to the consideration of this case. This contract was to remain in force for five years.

It is a sufficient reply to the whole defense set up in this part of the answer to say that the coal company was only to be allowed a rebate of 40 cents per ton in case it furnished the railroad company 200,000 tons per year for transportation, and there is no allegation in the answer that it ever did furnish this amount, or ever became entitled to the rebate. The want of such allegation is fatal to the contract as a defense, and the court, for this reason, if for no other, was right in sustaining the demurrer.

But we think the answer must be held insufficient for another reason. It is further stated that an additional consideration existed for this rebate in certain unliquidated claims for damages which the former owners of the Marshall mines had against the Denver, Western & Pacific Railway Company, the original constructors of the road, by reason of their negligently breaking into the mine during the construction of the road, setting it on fire, and thereby consuming a large amount of coal and personal property, for which claim suits were instituted against the railway company, and litigated at great expense for several years, and were still undetermined. There was also another claim for a right of way for one mile across their lands. These claims, Langford and others, who then owned the mine, sold and assigned to the Marshall Company with the property. The Denver, Western & Pacific Railway, which had done the injury for which the damages were claimed, was itself sold under foreclosure of its mortgage, and bought in by parties acting in the interest of the Union Pacific, who organized a new corporation, called the Denver, Marshall & Boulder Railway, leaving the claim of the Marshall Coal Company unadjusted and unpaid, and a lien upon the property. How this claim for unliquidated damages for the negligence of the railroad company became a lien upon the property of the company, and how such lien took precedence of the mortgage, and survived the foreclosure and sale of the property, and became a lien upon the road in the hands of the Denver, Marshall & Boulder Company, does not clearly appear; but admitting it to be still valid and outstanding, as alleged in the answer, the question still remains whether the defendant company can set up an unliquidated claim of this kind in defense of a rebate of 40 cents per ton allowed the coal company over every other shipper on its road.

It will be observed, in this connection, that not only was the amount of the damages suffered by the coal company never fixed, agreed upon, or adjusted, but the amount of coal which the Marshall Company was at liberty to deliver to the railroad company for transportation was left equally indefinite, save only that it must exceed 200,000 tons per year to entitle it to the rebate. This contract was to remain in force five years; but, upon the theory of the defendant, there was nothing to prevent it being continued indefinitely, provided the defendant company was willing to accede to any amount of damages which the coal company might see fit to claim. While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature to permit an unexplained, indefinite, and unadjusted claim for damages arising from a tort, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates. This act was intended to apply to intrastate traffic the same wholesome rules and regulations which congress two years thereafter applied to commerce between the states, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power, not in the railroad company itself, but in the railroad commissioner, to except "special cases, designed to promote the development of the resources of this state," and not to prevent the railroad company "from making a lower rate per ton per mile, in car-load lots, than shall govern shipments in less quantities than car-load lots, and from making lower rates for lots of less than five car loads than for single car-load lots." The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises, or to build up

new industries; but, deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality. Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. Rep. 907; Sandford v. Railroad Co., 24 Pa. St. 378; Messenger v. Railroad Co., 36 N. J. Law, 407; McDuffie v. Railroad Co., 52 N. H. 430. So opposed is the policy of the act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be appraised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices, he may know precisely with what he has to compete. To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported.

There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and if no one else were interested in the transaction that rule might apply here; but the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which in their practical application would be rendered nugatory if this rule were given full effect. For this reason we think the railroad company is in error in its assumption that "if, in the honest judgment of the officers of the defendant company who made the contract, the considerations which entered into it, and upon which alone it was made, were sufficient to warrant the company to pay back to the Marshall Company forty cents per ton for each ton it shipped for five years, that is enough." This is but a restatement, in different language, of a comment made by the court below in its opinion, that "the whole answer amounts only to this: that the Marshall Company is allowed less rates than other shippers are required to pay, upon considerations which are satisfactory to defendant; and it is obvious that this is no answer to a complaint of unlawful discrimination." If reasons of public policy dictate that the schedule rates shall be posted conspicuously in each railway station, it is no less important that the customers of the road should have the means of ascertaining whether any departure from such rates in favor of a particular shipper is justified by the facts. Such a method is contemplated by the act, in providing that no discrimination of this kind shall be made without the written approval of the railway commissioner. It was evidently designed to put it in the power of the commissioner to permit such discrimination to be made, possibly in a case like the present one, if, in his opinion, the circumstances seem to warrant it.

2. The second assignment of error is taken to the admission of certain letters of Taggart and Kimball.

Upon the trial of the case before a jury the plaintiffs gave evidence tending to show that the Jackson Coal Company was operating mines at Canfield, 36 miles from Denver, and was charged by defendant one dollar per ton for transportation, and that another railroad company, which ran across the mine, charged the same rate. There was also testimony showing the amount shipped by plaintiffs over defendant's road to have been 12,961 tons, for which they paid one dollar per ton. Plaintiffs thereupon called E. R. Taggart, who resided in Denver, and had been engaged in the coal trade for several years selling the product of the Fox Coal Company, which shipped its coal at the same station as the Marshall Company, and was charged one dollar, and who testified that upon information received by him of the rebate allowed to the Marshall Company, through the proceedings of a commission appointed to investigate the affair, he wrote to the president of the defendant, and also to T. L. Kimball, the general traffic manager and official head of the defendant company. The letter to Kimball, with the reply, was objected to upon the ground that, the demurrer to the second answer having been sustained, any statement of the way in which the defendant acted relating to that defense was immaterial, irrelevant, and incompetent, which objection was overruled, and defendant excepted. The letter from Kimball to the witness Taggart purported to be a reply to a letter from Taggart to the president of the road, and stated generally that the contract with the Marshall Company was made under circumstances entirely dissimilar to those existing between the Fox Company and the Union Pacific, and in consideration of the company's furnishing the railroad coal for its own use at not exceeding $1.25 per ton, and also in compromise and settlement of a claim against the company for some sixty-odd thousand dollars. Taggart's reply thereto, dated August 20, 1887, stated the claim from his standpoint, and that he had been advised by

the very highest legal sources that the contract was without warrant, and clearly in violation of law, and further insisted upon his claim for the repayment of 40 cents per ton. If there were any objection to the admission of Kimball's letter upon the ground that the letter to which it was a reply was not produced, that objection was met by the production of that letter upon cross-examination,—a letter which appears to have been written July 25, 1887, to Mr. Adams, president of the road, at Boston. The witness stood in the same position as the plaintiffs with respect to defendant, and had also brought suit against it to recover the same rebate which had been allowed to the Marshall Company, and which plaintiffs were suing to recover in this case. Assuming the correspondence to have been between different parties, and therefore irrelevant, it is not easy to perceive how it could have prejudiced the defendant, as Kimball's letter was a mere iteration of the defense set up in the answer, and put forward at the trial, and Taggart's reply thereto, if irrelevant, was not improper, *693 or prejudicial to the defendant. If the witness had had an oral conversation with Mr. Kimball, the manager of the defendant company, there can be no doubt that such conversation, and the whole of it, would have been admissible, as both Taggart's claim and defendant's stood precisely upon the same footing, and if this demand and refusal, instead of being oral, was by correspondence, it would seem to be equally admissible. As Kimball's letter stated clearly the position of the defendant with regard to both these claims, it is difficult to see how it could be prejudiced by its production.

3. The 3d, 4th, and 5th assignments of error are taken upon the same ground to the action of the court in refusing to allow the witnesses Taggart and Rubridge to testify as to what it cost to get out coal, and put it on the cars at the Marshall mine, and in ruling out testimony showing that by reason of such cost the Marshall Company actually paid at least $1 per ton for coal carried by defendant.

At the time witness Taggart was asked this question, the case stood in this position: A demurrer to the second answer of the defendant, setting up its excuses for the rebate, had been sustained, and the case set for trial upon the complaint and the denials,—in other words, upon the general issue. Plaintiffs had shown that they, as well as the Jackson & Fox Coal Company, had paid $1 per ton, and had shown the rebate paid to the Marshall Company, but the contract had not been put in evidence, though the witness Taggart had sworn that he knew "that defendant set up in bar of plaintiffs' claim a contract they had with the Marshall Company in consideration of the Marshall Company supplying them with coal at a given price,—much below the price at which they could mine it, or get it out of the mines,—and, further, in settlement of an old lawsuit they had;" and the record then states, in a very blind way, that "the witness gave further testimony showing that Kimball's testimony as to its own uses, and not exceeding $1.25 per ton, which was then costing plaintiffs and others about $1.50 to mine, and commercial coal at not exceeding $1.40 per ton, at a time when other producers asked $1.60 per ton,—that was making a difference of from 20 to 25 cents per ton on every ton of coal than what it cost." Defendant's counsel here asked: "As a matter of fact, do you know what it did cost to get out a ton of coal, and put it on cars at the Marshall or Fox mine?" This was clearly immaterial, as it was no excuse for a rebate that the coal cost more or less. The right of a railroad to charge a certain sum for freight does not depend at all upon the fact whether its customers are making or losing by their business.

The next witness, Robert H. Rubridge, who had been the treasurer and assistant secretary of the Marshall Company, testified that from November 1, 1885, to August 1, 1887, there was shipped from the Marshall mine to Denver 67,863 tons, upon which a rebate of 40 cents per ton was allowed. Upon cross-examination he testified that that rebate was allowed in consideration "of our giving an indemnity bond. Our company gave an indemnity bond protecting the Union Pacific from all claims on account of a damage suit against them, amounting to about $65,000, for which they had attachments on some of the rolling stock and ties and half a mile of track of the Denver, Western & Pacific. * * * We were to give them coal at cost for the company's use, but not to exceed at any time $1.25 per ton, and also to give them coal for commercial use at not exceeding $1.40 per ton; that is, for Kansas, but not for Denver." This oral testimony with regard to the contract was objected to by plaintiffs' counsel on the ground that the written contract should be produced,—an objection which was overruled by the court. There was evidently an attempt here to obtain from the witness a statement of so much of the contract as was favorable to the defendant, and at the same time not to put it in evidence, since the contract would show on its face that the coal company was not entitled to any rebate, unless it furnished the railroad company 200,000 tons per annum for transportation,—a far larger amount than it did actually furnish. It further appeared that the contract establishing the price of coal was not lived up to, as the railroad company was paying anywhere from $1.25 to $1.75 per ton. The witness was then asked how much it cost to get out coal, and to put it on the cars for the use of the Union Pacific in its engines, and also for its commercial use in Kansas.

The answer to this question, as well as

the proposal of the defendant to show by the witness that the cost of getting out the coal, which they were obliged to furnish the Union Pacific under the contract, was largely in excess of what they got, was properly ruled out. The relations between the defendant and the Marshall Company were fixed by their written contract, and under that contract the railway company was entitled to a certain amount of coal at $1.25 per ton, regardless of cost, and the Marshall Company was not entitled to a rebate unless they furnished 200,000 tons per annum for shipment. This testimony could only have been offered to show that the company was losing money in furnishing the coal at $1.25 per ton, and therefore that the discrimination in their favor by the railroad company was not unjust. But the court, having sustained the demurrer to the answer setting up this contract upon the ground that it constituted no defense, could not consistently have permitted the defendant to introduce oral testimony of such contract for the purpose of enabling it to rely upon such stipulations as were thought to be favorable to itself. The witness had stated, in answer to the question why the rebate of 40 cents per ton was allowed, that the consideration for doing this was in writing. Plaintiffs' counsel thereupon objected to the proposed oral evidence of the contract as incompetent; and while this objection, though it seems to us to have been well taken, was not sustained, and the witness was permitted to give certain of its stipulations, the court was at liberty at any time to put a stop to this character of testimony, or to rule out any further questions based upon it. The whole case virtually turned upon the demurrer to that portion of the answer setting up this contract. This demurrer having been sustained, the defendant should not have been allowed, in this indirect way, to obtain the advantage of certain stipulations included in the contract.

*469 4. The sixth assignment, that the court *erred in refusing to receive in evidence the release of the Marshall Company to the defendant company, cannot be sustained, for the same reason. This release, a copy of which is given in the record, was given by the Marshall Coal-Mining Company, and by Langford and Marshall, the previous owners of the mine, to the defendant railway company, releasing it from "all actions and causes of action, suits, controversies, claims, and demands whatsoever for or by reason of any cause, matter, or thing arising out of the construction of any railroad across the property of either of us in Boulder and Jefferson counties, Colorado." It is obvious, upon the principles hereinbefore stated, that this release was altogether too vague and general to serve as a basis for making the rebate to the Marshall Company.

After some other testimony as to prices paid by other companies, and of unsuccessful efforts made to ascertain why the Marshall Company was given lower rates than its competitors, the plaintiffs rested. The defendant put in no testimony, and the case was committed to the jury, who returned a verdict for $5,481.34.

5. The seventh and last assignment of error was to the action of the court in refusing to grant a new trial, and in entering a judgment on the verdict, because there was no sufficient evidence to support the verdict, and especially to sustain it as to the amount of damages. Plaintiffs' evidence had shown that the Marshall Company had been receiving a rebate upon all coal transported by it to Denver, which was not allowed to its competitors in business, and the damages sustained by the plaintiffs were measured by the amount of such rebate, which should have been allowed to them. The question whether they lost profits upon the sale of their coal by reason of the nonallowance of such rebates was too remote to be made an element of their damages. They were entitled to the same terms which the Marshall Company would have received, and damages to the exact extent to which the Marshall Company was given a preference.

There was no error in the action of the court below, and its judgment is therefore affirmed.

(149 U. S. 698)

UNION PAC. RY. CO. v. TAGGART.

(May 15, 1893.)

No. 212.

In error to the circuit court of the United States for the district of Colorado. Affirmed.

John F. Dillon, Harry Hubbard, Willard Teller, and H. M. Orahood, for plaintiff in error. Chas. S. Thomas and W. H. Bryant, for defendant in error.

Mr. Justice BROWN. This case depends upon the same facts as the one previously decided, (Railway Co. v. Goodridge, 13 Sup. Ct. Rep. 970,) and is controlled by the decision of that case, and the judgment of the court below is therefore affirmed.

(149 U. S. 451)

CATES et al. v. ALLEN et al.

(May 10, 1893.)

No. 153.

CIRCUIT COURTS—JURISDICTION—CREDITORS' BILL.

Under the removal act of 1875, § 2, which provides that "in any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds $500, in which there is a controversy between citizens of different states, either party may remove said suit," the United States circuit court may entertain and determine a suit to set aside a fraudulent conveyance, brought, under the laws of Mississippi, by a creditor who has not obtained a judgment, or has not had an execution returned unsatisfied, for such laws provide that the creditor shall have a lien from the time of filing his bill. Per Mr. Justice Brown and Mr. Justice Jackson, dissenting.

For majority opinion, see 13 Sup. Ct. Rep. 883.

*461 *Mr. Justice BROWN, with whom was Mr. Justice JACKSON, dissenting.

This was a bill in equity filed in the state court by creditors, to set aside an alleged fraudulent assignment under a provision of the Mississippi Code which gives the chancery court of that state jurisdiction of bills by creditors who have not obtained judgments, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of defrauding creditors. The case was removed to the circuit court of the United States under the act of 1875, the second section of which provides "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit," etc.

In the opinion of the court this case is controlled by that of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. Rep. 712, in which it was held that the circuit courts of the United States, in Mississippi, could not, under this *462 provision of the Code of that state, take jurisdiction of a bill in equity to subject the property of the defendants to the payment of a simple contract debt of one of them in advance of any proceedings at law, either to establish the validity and amount of the debt, or to force its collection, for the reason that in such proceedings the defendant is entitled, under the constitution, to a trial by jury of the existence or amount of the debt. While I freely concede the general rule to be as stated,—that a bill of this kind will not be entertained without a prior judgment and execution at law,—I am unwilling to admit that the federal courts are incompetent to administer a state law which provides that such a bill may be filed by a simple contract creditor, where the requisite diversity of citizenship exists, and the requisite amount is involved. In a case where such a bill was filed in the state court the statute then in force gave to either party the absolute right of removal of the suit to the federal court, upon the clear assumption that the federal court had the same power to administer the law that the state court had. I freely concede that if the state system of jurisprudence should invest the court of chancery with an ordinary common-law jurisdiction, as, for example, with jurisdiction of an action upon a promissory note, such cause, when removed to the federal court, would simply be placed on the common-law side, and be tried by a jury. But in this case the jurisdiction of the federal court, as a court of chancery, may be supported, not only upon the ground that the proof of the debt is merely an incidental feature of the bill, but upon the further ground, stated in the statute, that "the creditor in such case shall have a lien upon the property described therein from the filing of his bill," etc.,—a fact which in Case v. Beauregard, 101 U. S. 688, was held to obviate the necessity of a prior judgment and execution.

I had always supposed it to be a cardinal rule of federal jurisprudence that the federal courts are competent to administer any state statute investing parties with a substantial right. As was said in Ex parte McNiel, 13 Wall. 236, 243: "A state law cannot give jurisdiction to any federal court, but that is not a question in this case. A state law may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute, in such cases, does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality." So, also, in Davis v. Gray, 16 Wall. 203, 221: "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals." So, also, in the case of Broderick's Will, 21 Wall. 503, 520, it is said, (page 520,) that "while it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state." In the case of Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495, a statute of Nebraska providing that an action might be brought and prosecuted to a final decree by any person claiming title to real estate, whether in actual possession or not, against any person claiming an adverse estate or interest therein, for the purpose of determining such estate and interest, and quieting title, was held to be enforceable in the federal courts, although it dispensed with the general rule of equity that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and that his title should have been established by law. The statute under considera-

tion merely dispenses with the general rule of courts of equity,—that, in order to maintain a creditors' bill, a prior judgment and execution at law is necessary,—and the case
*464 appears to me to be directly in point.

*In this case the court of equity proceeds to establish the debt, not as a personal judgment against the debtor, which may be sued upon in any other court, but for a purpose special to that case, in order to reach property which has been fraudulently conveyed, and to appropriate it to the payment of the debt. If the object of the proceeding were the establishment of a debt for all purposes, which should become res adjudicata in other proceedings, and be suable elsewhere as an established claim against the debtor, or were not a mere incident to the chancery jurisdiction, I can understand why the constitutional provision might apply. But in this case I see no more reason for requiring a common-law action to establish the debt than in case of the foreclosure of a mortgage, or the enforcement of a mechanic's lien, where proof of an existing debt is equally necessary to warrant a decree. In Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. Rep. 1163, a bill in equity was filed by creditors in the chancery court of Mississippi under this statute, was removed to the circuit court of the United States, and was prosecuted to a decree in that court, although it is but just to say that no question seems to have been made with regard to the jurisdiction, in this particular. The same may be said of Dewey v. Coal Co., 123 U. S. 329, 8 Sup. Ct. Rep. 148, in which a bill under a similar statute of West Virginia was sustained in an opinion by Mr. Justice Matthews. Indeed, proceedings under these statutes, which are common to many of the states. are in the nature of an equitable attachment, and operate to impound the debtor's property for the payment of the claim.

The logical consequence of the position assumed by the court in this case is that it is compelled to remand the case for a reason entirely outside of the removal acts. and thus to deny to the removing party the benefit of the act. I understand the duty imposed by the fifth section of the act—to remand a cause which, it appears, "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court"—to be limited to disputes or controversies not within the jurisdiction of the circuit court, by reason of the requisite citizenship not really existing, or being collusively obtained, as in
*465 Hawes v. Oakland, 104 U. S.*450, or where, upon an examination of the record, the requisite amount is found not to have been involved, as in Walter v. Railroad Co., 147 U. S. 370, 13 Sup. Ct. Rep. 348.

I have never known of a federal court admitting its inability to do justice between the parties, and remanding the case upon that ground. In Thompson v. Railroad Companies, 6 Wall. 134, it appeared only that a civil action removed from a state court, which was essentially a common-law action, could not be proceeded with in a federal court as an equity case,—a proposition I certainly should not deny. Indeed, in that case it was said that "as the action was a purely legal one, if they [the plaintiffs] could have maintained it in their names in the state courts, they had an equal right to maintain it in their names when it arrived in the federal court." The only error was in not proceeding with it as a common-law action in the federal court.

I am authorized to state that Mr. Justice JACKSON concurs in this dissent.

(149 U. S. 532)

CADWALADER, Collector of Customs, v. WANAMAKER et al.

(May 15, 1893.)

No. 31.

CUSTOMS DUTIES—CLASSIFICATIONS—HAT TRIMMINGS—SILK RIBBONS.

Under the tariff act of March 3, 1883, (22 Stat. 488,) ribbons made of silk, or of which silk is the component material of chief value, and which the jury found are commonly and principally used in trimming hats, were dutiable at 20 per cent. ad valorem, as "hat trimmings," under Schedule N, and not at 50 per cent., under Schedule L, as unenumerated silk merchandise.[1] Hartranft v. Langfeld, 8 Sup. Ct. Rep. 732, 125 U. S. 128, and Robertson v. Edelhoff, 10 Sup. Ct. Rep. 186, 132 U. S. 614, followed.

In error to the circuit court of the United States for the eastern district of Pennsylvania. Affirmed.

Sol. Gen. Aldrich, for plaintiff in error. F. P. Prichard, H. E. Tremain, M. W. Tyler, and Jos. H. Choate, for defendants in error.

Mr. Justice SHIRAS delivered the opinion of the court.

The firm of John Wanamaker brought an action in the court of common pleas of Philadelphia, state of Pennsylvania, against John Cadwalader, the collector of customs for that district, wherein it was sought to recover from the defendant moneys paid under protest by the plaintiffs to the defendant as collector of customs, as duties, in order to obtain possession of merchandise imported for the plaintiffs, which moneys were demanded and collected by defendant in excess of the amount authorized by law. This action was certified to the circuit court of the United States for the eastern district of Pennsylvania, and there resulted in a verdict and judgment in favor of the plaintiffs, from which judgment the case is brought into this court by a writ of error.

The matter in controversy arose under the tariff act of March 3, 1883, (22 Stat. 488.)

[1] See 13 Sup. Ct. Rep. 983, for an opinion in which Mr. Justice Brewer expresses the concurrence of himself and Mr. Justice Brown in this decision.

The plaintiffs claimed the imported articles were dutiable under Schedule N, which was in the following terms:

"Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow sheets, and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone, or any other substance or material, not specially enumerated or provided for in this act, twenty per centum ad valorem." 22 Stat. 512.

The defendant contended that he was right in having assessed the articles under Schedule L, which provided as follows:

"All goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem." 22 Stat. 510.

In applying these respective clauses, the plaintiffs claimed that articles chiefly used to trim hats with are trimmings, dutiable at 20 per cent. The defendant claimed that articles are not materials for hat trimmings when the imported articles bear the commercial name of ribbons, or belong to that commercial class; that, being made of silk, the imported articles in question fell within Schedule L; and that, if the jury believed that the articles belonged to the class commercially distinguished under the general name of "ribbons," then the plaintiffs could not recover, even if their chief use was as trimmings for hats, as claimed by the plaintiffs.

The issues thus raised were submitted to the jury in a charge the correctness of which is the subject of our judgment.

The essential deliverances of the court, which determined the verdict of the jury, were in these words:

"Upon the uncontroverted proofs in this case, ribbons are trimmings. The issue here is, what kind of trimmings are the particular ribbons in controversy? Are they trimmings chiefly for hats, bonnets, or hoods? This is a question of fact for the jury, which, if answered in the affirmative, entitles the plaintiff to recover. I instruct you accordingly.

"If you are satisfied under the evidence, considering the preponderating weight of it, that these kinds of ribbons, such as you have here, are commonly and usually used for the ornamentation of hats, then the character of these goods is determined.

"These are the two facts that you are to consider and determine by your verdict: First, are these ribbons, of which you have samples here, trimmings, within the section of the act of congress? And, secondly, if so, are they used more largely than for any other purpose in the making and ornamentation of hats, bonnets, and hoods? These are the two facts, and as you determine them this case must be decided.

"In a case that was decided by the supreme court, which went up from this district, the supreme court has unquestionably held that articles which come within the description of this clause of the act are subject only to a duty of 20 per cent.; that is, if they are trimmings, and if they are used for making and ornamenting hats, they are classifiable under this clause of the act of congress, and are subject to a duty of only 20 per cent.

"It is immaterial to inquire whether the supreme court in terms has said anything about the silk clause. They have determined that articles which are of the character described here, and for the use stated, come within that clause, and are subject only to a duty of 20 per cent. That is incontestable. So that by that ruling of the supreme court we are governed, and must so expound the law in cases occurring afterwards, and relating to articles of a similar character."

It will be observed that the court below was controlled in its charge by the decision of this court in the case of Hartranft v. Langfeld, 125 U. S. 128, 8 Sup. Ct. Rep. 732, and construed that decision as ruling that, if the imported articles were trimmings, and were more generally used for the ornamentation of hats than for any other purpose, then such articles must be regarded as coming within Schedule N of the tariff act of 1883, and subject to a duty of 20 per centum.

An examination of that case, in the light of the extended criticism bestowed upon it in the briefs filed in the present case, satisfies us that the court below did not misinterpret the decision. The case was, in all important respects, like the present one. It was an action by an importer to recover an alleged illegal excess of duties, and wherein ribbons made of silk and cotton, of which silk was the material of chief value, were the articles in question. The testimony on the part of the plaintiff tended to show that the ribbons were chiefly used in making or ornamenting hats, bonnets, and hoods, but that they might be, and sometimes were, used for trimming dresses. The testimony on the part of the defendant tended to show that they were dress trimmings equally with hat trimmings, and were commonly used as much for the one purpose as the other. In this state of the evidence the trial court charged the jury thus: "It is the use to which these articles are chiefly adapted, and for which they are used, that determines their character within the meaning of this clause of the tariff act. * * * It is the predominant use to which articles are applied that determines the character. * * * You will therefore determine to which use these articles in question are chiefly devoted. If they are hat trimmings, and used for making and ornamenting hats, then the rate of duty was excessive. * * * The question is simply and purely one of fact, namely, what is the predominant use to which these articles are devoted? As you

determine that question you will return your verdict." These instructions were approved by this court, and the judgment of the court below in favor of the importer was affirmed.

It is quite apparent that if the law was correctly laid down in Hartranft v. Langfeld, the court below, in the present case, did not err in its treatment of the subject. Substantially the same question came afterwards before this court in the case of Robertson v. Edelhoff, 132 U. S. 614, 10 Sup. Ct. Rep. 186, on error to the circuit court for the southern district of New York. Again the question was as to the correct classification, under the act of March 3, 1883, of ribbons composed of silk and cotton, in which silk was the component material of chief value. The court below gave peremptory instructions to the jury to find for the plaintiff, the undisputed evidence being that the articles in question were used exclusively as trimmings for ornamenting hats and bonnets, and had a commercial value only for that purpose; and this action of the trial court was approved by this court in an elaborate opinion.

It will be noticed that the case of Robertson v. Edelhoff differs from the case of Hartranft v. Langfeld and from the present case in the particular that the fact was conceded that the ribbons in question were exclusively used for hat trimmings, and that question was not submitted to the jury; whereas, in the other cases there was conflicting evidence as to the use made of the ribbons, and it was submitted to the jury to find what was the chief or predominant use made of the articles.

In view of these decisions of this court, it is evident that the court below, in the present case, cannot be convicted of error.

A very earnest and able effort has been made on behalf of the government to lead us to reconsider the doctrine of those cases.

*541 We have read with care the elaborate briefs submitted to us by the solicitor general, but, as we are unable to accept the conclusions there urged upon us, nothing could be gained by a minute discussion of the several arguments advanced. If the subject had come before us unembarrassed by previous decisions it would have been worthy of a more thorough discussion. As it is, we are content to abide by the views that have heretofore prevailed in this court, expressed in two unanimous decisions.

The judgment of the court below is accordingly affirmed.

(149 U. S. 541)

WALKER v. SEEBERGER, Collector.

(May 15, 1893.)

No. 151.

CUSTOMS DUTIES—CLASSIFICATION—HAT TRIMMINGS.

Under the tariff act of March 3, 1883, goods composed, some entirely of silk, some chiefly of silk, and some chiefly of metal, and known by the general name of "trimmings," though they have specific names to distinguish one from the other, and some of which are used exclusively, and the others chiefly, for the making and ornamenting of hats, bonnets, and hoods, were dutiable at 20 per cent., under Schedule N, as trimmings for hats, etc., and not at 50 per cent. for the goods composed wholly or chiefly of silk, and 45 per cent. for those composed chiefly of metal, under Schedules L and C, respectively. 38 Fed. Rep. 724, reversed.[1] Cadwalader v. Wanamaker, 13 Sup. Ct. Rep. 979, followed.

In error to the circuit court of the United States for the northern district of Illinois. Reversed.

For the charge of the court below to the jury, see 38 Fed. Rep. 724.

Percy L. Shuman, H. E. Tremain, and A. H. Garland, for plaintiff in error. Sol. Gen. Aldrich, for defendant in error.

*542 Mr. Justice SHIRAS delivered the opinion of the court.

This was an action brought by the firm of James H. Walker & Co. in the circuit court of the United States for the northern district of Illinois to recover from the collector of that district moneys which were alleged to have been paid in excess of the legitimate duties assessable on certain imported articles.

The history of the case, as we find it in the bill of exceptions, shows that the goods in question were trimmings of various styles and materials, some being composed entirely of silk, some chiefly of silk, and some chiefly of metal, and some being a combination of both silk and metal. The evidence further tended to show that all the said trimmings were used either exclusively or chiefly for hat or bonnet trimming, and in respect to all the merchandise the use was exclusively or chiefly for the making or ornamenting of hats, bonnets, and hoods, and that the goods were not suitable for, and were not used to an appreciable extent for, any other purpose. A considerable portion of said goods were manufactured expressly for the plaintiffs, and upon their order, to be used, as the same were used, as trimmings in the making and ornamenting of hats, bonnets, and hoods. The proof tended to show that most of the trimmings in question had more or less specific commercial names, which aided to distinguish one from another, and that "trimmings" was their general name, and not their specific one.

The importers claimed that these goods should have been assessed under Schedule N of the act of March 3, 1883, (22 Stat. 512,) at the rate of 20 per centum ad valorem. The collector assessed the duties under Schedule

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[1] See 13 Sup. Ct. Rep. 983, for an opinion in which Mr. Justice Brewer expresses the concurrence of himself and Mr. Justice Brown in this decision.

L (22 Stat. 510) at the rate of 50 per centum for the articles composed wholly or chiefly of silk, and under Schedule C at the rate of 45 per centum for the articles composed chiefly of metal.

*543 The court below charged the jury as follows: "The collector classed these goods as a manufacture of silk, and assessed a duty of fifty per cent. ad valorem upon them. The proof tends to show that the goods in question are composed of chenille and silk. * * * Now, it makes no difference whether these goods are used only for hats and bonnets or not. If they are specially dutiable by name or commercial description in some other clause of the statute than clause 448, then the plaintiff has failed in his case." And as to other articles the court said: "There are no samples of these goods produced, but the proof tended to show that they were used for making or ornamenting hats and bonnets. They were classed as a manufacture of silk; and if they were silk, as the proof on the part of the plaintiff tended to show, then they would be properly classed as silk goods, and not as bonnet material."

As to various other articles in question, the court instructed the jury that if they were composed wholly or chiefly of silk they were dutiable at the rate of 50 per centum ad valorem, as manufactures of silk, notwithstanding that the evidence showed that they were used only for hats and bonnets.

Under these instructions, which were duly excepted to, the jury found, as to most of the articles, a verdict in favor of the collector, and, judgment having been entered accordingly, the case is before us on a writ of error.

No extended discussion is required. We have just decided in the case of Cadwalader v. Wanamaker, 13 Sup. Ct. Rep. 979, in which the facts were substantially the same with those disclosed in the present record, that goods intended for trimmings for hats, bonnets, and hoods, and found by the jury to be chiefly so used, were properly assessed for duty, under Schedule N, at 20 per centum ad valorem, notwithstanding that such goods were composed wholly or chiefly of silk. In so ruling we considered ourselves bound by our previous decisions. Hartranft v. Langfeld, 125 U. S. 128, 8 Sup. Ct. Rep. 732; Robertson v. Edelhoff, 132 U. S. 618, 10 Sup. Ct. Rep. 186.

Under the law as there laid down the case ought to have been submitted to the jury to find whether the goods in question were *544 trimmings used wholly or chiefly in the making and ornamentation of hats, bonnets, or hoods, and with instructions that, if they so found, their verdict should be given in favor of the plaintiff, notwithstanding it might appear that the articles were composed wholly or chiefly of silk.

The judgment of the court below is accordingly reversed, with directions to award a new trial.

(149 U. S. 540)

HARTRANFT v. MEYER et al.

(May 15, 1893.)

No. 860.

CUSTOMS DUTIES — CLASSIFICATION — HAT TRIMMINGS — "CHINAS" AND "MARCELINES."

Under the tariff act of March 3, 1883, piece goods composed of silk, or of which silk is the component material of chief value, which are bought and sold under the commercial designation of "chinas" and "marcelines," and which the jury finds are "trimmings," chiefly used in making hats and bonnets, were dutiable at 20 per cent., as trimmings used in making or ornamenting hats, bonnets, and hoods, and not at 50 per cent., under Schedule L, as unenumerated silk merchandise. Mr. Justice Brewer and Mr. Justice Brown, dissenting, on the ground that these articles are not "trimmings."[1] Cadwalader v. Wanamaker, 13 Sup. Ct. Rep. 979, followed.

In error to the circuit court of the United States for the eastern district of Pennsylvania. Affirmed.

Sol. Gen. Aldrich, for plaintiff in error. F. P. Prichard, H. E. Tremain, M. W. Tyler, and J. P. H. Choate, for defendants in error.

Mr. Justice SHIRAS delivered the opinion of the court.

This was an action brought by the firm of Meyer & Dickinson in the court of common pleas of Philadelphia against the collector of customs for that district to recover duties which they allege to have been illegally assessed against certain articles imported by them. The action was certified to and tried in the circuit court for the eastern district of Pennsylvania, and resulted in a verdict and judgment in favor of the plaintiffs. The collector sued out a writ of error, which is now prosecuted in this court by his executrix.

The issues that were tried in the court below arose under the tariff act of March 3, 1883, (22 Stat. 510, 512.) The imported articles consisted of "chinas" and "marcelines;" the latter being made wholly of silk, and the former of silk and cotton, silk being the component material of chief value.

The position of the government was that such articles were dutiable under Schedule L of the act, at the rate of 50 per centum ad valorem, while the plaintiffs contended that they came under Schedule N, and were chargeable with duty at the rate of 20 per centum ad valorem.

The court below regarded the case as falling within the doctrine of Hartranft v. Langfeld, 125 U. S. 125, 8 Sup. Ct. Rep. 732, and of Robertson v. Edelhoff, 132 U. S. 614, 10 Sup. Ct. Rep. 186, and accordingly referred it to the jury to find, under the evidence, whether the goods in question were trimmings, and what was their chief use.

[1] For dissenting opinion, see 13 Sup. Ct. Rep. 983.

A large number of witnesses was called on both sides. There was no dispute as to the composition of the goods, but there was conflicting evidence as to the extent of their use as hat trimmings. The testimony on behalf of the government tended to show that such goods were largely, and, according to some of the witnesses, chiefly, used for purposes other than for hat and bonnet trimmings. The plaintiffs' witnesses testified that, while they were used to a limited extent for other purposes, their chief use was for trimming and lining hats and bonnets. A verdict was found and judgment entered in favor of the plaintiffs.

If this case is not distinguishable in its facts from the cases above referred to, then a like conclusion must be reached as that announced in the case of Cadwalader v. Wanamaker, 13 Sup. Ct. Rep. 979, (just decided,) and for the same reasons, which we need not here repeat.

*546 *An attempt is made to distinguish the facts of the cases in the particular that whereas, in the other cases, the imported goods were ribbons, and thus articles naturally fitted for hat and bonnet trimmings, in this case they are piece goods, bought and sold under the commercial designation of "chinas" and "marcelines," and chiefly used for lining hats and bonnets.

But an examination of the record shows that the judge of the trial court did not overlook the distinction supposed to be involved in the character of the imported articles. He stated to the jury that "undoubtedly the word 'trimmings,' as used in the clause relating to 'hats, and so forth, material for,' includes ornamental appendages. But does it include nothing more? This you will determine upon a consideration of the whole evidence, and having regard also to the terms of the particular claim of the tariff act with which we are now dealing. The language of that clause as it relates to 'trimmings' is: 'Hats, and so forth, materials for, * * * trimmings, * * * used for making or ornamenting hats, bonnets, and hoods.' The use is not confined to ornamentation, but by the express words of the clause is for 'making' as well as ornamenting. * * * But, aside from the matter of ornamentation, you are to consider whether the lining of a hat, bonnet, or hood is not part of the construction or 'making' of the article, within the meaning of the clause of the tariff act."

And again: "The evidence tends to show that chinas and marcelines are particularly adapted and intended to be used, and in fact are and long have been used, as inside appendages for hats, bonnets, and hoods, to trim and finish them, and that their substantial commercial value consists in that use. Are they or are they not trimmings, according to the natural meaning of that word? This you will determine, taking into consideration all the evidence on the subject, and having regard to the preponderating weight of the evidence. If you should find from the evidence that the articles here in question, chinas and marcelines, were not trimmings, that, of course, would make an end of the plaintiffs' case; but if you should find them to be trimmings, then the only remaining inquiry will be as to what their chief use is."

*547 * We are unable to see anything objectionable in these instructions, and the charge must be deemed a sound exposition of the law, if the previous decisions of this court, whose rulings the learned judge had in view, are to stand.

Conceding there is force in the views so ably urged in behalf of the government, for the reasons given in the case of Cadwalader v. Wanamaker we adhere to the conclusions reached in the cited cases, and the judgment of the court below is accordingly affirmed.

(149 U. S. 532, 541, 544)

CADWALADER, Collector of Customs, v. WANAMAKER et al. WALKER v. SEEBERGER, Collector. HARTRANFT v. MEYER et al.

(May 15, 1893.)

Nos. 31, 151, and 860.

CUSTOMS DUTIES — CLASSIFICATION — HAT TRIMMINGS—"CHINAS" AND "MARCELINES."

Piece goods known as "chinas" and "marcelines," invoiced as such, and imported in rolls or folds, being 18 to 31 inches wide and 75 to 125 yards long, are not "trimmings," within the meaning of the tariff act of March 3, 1883, and therefore were not dutiable under Schedule N as trimmings for hats, bonnets, and hoods, although they are in fact cut up and used exclusively or chiefly for making or ornamenting hats, etc. Per Mr. Justice Brewer and Mr. Justice Brown, dissenting. Cadwalader v. Wanamaker, 13 Sup. Ct. Rep. 979, and Walker v. Seeberger, 13 Sup. Ct. Rep. 981, distinguished.

For majority opinions, see Cadwalader v. Wanamaker, 13 Sup. Ct. Rep. 979; Walker v. Seeberger, Id. 981; and Hartranft v. Meyer, Id. 982.

*547 * Mr. Justice BREWER, dissenting.

With respect to these three cases I desire to make these observations: The questions presented in them are not constitutional, nor even of general and permanent law, but relate only to the scope and meaning of certain statutory clauses now repealed, and which were in force for only a few years. While the amounts involved may be, as counsel contend, large, yet the questions are but of temporary and passing importance. Hence, after two decisions, the questions should be considered as settled, and that notwithstanding some of the present members have come onto the bench since those decisions, and may not concur in the views therein expressed.

The end of litigation, so much to be desired, is not fully satisfied by the close of the particular lawsuit, but implies that the question involved therein is settled; so settled,

that all parties may adjust their dealings and conduct accordingly. A change in the personnel of a court should not mean a shift in the law. Stare decisis is the rule, and not the exception. Whatever, therefore, is within the letter or spirit of the two cases of Hartranft v. Langfeld, 125 U. S. 128, 8 Sup. Ct. Rep. 732, and Robertson v. Edelhoff, 132 U. S. 614, 10 Sup. Ct. Rep. 186, should be considered as having passed beyond the scope of present inquiry. For these reasons, considering the course of the trial and the rulings of the court, I concur in the decisions in the first two cases.

*545 With regard to No. 860, I think that the facts and rulings bring out a clear distinction. The importations in that case were chinas and marcelines, so described in the invoices, imported as piece goods, in rolls or folds of from 75 to 125 yards in length, and from 18 to 31 inches in width. Are such goods trimmings? I think by no fair construction of the word can they in that condition be called "trimmings." Confessedly, they must come within these words of the statute, "trimmings * * * used for making or ornamenting hats, bonnets, and hoods." The question of use or chief use does not arise until it is established that the goods are trimmings. This question was really not in the cases in 125 and 132 U. S. and 8 Sup. Ct. Rep. and 10 Sup. Ct. Rep., supra. In the opinion in the former it was said of the goods there in question: "That they were trimmings was not a matter of controversy. All the witnesses on both sides spoke of them as such." And in the latter: "On the trial the undisputed evidence was that the articles in question were used exclusively for trimming hats and bonnets, and had a commercial value only for that purpose." In neither case does it appear that any question was made as to whether the articles there imported were trimmings or not. But it was in this case, and such instructions asked and refused as compel a determination of that specific question. The instructions and comments of the court are as follows:

"(1) If you believe that in March, 1883, chinas and marcelines were commercially known as 'linings,' and not 'trimmings,' then your verdict should be for the defendant.

"This point is refused.

"(2) If you believe that the chinas and marcelines in suit were bought, sold, and used in trade in March, 1883, under those names, and were not commercially known as 'trimmings,' then your verdict should be for the defendant.

"This point is refused."

"(6) If you believe that the chinas and marcelines in suit were not in the form of trimmings at the time of their importation, you must find for the defendant, although you should believe that they were suitable and adapted by their nature and qualities to be made into hat trimmings.

"This point is refused. This point which I have just read and the next one embody the proposition advanced by defendant's counsel and discussed by them before the jury, that the chinas and marcelines here in question cannot be regarded as within the term 'trimmings,' as employed in the act of congress, because they are imported by the piece, and before the material is actually applied to use in the making or ornamenting of hats, bonnets, and hoods the pieces have to be cut into smaller pieces and made into certain forms.

"But the court cannot accept this view as correct, and I instruct you that hat materials which are imported by the piece are 'trimmings' within the meaning of the act of congress if they are distinctively adapted, and, in fact, are chiefly used, for trimming hats, bonnets, and hoods, and are not specially enumerated or provided for in the act.

"(7) The jury are instructed that there is a distinction properly to be made between 'trimmings' and materials out of which to manufacture trimmings, and, if the articles in suit are not trimmings in the sense of being completely fabricated as such, but required skill and labor to cut, fit, fold, sew, or fashion them into trimmings, then they must find for the defendant.

"You will understand that I am asked to instruct you in this way; this is the proposition which counsel hand me to affirm. I decline to give you that instruction, and I have given you the contrary instruction. The point is refused."

Now, I am of the opinion that these goods were, in the condition in which they were imported, not trimmings. I concede that if they had a commercial designation as such, that would be sufficient within many rulings of this court, but the testimony does not establish that fact, and the refusal of the first two instructions eliminates that matter from present consideration. That being eliminated, it does not seem to me that these goods, when and as imported, legitimately fall within the ordinary meaning of the word "trimmings." The idea of trimmings is of something cut up or prepared ready for present use in the ornamentation or making of hats, bonnets, etc. Concede that these rolls or folds of cloth were generally used for cutting up into trimmings, they were not, while in the piece, fairly to be denominated "trimmings." Take other piece goods, bolts of linen or cotton cloth. Suppose that some of them were used mainly, or even exclusively, for cutting up into handkerchiefs, napkins, or towels, would any one suppose that the terms "handkerchiefs," "napkins," or "towels," when used with statutory precision, were intended to include or did include the cloth imported in bolts? Were the language "cloth for handkerchiefs," etc., or "material for handkerchiefs," etc., doubtless such expressions would include the cloth in bolts. So here, if the statute named cloth or material for trimmings, the conclusion would be different; but

where the word is simply "trimmings," I take it to mean that which at the time of importation and in the condition in which it is imported is ready for immediate use as trimmings, and not that which is to be cut up into trimmings. Or, to carry the illustration further, could hickory logs be called "wooden toothpicks," because, when cut up into little pieces, they may be used as such; or would ivory fall under the designation of "piano keys," because, when sawed into proper shape, it is used for that purpose?

Indeed, to my mind the word "trimmings" carries necessarily this idea: Something in size, form, or condition fit and ready for present use in the making or ornamentation of hats, bonnets, or other such articles.

For these reasons I cannot concur in the decision in the latter case.

I am authorized to say that Mr. Justice BROWN concurs in this opinion.

(149 U. S. 662)

CURTNER et al. v. UNITED STATES.[1]

(May 15, 1893.)

No. 258.

PUBLIC LANDS — RAILROAD GRANTS — LISTINGS TO STATES — SUIT TO CANCEL — LACHES — LIMITATIONS.

1. Where lands which fall within the sections donated by congress to a railroad company by grant in praesenti were listed by the land department to a state (wrongfully, as is claimed) as indemnity school lands, according to selections alleged to have been made before the filing of the maps of either general or definite location, and afterwards the United States brings a suit against the state's grantees to cancel the listings, in order that patents may be issued to the railroad company for the benefit of its grantees, such suit is practically one brought by the government in behalf of private parties who might sue in their own names, either at law or in equity, to determine the title; and in such case the rule that limitation and laches do not run against the sovereign is inapplicable, and these defenses may be set up in the same manner as in suits between private persons.

2. In such case a right of action against the state's grantees accrued to the railroad company at the date of the filing of its map of definite location, and a lapse of 13 years thereafter before the bringing of the suit to cancel the listings was fatal to the case, both on the ground of laches, and under the California statute of limitations, which, in actions to recover lands, bars the claim in 5 years.

3. The running of the statute of limitations was not interrupted, or the accrual of laches prevented, by the fact that during the period of delay the railroad company made many ineffectual efforts to induce the land department to reconsider and annul its action in listing the land to the state.

Mr. Justice Field, dissenting.

Appeal from the circuit court of the United States for the northern district of California. Reversed.

Statement by Mr. Justice FULLER:

This was a bill in equity filed by the United States in the circuit court of the United States for the northern district of California, July 23, 1883, against Henry Curtner and others, patentees of the state of California, for the purpose of having certain listings of indemnity school lands situated in that state in township 3 S., range 3 E., and in township 2 S., range 1 E., set aside and canceled, and the lands decreed to be held subject to the grant made for the purpose of aiding the construction of the Pacific Railroad, as provided in the acts of congress of July 1, 1862, and July 2, 1864. *663

The bill was demurred to, and amended, and to the amended bill a demurrer was interposed, which was overruled, Judge Sawyer delivering an opinion. 11 Sawy. 411, 26 Fed. Rep. 296.

The bill averred that on July 1, 1862, congress passed an act by which the Union Pacific Railroad Company was incorporated for the purpose of constructing a railroad and telegraph line from the Missouri river to the Pacific ocean, and by which it was provided that "there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad, * * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed. * * * And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." 12 Stat. 489, 492. That the Central Pacific Railroad Company of California was by the act declared entitled to the benefit of this land grant, on the same terms and conditions as the Union Pacific Railroad Company. That on October 31, 1864, the Central Pacific Railroad Company of California assigned to the Western Pacific Railroad Company the right to earn the land grant along and through the location where the land in controversy is situated, and that this assignment was ratified by act of congress of March 3, 1865. 13 Stat. 504. *664

It was further alleged that by the act of July 1, 1862, the railroad company seeking the benefit of the grant therein provided for was required, within two years after its passage, to file a map of its general route in the department of the interior, and thereupon the secretary of that department should cause the lands within 15 miles of such general route to be withdrawn from pre-emption, private entry, and sale. That when any portion of said route was finally located the secretary of the interior should cause the said lands so granted to be surveyed and set

[1]For dissenting opinion, see 13 Sup. Ct. Rep. 1041.

off as fast as might be necessary for the purposes therein named, (12 Stat. 493,) and that by the act of July 2, 1864, the time for filing the general route map was extended to July 1, 1865, (13 Stat. 356.) By this act the 15-mile limit was enlarged to 25, and the 5 alternate sections to 10, and by its fourth section it was provided that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim."

That a map of the general route of the road was filed in the department of the interior on December 8, 1864, and that the secretary of that department, on January 30, 1865, caused the lands within 25 miles of such general route to be withdrawn from pre-emption, private entry, and sale. That the land in controversy was within those limits. That on February 1, 1870, the map of the line of the road, as definitely fixed, was filed with the secretary of the interior, and on that day the line of the road was definitely fixed. That on December 29, 1869, the road was completed in all respects as contemplated by said act of congress, and the Western Pacific Railroad Company was entitled to have and receive patents from the United States for the land in controversy, the same being within 10 miles of the road so completed, and not sold, reserved, or otherwise disposed of by the United States.

*990 And also that the Western Pacific Railroad Company and the Central Pacific Railroad Company of California became consolidated on June 22, 1870, under the name of the Central Pacific Railroad Company, and that the said Western Pacific and its successor, the Central Pacific, did, within three years of the completion of the said road, sell and dispose of the land in controversy to persons other than the defendants.

The bill then averred that "the commissioner of the general land office did, at the various and respective times hereinafter stated, without right and through error, inadvertence, and mistake, wrongfully list, by certified lists thereof, to the state of California, the said above-described lands;" and then follow four lists, covering the lands in controversy, dated September 8, 1870; March 11, 1871; November 15, 1871; and March 24, 1873.

That on May 12, 1874, the railroad company, by its deputy land agent, presented to the register and receiver of the local land office a selection of lands claimed by it under its grant, numbered 13, including these lands; that the "mistake, error, and inadvertence of the said commissioner of the general land office in listing by certified lists said land to the state of California was not discovered by complainants, or its officers of the said land department, or by said Central Pacific Railroad Company or its grantees, until the 12th of May, 1874, nor could the same by reasonable diligence have been discovered sooner; that thereupon said register and receiver wrongfully, and in violation of their duty, refused to certify said list as aforesaid requested, and refused to certify the same in any manner whatever."

It was further alleged "that the state of California did at various times subsequent to said eighth (8th) day of September, A. D. 1870, by its land patents, purport to convey said lands mentioned in said list to divers and sundry persons other than 'the Western Pacific Railroad Company' or its successors, the Central Pacific Railroad Company, and against the will and without the consent of the said companies, or either of them, as follows, to wit." And then follow the dates of the patents, the lands patented, and the names of the patentees, the dates being February 3, 1871; April 3, 1871; November 29, 1871; May 18, 1872; and March 4, 1878, respectively. And that the patentees subsequently to the issue of the patents by the state to them, respectively, and prior to the commencement of this action, "did by valid mesne conveyances, duly executed and acknowledged, convey all their right, title, and interest in and to said lands to the defendants herein."

The bill further averred that the lands so patented by the state were on July 1, 1862, November 30, 1862, July 2, 1864, October 5, 1864, January 30, 1865, and December 29, 1869, alternate sections of the public lands of the United States, and were within the limits of the railroad grant, and had not been sold or reserved or otherwise disposed of by the United States, and that no pre-emption or homestead claim had attached thereto at the time the line of the road was definitely fixed; that the president of the United States refused to issue patents to the railroad company for said lands, "not because the said the Western Pacific Railroad Company and its successors had not complied with the said acts of congress, nor because it was not the kind and description of land granted, but solely because said land had previously been, by mistake, wrongfully and inadvertently listed to the state of California, as hereinbefore set forth," and that the defendants and their grantors at the time mentioned in the bill "had actual notice of the said grant of said lands to said company, the said withdrawal thereof, the said erroneous and unlawful listing thereof by the said error, inadvertence, and mistake of the said commissioner, and of each and all of the matters and things hereinbefore set forth."

The bill then set forth various steps taken by the railroad company to procure patents from the interior department notwithstanding the listings to the state, and among other things that on March 18, 1879, the register and receiver at San Francisco reported that in accordance with instructions of January 24, 1878, they had on February 25, 1878, made demand on the state of California for

the surrender of the certification of the lands hereinbefore described, and that no surrender had been made; that they also reported *607 on the same day that in accordance with instructions of March 9,*1878, they furnished the state surveyor general, on March 26, 1878, with a copy of said instructions, and made demand on the state of California to surrender her title and listing of said lands, but that up to that date she had failed to surrender as requested; that on April 2, 1879, the reports were submitted to the secretary of the interior, and on the 26th of June the secretary affirmed the commissioner's decision of March 9, 1878, awarding the land to said company, but refusing to issue patents for the reason that said land had been wrongfully listed to the state of California. On December 8, 1879, the secretary of the interior transmitted to the commissioner a letter from the attorney general of California, dated April 1, 1878, refusing to relinquish the certification and listings of said lands theretofore listed and certified to the state by the commissioner; that afterwards a petition was filed in the general land office for a reconsideration of so much of the secretary's decision of June 26, 1879, as declined to issue to the railroad company patents for the lands that by mistake were wrongfully listed and certified to the state of California, and thereafterwards the papers were sent to the secretary, who on July 1, 1882, requested the opinion of the attorney general of the United States whether patents could then be issued for the lands, or whether the certification to the state must be first judicially vacated; that on October 18, 1882, the secretary of the interior wrote to the commissioner of the general land office, inclosing a copy of the attorney general's opinion, and directing the papers to be prepared for a suit to set aside the listing and certification to the state, and thereafterwards, on December 6, 1882, the secretary requested the attorney general to commence suit in the proper court.

The bill then charged that a demand was duly made by the United States upon the state, February 25, 1878, and refused, and that the United States were bound, in equity and good faith, to hold the Central Pacific Railroad Company, its grantees and assigns, harmless from the consequences of errors and *608 mistakes, and particularly those relating to the mistake and inadvertence of the commissioner of the general land office. The bill further averred that proceedings had been continuously pending before the land department for the purpose of correcting the error and mistake, and had been prosecuted with due diligence, and in accordance with the usages of the department in relation to such matters. It was further stated that prior to December 6, 1882, it had been the practice of the department to issue second patents to claimants of land whenever it was made to appear that the first patent had been wrongfully issued.

The prayer was that "the said listings of said lands to the state of California as aforesaid be set aside, recalled, canceled, and annulled, and that all the defendants herein be forever estopped and forbidden from asserting any right or title to said lands, and that the same in said decree be declared to be public lands of the United States of America, subject to said rights of the Central Pacific Railroad Company, its grantees and assigns, as hereinbefore set forth," and for general relief.

Answers having been put in, evidence taken, and hearing had, a decree was rendered which annulled the listings and certifications to the state, adjudged the patents issued to the state to be void, and enjoined the defendants from asserting any title under them.

H. F. Crane, E. R. Taylor, and Mich. Mullany, for appellants. Sol. Gen. Aldrich, A. T. Britton, and A. B. Browne, for appellees.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The lands in question were odd sections lying within the 20-mile limit of the grant of lands made to the Central Pacific Railroad Company to aid in the construction of its road, and situated partly in township 3 S., *609 range 3*E., Mount Diablo base and meridian,* and partly in township 2 S., range 1 E.

It is stated in the opinion of the circuit court rendered on the final hearing and reported in 38 Fed. Rep. 1, that "between May 15, 1863, and May 16, 1864, after actual survey in the field, but before the survey had been officially adopted or recognized by the secretary of the interior, and before it had been approved by the surveyor general, and filed in the district land office, the state of California, by its locating agent, made selections and locations of all the lands now in controversy in township three, range three, in part satisfaction of the grant to the state of lands in lieu of sections 16 and 36, under the act of March 3, 1853, (10 Stat. 246.) Between February 17, 1864, and February 9, 1866, the state had issued its certificates of purchase to the several purchasers thereof, the first payments of the purchase money having been made. The selections, apparently, at their respective dates, were by the register of the land office entered in his office. A portion of these lands were certified over to the state by the land department at Washington, approved by the secretary of the interior on November 15, 1871, and the remainder on March 24, 1873, and they were afterwards patented to the purchasers by the state. The lands in controversy, situate in said township two, range one, were selected in advance of any survey in the field by the United States surveyor general, upon surveys made by the county surveyors of the state, between July 28, 1862, and July 20, 1863. Certificates of sale were issued to purchasers by the state for a part between March 2, 1863, and January 25, 1864, and for the remainder between

February 20 and March 14, 1865. These selections were entered by the register of the land office on June 12, 1865. A part was certified over to the state by the secretary of the interior on September 8, 1870, and the rest on March 11, 1871. These lands were also afterwards patented to the purchasers by the state." In the view which we take of the case, this summary of the evidence, in the particulars mentioned, may, for convenience, be accepted without restatement.

*429 The map of the general route of the railroad company was filed in the general land office, December 8, 1864, and the order of withdrawal issued January 30, 1865. The road was completed December 29, 1869, and the map of definite location filed February 1, 1870. The selections of the railroad company embracing these lands were made May 12, 1874. The bill alleges, and the record shows, that patents for all but 320 acres of the lands were issued to persons mentioned in the bill, from November 9, 1870, up to and including April 5, 1873, and that the 320 acres were patented by the state to one of such persons March 4, 1878. The purchasers from the state, and their grantees, entered into actual occupation of the lands in controversy under their certificates of purchase, and from that time on had continued in the possession of the same. This suit was commenced July 23, 1883,—over 12 years and 8 months after the first patent issued, and over 5 years and 4 months after the issue of the last-named patent.

The circuit court held that lands are not surveyed lands by the United States until a certified copy of the official plat of survey has been filed in the local land office; that this had not been done in respect of these lands, or, if done, that the filing was too late; that they were therefore unsurveyed; and that the selections, being made on unsurveyed lands, were "utterly void." These premises were denied by appellants, both as to the law and the fact.

The circuit court also held that the state selections were void for the reason that the act of 1853, under which they were made, excepted from selection by the state, in lieu of school sections lost, "lands reserved by competent authority," and "lands claimed under any foreign grant or title," and "mineral lands," and that these lands were excepted because at the time of their selection, location, and sale by the state they were claimed under a Mexican grant known as "Las Pocitas." Appellants contended that this conclusion was based on a mistaken construction of the act of 1853, and an erroneous application of the act, if properly so construed, under the facts in the case.

*430 *Among the points raised upon the demurrer, and necessarily presented upon the final hearing, were these: First, whether the United States had such an interest in the subject-matter of the controversy as warranted their filing the bill; second, whether the claim set up was not barred by laches and limitations.

The bill averred that the United States had granted the land to the railroad company; that the railroad company was entitled to a patent; that the lands had been wrongfully listed to the state, and for that reason the United States refused to grant a patent to the same; and therefore the bill was filed to enable the government to issue the patent. But it was also alleged that the Western Pacific Railroad Company and its successor, the Central Pacific Railroad Company, did, within three years of the completion of the road, sell and dispose of the land hereinbefore described to persons other than defendants. The road was completed December 29, 1869, so that the sale of the land by the railroad company to others than the defendants must have been before January, 1873, or 9½ years before the original bill was filed.

The rule in relation to the institution of suit by the attorney general of the United States to vacate a patent is thus stated by Mr. Justice Miller in U. S. v. San Jacinto Tin Co., 125 U. S. 273, 285, 8 Sup. Ct. Rep. 850:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it *431 is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use,—in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own,—it can no more sustain such an action than any private person could under similar circumstances.

"In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist, as the foundation of the right of action. Of course, this interest must be made to appear in the progress of the proceedings, either by pleading or evidence; and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person,

and that no obligation to the general public exists, which requires the United States to bring it, then the suit must fail. In the case before us the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, together with the beneficial interest in it."

And in U. S. v. Beebe, 127 U. S. 338, 342, 8 Sup. Ct. Rep. 1083, it was said by Mr. Justice Lamar, delivering the opinion of the court: "If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle by personal litigation the question of right in which they alone are interested. But if it should come to the knowledge of the government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent."

*673 In the case before us the state of California and its grantees claimed title under the United States, as did the railroad company and its grantees. Either the grantees of the state or the grantees of the railroad had, when the bill was filed, the title to the land. No fraud or imposition or wrong, as against the United States, was charged, and no case made upon which the United States sought relief for themselves. Nor was the case one of mistake, in the sense that the action of the United States and the state would have not been what it was but for ignorance of particular facts or of the law. If the state acquired the legal title by the listings, that legal title passed to its grantees; and, if the railroad company and its grantees acquired an equitable title, no reason is perceived why the real parties in interest could not litigate their claims, as between each other. And this was equally true if the state's selections and the listings were wholly void. No wrong was chargeable to the state, and if the state and railroad company each claimed the land in good faith upon mere questions of law and fact, without any element of wrong or fraud, it does not appear to us that the bill should be regarded as accomplishing anything more than raising a controversy between the parties actually in interest.

Under the railroad grant acts themselves, nothing contained therein was to impair or defeat any valid claim existing at the time the line of road was definitely fixed; and upon the face of this record there can be no question that the claim of the state of California, based upon its making selections of the lands, and presenting the same for approval, was a claim in good faith, and the obligation of the United States to the state was as much to be considered as the obligation of the railroad company, and its liability to make good the loss was to that one of the parties upon whom the loss might finally fall.

We are of opinion that upon the case made the same principles must be applied as if the litigation were between private parties.

In this regard the case of U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. Rep. 1083, is exactly in point and of controlling weight. There a bona fide claimant had made a location under a New Madrid certificate, perfected his *674 claim, and received a certificate upon which he had become entitled to a patent for the land. Afterwards, and while the matter was pending, Beebe and others, as was alleged, by some imposition or fraud, procured a patent to be issued to them for the same land. Suit was permitted to be brought in the name of the United States to cancel the Beebe patent, and the defenses relied on in the court below were (1) the want of authority in the attorney general to file a bill for an annulment of a patent in a case like that; (2) that the claim was barred by the statute of limitations; (3) that the claim sued on was stale; (4) that the complainant had no equity to maintain the suit. It was held by this court that the United States could properly proceed, by bill in equity, to have a judicial decree of annulment and an order of cancellation of a patent issued by mistake, or procured by fraud, where the government had a direct interest or was under an obligation respecting the relief sought, but that, in the language of Mr. Justice Lamar, "when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right, or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government, designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party, nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants. These principles, so far as they relate to general statutes of limitation, the laches of a party, and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the *675 decisions of this court. According to these decisions, courts of equity, in general, recog-

nize and give effect to the statute of limitations as a defense to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."

The decision of the circuit court in that case, dismissing the bill on the ground of laches, was sustained, because although Beebe had procured his patent by fraud and imposition upon the government or its officers, and the superior right to the land was originally in others, yet it was apparent that the suit was prosecuted in the name of the United States only on behalf of private persons, and therefore should be barred if they were.

Tested by this rule, it is clear that the claim of the railroad company and its grantees cannot be sustained.

The grant was in praesenti, and attached upon the filing of the map of definite location. When the identification of a granted section became so far complete as to authorize the grantee to take possession, the legal title of the granted land passed, and an action for possession could be maintained by the company or its grantees before the issue of a patent. The patent would have been evidence that the land named was granted, that the grantee had complied with the conditions of the grant, and that the grant was to that extent relieved from the possibility of forfeiture for breach of its conditions, but was not essential to transfer the legal right. Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. Rep. 158; Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. Rep. 362.

The company had on February 1, 1870, whatever title it could obtain, and whatever rights belonged to it, and its cause of action then accrued. The land had already been certified to the state by the commissioner of the general land office and the secretary of the interior, and their action in that regard was, in law, the same as if patents had been issued to the state. Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. Rep. 1141.

If that action was wholly void, then it was open to collateral attack, and the railroad company and its grantees could have brought suit to test the legal title at once. Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. Rep. 1228.

If that action was not void, but the interior department had taken mistaken views of the law, or drawn erroneous conclusions from the evidence, and the railroad company and its grantees possessed such equities as would control the legal title vested in the state and its grantees, then resort could have been had to a court of equity for relief. Smelting Co. v. Kemp, 104 U. S. 636.

In either aspect the rights of the parties could have been determined by proceedings on behalf of the company or its grantees against the patentees of the state or their grantees; but instead of instituting such proceedings the railroad company besieged the principal officers of the land department to ignore the action of their predecessors in office, and to exercise a power that had become functus officio. Noble v. Railroad Co., 147 U. S. 175, 13 Sup. Ct. Rep. 271. If patents had been issued to the railroad company, then the case would have been presented of two patents for the same land issued to two different parties, and, as pointed out in U. S. v. Beebe, the matter might properly be left to those parties to settle by personal litigation.

This bill was not filed until more than 13 years after the cause of action had accrued, and 12 years after the first patent, and over 5 years after the last patent, was issued, by the state, while the selections and purchases thereunder were made long before.

Under the laws of California an action may be brought by any person against another, who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim; but no action can be brought for the recovery of real property, or for possession thereof, or arising out of the title thereto, unless such action is commenced within five years after the cause of action shall have accrued, and an action for relief not otherwise provided for must be commenced within four years. Code Civil Proc. Cal. §§ 318, 319, 343, 738.

Whether the statute be applied directly or by analogy, or the rule in equity founded upon lapse of time and staleness of claim, the delay and laches here are fatal to the maintenance of the suit.

The ineffectual pressure of the company on the land department furnished no excuse as between the real parties to this litigation, and the United States occupied no such relation to the case as to be entitled to the exemption from litigation and laches accorded to governments proceeding in their own right.

If, through erroneous action of its officers, the bounty of the government in the particular instance has not reached those for whom it was intended, but has reached beneficiaries who were not intended to have these particular lands, the government may be relied on to effectuate its own designs, and to make good any moral obligation that rests upon it; but it had not such pecuniary or other interest in this litigation as entitled it to ask the suspension of the beneficent rules applied by the courts in the administration of justice between individuals.

The decree is reversed, and the cause remanded, with a direction to dismiss the bill.

Mr. Justice FIELD dissented.

(149 U. S. 465)

CITY OF ST. LOUIS v. WESTERN UNION TEL. CO.

(May 15, 1893.)

No. 94.

MUNICIPAL CORPORATIONS—TELEGRAPH COMPANIES—RENTAL.

The charter of the city of St. Louis empowers the mayor and assembly to establish,

open, vacate, and improve all streets, and to regulate their use, and provides that the costs of such improvement, etc., shall be paid by the city in so far as it is a benefit to the public generally, and that special benefits to adjacent property shall be assessed to the owners thereof. It also authorizes the mayor and assembly to license, tax, and regulate telegraph companies. *Held* that, where a telegraph company has been granted the right to erect its poles in a street, the city, under these provisions of its charter, has power to require it to pay a reasonable sum in the nature of rental for the privileges of such use.

On rehearing. Denied.

For prior report, see 13 Sup. Ct. Rep. 485.

*467 *Mr. Justice BREWER delivered the opinion of the court.

In the opinion heretofore announced it was said: "We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has full control of its streets in this respect, and represents the public in relation thereto." A petition for a rehearing has been filed, in which it is claimed that the court misunderstood the position of counsel, and, further, that in fact the city of St. Louis has no such control. Leave having been given therefor, briefs on the question whether such control exists have been filed by both sides, that of the telegraph company being quite full and elaborate.

We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a state is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state, given in the constitution. Sections 20, 21, art. 9, Const. Mo. 1875, authorized the election of 13 freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to "become the organic law of the city." Section 22 provided for amendments, to be made at intervals of not less than two years and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the constitution and laws of Missouri, and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the constitution a charter was prepared and adopted, and is, therefore, the "organic law" of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an *organic act, *468 so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an "imperium in imperio." Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter.

An examination of this charter (2 Rev. St. Mo. 1879, p. 1572 and following) will disclose that very large and general powers are given to the city, but it would unnecessarily prolong this opinion to quote the many sections defining these powers. It must suffice to notice those directly in point. Paragraph 2, § 26, art. 3, gives the mayor and assembly power, by ordinance, "to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle, all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for the grading, lighting, cleaning, and repairing the same, and to condemn private property for public uses, as provided for in this charter; to construct and keep in repair all bridges, streets, sewers, and drains, and to regulate the use thereof," etc. The fifth paragraph of the same article grants power "to license, tax, and regulate * * * telegraph companies or corporations, street-railroad cars," etc. Article 6 treats of public improvements, including the opening of streets. Section 2 provides for condemning private property, and "for establishing, opening, widening, or altering any street, avenue, alley, wharf, market place, or public square, or route for a sewer or water pipe." By section 4 commissioners are to be appointed to assess the damages. By section 5 it is made the duty of these commissioners to ascertain the actual value of the land and premises proposed to be taken, and the actual damages done to the property thereby; "and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be specially benefited by the proposed improvement in the opinion of the commissioners, to the amount that each lot of such owner shall be benefited by the improvement." Except, therefore, * for the special * benefit done to the adjacent property, the city pays out of its treasury for the opening of streets, and this power of the city to open and establish streets, and the duty of paying the damages therefor out of the city treasury, were not created for the first time by this charter, but have been the rule as far back as 1839.

Further than that, with the charter was, as authorized by the constitution, a scheme for an enlargement of the boundaries of the city of St. Louis, and an adjustment of the

relations consequent thereon between the city and the county. The boundaries were enlarged, and by section 10 of the scheme it was provided:

"Sec. 10. All the public buildings, institutions, public parks, and property of every character and description heretofore owned and controlled by the county of St. Louis within the limits as extended, including the courthouse, the county jail, the insane asylum, and the poorhouse, are hereby transferred and made over to the city of St. Louis, and all the right, title, and interest of the county of St. Louis in said property, and in all public roads and highways within the enlarged limits, is hereby vested in the city of St. Louis, and divested out of the county; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt and the entire park tax." 2 Rev. St. Mo. 1879, p. 1565.

Obviously, the intent and scope of this charter are to vest in the city a very enlarged control over public property and property devoted to public uses within the territorial limits.

It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word "regulate" is one of broad import. It is the word used in the federal constitution to define the power of congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets *470 or public grounds, as it did by ordinance No. 11,604, it simply *regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the state. The law in force in Missouri from 1866 gives certain rights in streets to "companies organized under the provisions of this article." Of course, the defendant, a corporation organized under the laws of the state of New York, can claim no benefit of this. It is true that, prior to that time, and by the act of November 17, 1855, (2 Rev. St. Mo. 1855, p. 1520,) the right was given to every telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; and when in force it was only a permission, a license, which might be revoked at any time; and, further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the Revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the state, and occupy any other streets and highways.

Neither have we found in the various decisions of the courts of Missouri, to which our attention has been called, any denial of the power of the city in this respect. It is true, in Glasgow v. St. Louis, 87 Mo. 678; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. Rep. 130; Glaessner v. Association, 100 Mo. 508, 13 S. W. Rep. 707; and Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. Rep. 822,—the power of the city to devote the streets or public grounds to purely private uses was denied; but in the cases of Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258, and City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. Rep. 197,—it was expressly held that the use of the streets for telephone poles was not a private use, (and of course telegraph poles stand on the same footing,) and that a private corporation carrying on the public service of transportation of messages might be permitted to use the streets for its poles. Counsel rely strongly upon the latter of these cases, in which the power of the city to regulate the charges for telephone service was denied. But obviously that decision does not cover this case. The relations of a telephone or telegraph company to its patrons, after the use of the streets has been granted, do not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons; but what the company shall pay to the city for the use is directly involved in a regulation of the use. The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use is persuasive that fixing a price for the use is such a regulation. Counsel also refer to the case of Atlantic & P. R. Co. v. St. Louis, 66 Mo. 228, but there is nothing in that case which throws any light upon this. In that it appeared that there was an act

of the legislature giving to the railroad company a specific right in respect to the construction of a track within the city limits, and it was held that the company was entitled to the benefit of that act, and to claim the right given by the general assembly, although it had after the passage of the act proceeded in the construction of the track under an ordinance of the city purporting to give it the privilege. But, as we have seen, the act of November 17, 1855, vested in defendant no general and irrevocable power to occupy the streets in any city in the state through all time. We find nothing, therefore, in the cases cited from the Missouri courts which militates with the conclusions we have drawn as to the power of the city in this respect.

One other matter deserves notice: It will be seen by referring to our former opinion that one of the contentions of the counsel for the telegraph company was that by ordinance No. 11,604 the city had contracted with the company to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm free of charge. We quote this statement of counsel's claim from their brief: "Ordinance 11,604 granted defendant authority to set its poles in the streets of the city without any limitation as to time, for valuable considerations stipulated; and having been accepted and acted on by defendant, and all its conditions complied with, and the city having acquired valuable rights and privileges thereunder, said ordinance and its acceptance constitute a contract, which the city cannot alter in its essential terms without the consent of defendant; nor can it impose new and burdensome considerations." And in respect to this, further on, they say: "No question is or can be raised as to the validity of the contract made by ordinance No. 11,604, and its acceptance." But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city has such control over the use of the streets as enables it to demand pay therefor?

The petition for a rehearing is denied.

(149 U. S. 629)

McCOMB v. FRINK et al.

FRINK et al v. McCOMB.

(May 15, 1893.)

Nos. 215, 216.

TRUSTS—CONSTRUCTION—RES JUDICATA—MEASURE OF DAMAGES.

1. M. held certain corporate stock as trustee for B., and the latter requested him by letter to execute an acknowledgment that he held it in trust for S., stating that S. had paid B. "its cost and interest." M. executed an acknowledgment that he so held the stock "under an arrangement with B.," and "in conformity with an arrangement between B., S., and myself;" this he sent to B., requesting him to return it for any alterations needed to make it conform to his wishes. When S. afterwards called on him to account for the stock so held, M. claimed that it was and had always been held subject to advances made by him to B. *Held*, that this claim could not be sustained upon the face of the transaction, and in view of further evidence that S. paid to B. the full amount paid upon the stock, which was never repaid, and that when M. executed the acknowledgment of trust in favor of S. he knew that B. was in extreme financial embarrassment. Affirming 39 Fed. Rep. 292.

2. In a suit by S. against M. on the declaration of trust for an accounting, it was shown that plaintiff had theretofore sued defendant at law for alleged breach of contract to invest the sum in question in such corporate stock, and the declaration contained a count for conversion of the stock. This count was abandoned, and the court refused plaintiff's application to amend the declaration into a bill in equity founded on the declaration of trust. *Held*, that a judgment for defendant in this action was not a bar—as res judicata—to the suit for an accounting. Affirming 39 Fed. Rep. 292.

3. M. sold his own stock in the corporation for a large price, and transferred the trust stock to the same purchaser without receiving anything therefor. The object of the purchaser was to secure a controlling interest in the corporation; but the sale of M.'s stock was subject to an obligation to repurchase at the end of a given time at an advance of 30 per cent. *Held*, that the price received by M. was not the measure of damages for his conversion of the trust stock, and the cestui que trust could only recover what he actually paid for the stock, with interest. Affirming 39 Fed. Rep. 292.

Appeals from the circuit court of the United States for the district of Delaware.

Suit by George A. Frink and Esther S. Snyder, administrator and administratrix of C. Brown Snyder, against Elizabeth B. McComb, executrix of Henry S. McComb, for an accounting. There was a decree for complainants, (39 Fed. Rep. 292,) from which both parties appeal. Affirmed.

Statement by Mr. Justice BREWER:

On June 30, 1868, the Southern Railroad Association, an unincorporated association, was organized by certain parties for the purpose of leasing and operating the Mississippi Central Railroad, of which Henry S. McComb had previously obtained a lease for himself and his associates. The capital of this association was $1,500,000, of which Henry S. McComb subscribed $415,000 personally, and also $60,000 as trustee; Josiah Bardwell, $100,000; the balance being taken by 10 associates. On January 14, 1869, this association became incorporated, under a special act of the legislature of Tennessee, and to this corporation the voluntary association, on January 22, 1869, transferred its property. On January 21, 1869, such action was taken by this incorporated company that the capital stock named in its charter, to wit, $2,000,000, was issued to the subscribers of the original unincorporated association in proportion to the amounts of their subscrip-

tions. In this way the subscription in the name of Henry S. McComb, trustee, was enlarged from $60,000 to $80,000, and represented 800 shares of stock, for which 8 certificates of 100 shares each, and numbered from 157 to 164, inclusive, were formally issued by the incorporated company on October 6, 1870, to Henry S. McComb, trustee, and so remained on the books of the company at the time of his death, December 30, 1881. It is undisputed that the subscription was taken originally by McComb as trustee for Josiah Bardwell. In the fall of 1869 this correspondence took place between Bardwell and McComb:

"My Dear McComb: Will you please acknowledge that you hold in 'the Southern Ass'n,' as trustee for [the benefit] or rather for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest. Yours truly, J. Bardwell. Boston, Nov. 12, 1869."

"Office of H. S. McComb, Wilmington, Del., Nov. 22, 1869. Josiah Bardwell, Esq., care of F. Skinner & Co., Boston. Dear Sir: I send this [acknowledgment as trustee] the first leisure moment after the receipt of your letter, and if it is not in conformity with your wishes in any manner please return it to me, with such instructions to be carried out as you shall be disposed to make. Yours truly, H. S. McComb. M."

The following is a copy of the paper inclosed in McComb's letter:

"To whom it may concern: I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself. H. S. McComb, Trustee."

On this acknowledgment is a memorandum in Bardwell's handwriting: "Received, Nov. 23, 1869."

At the time of his death, on July 18, 1882, Snyder was still the beneficiary under this trust, and on January 30, 1883, the plaintiffs, as administrator and administratrix, commenced this suit against defendant, as executrix, etc., of Henry S. McComb, the purpose of which was to establish the trust, and compel an accounting. The pleadings having been perfected, proofs were taken, and the case submitted for final hearing, which resulted in a decree on July 3, 1889, for the sum of $42,000 principal, and $49,420 as interest, making in the aggregate $91,420. 39 Fed. Rep. 292. Both parties appealed to this court.

Geo. H. Bates and Wayne MacVeagh, for McComb, executrix. George Gray, Wm. G. Wilson, and Hamilton Wallis, for Frink and others, administrators.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

That some kind of a trust was created by this declaration of McComb appears on the face of the paper itself, and from its language, taken in connection with the correspondence which induced and accompanied it, it is also clear that it was an absolute, unqualified, unconditional trust which was declared by McComb. Whatever of doubt might from the mere language of the declaration arise as to whether this trust was limited or qualified by some arrangement with Josiah Bardwell, and whatever suggestiveness there might be in such language of a foundation for the claim now put forward, that this subscription and stock was by arrangement with Bardwell held primarily as security for advances made or to be made by McComb to him, and for the benefit of Snyder, as cestui que trust only thereafter, and subject to this primary burden, is clearly displaced by the two letters which called for and accompanied the declaration. Bardwell's letter to McComb is a request that he acknowledge the holding to be in trust for Snyder, and because Snyder had paid therefor its cost and interest. That clearly is a request for an absolute and unqualified declaration of trust, and because the property had been fully paid for by Snyder to the original cestui que trust. That McComb intended and supposed by this declaration that he was giving the absolute declaration of trust requested is evident from the letter which he wrote accompanying it, for in that he says, "If it is not in conformity with your wishes in any manner, please return it to me with such instructions to be carried out as you shall be disposed to make." In other words, the transaction is this: Bardwell writes asking for an absolute declaration of trust in behalf of Snyder; McComb sends this declaration, accompanying it with a letter saying that, "if this does not comply with your wishes, send it back with such changes as you desire." Evidently the reference to an arrangement in the declaration was for the purpose of identifying the stock and subscription; and that there might not arise any pretense that any part of the subscription and stock standing in his own name was held in trust for Snyder. He simply meant to identify the trust property as that which all along had stood in his name as trustee, and to guard against the assertion of a trust in some other portion of the stock. If we go outside of the papers themselves, the testimony tends strongly to uphold the claim of plaintiffs that this was an absolute and unconditional trust. Bardwell did get from Snyder $45,000, as shown, in this way: On April 22, 1869, Bardwell drew three drafts on Strang & Snyder, in favor of McComb, for $15,000 each. On the same day this receipt was given by McComb:

"Received, Boston, April 22, 1869, of J.

Bardwell his three drafts of $15,000 each, 30, 40, and 50 days' date, on Strang & Snyder, New York, being in payment for one-fourth interest in 10,000-share transaction in the stock of the Chicago and Rock Island Railroad Co., to be managed by John F. Tracy, as agreed between myself and said Tracy, through Smith, Randolph & Co., of New York, as brokers, for the account of myself and Bardwell. H. S. McComb."

This was found among the papers of Mr. Snyder, with the following minute attached to it, signed by Mr. Snyder:

"The three drafts mentioned in the foregoing receipt were paid by Strang & Snyder, and by them charged to my account on their books after the transaction in Chicago and Rock Island Railroad Company's stock was
*685 closed. The whole or no part of the money or interest was returned to me, but *$42,000 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt, as trustee, dated November 23, 1869. C. B. Snyder. Boston, January 23, 1870."

McComb received and discounted these drafts, and sent the proceeds to Smith, Randolph & Co., which, by their letter of May 6th, amounted to $44,709.38. On August 4, 1869, McComb gave Bardwell a draft on Smith, Randolph & Co. for $44,709, the exact amount of the deposit on May 6, the cents omitted; and on August 6 a check on the Bank of North America for $2,500; and on the 15th of September wrote to Bardwell, stating, among other things, as follows: "The net of your account is $36,719.80; from which deduct payment of $2,500.00; leaving due you and subject to call, $34,219.80. Shall I pay your trustee call S. R. R. A. due the 20th inst.? Ever yours, H. S. McComb."

These transactions, including the letters, show that Snyder (or the firm of Strang & Snyder) advanced to Bardwell $45,000, and there is no testimony that it was ever repaid to Snyder, other than in this trust matter. The letter of September 15th also shows that McComb held money to the amount of $34,000 and over, subject to Bardwell's call. It appears also that Bardwell was very much embarrassed in October, and that this embarrassment was known to McComb.

The following is one letter that passed between them:

"(Personal.) Boston, Oct. 5, 1869. My Dear Friend McComb: I am in trouble, and first to you I write. I left here Saturday night for New York, and returned Sunday; since Sunday I have not closed my eyes. I have been duped and swindled by that man Barry, and it is my own fault that makes the
*686 matter so much the worse. I had his honor pledged to me, and were credulous enough
* to *believe. Since Sept. 23 I have paid $260,000 for him. From a sick bed he came to see me in New York Sunday when my worst fears were realized, and he owned that he had lost $120,000 in stocks. After talking with him six hours I left, feeling disgusted and tired. I only fear now that I do not know the worst. He owes me $700,000, and I fear he has misapplied or used some $150,000 of acceptances. He said he had them on hand unused, but I have reason to think otherwise, when he told me that there were no more drafts on us, and that as it stood Friday, so it was and no more. I came home to find his drafts for $350,000 drawn on Saturday. These of mine have gone back. The sufferings of hell cannot compare but unfavorably with mine, but I won't write more. Yours, always, J. Bardwell. Don't say a word about this to any one."

With knowledge of Bardwell's condition, as shown by this letter, as well as otherwise, McComb gave this declaration of trust. Can it be believed that it would have been issued in that form, and sent in a letter accompanied with an implied promise to put it in any other form that might be desired, if at the time the stock was held by McComb as security for advances made, and to be made, to a man so financially embarrassed?

Further, so far as appears from the testimony, McComb never suggested to Snyder, or, for that matter, to any one else, that this was other than an absolute and unqualified declaration of trust, until July 21, 1874, and then in this way. On June 3, 1874, Snyder wrote to McComb:

"I have unexpectedly been called on to pay $40,000, a debt of F. Skinner & Co. and myself, which I supposed was paid long since. Not owing anything, my means are all invested in a way that I cannot reach them at present. I can get along with $30,000. What I want is for you to let me have in some way the above amount, ($30,000,) so that I can use it at once, and then you can reimburse yourself from the sale of consolidated bonds when they are issued."

*To which, on June 15th, McComb replied *687 as follows:

"I do not know how I can help you. I will do anything I can consistently with the obligations that are already on me, and hope to be able, at the meeting on Monday next, at New York, to suggest something that will relieve you, and not hurt me. You can depend upon my doing everything I can reasonably be expected to do in the matter."

On July 16th, Snyder wrote again, and urgently, saying:

"I trust you will do me this favor, because I am really in a tight place, and am borrowing the money from day to day, from my friends. I would not ask you for the favor if I could possibly get along without it. Will you help me? Please let me know when you will be in N. Y., or where I can see you next week."

In reply to this, on July 21st, McComb said:

"I can send you the $30,000 Southern R. R. Ass'n paper, and will do it if you will return me the paper I signed, giving you so

much of the benefits of the stock which was in my name as trustee for Mr. Bardwell, and which I held, by agreement from him, as collateral for advances made to him and F. Skinner & Co., which advances more than cover all this stock."

And this is the first intimation that the trust was not wholly for the benefit of Snyder. In addition, there is the testimony of Charles Marsh that in the year 1873 he was in the office of the Southern Railroad Association, in the city of New York, at a day on which there was to be a meeting of the directors, and that while there McComb came in, and after saying good morning and passing the time of day, said: "Now, gentlemen, to-day I am prepared to offer you cost and interest of your stock. I had to guaranty Mr. Snyder that before he would take his at all; but this isn't anything you want to sell, this stock." And, again, the testimony of Francis C. Cross that in June, 1874, he was present at a conversation between Snyder and McComb, which was substantially as follows:

*638 "Mr. Snyder asked Mr. McComb to perform his agreement in regard to the Southern Railroad Association stock. Mr. McComb replied to Mr. Snyder that he had better keep it and do as the other gentlemen were about to do, put in some more money; that it was a good thing, and was worth two for one. Mr. Snyder told him that he wished the money, as he desired to foster other interests that were pressing him. Mr. McComb said that he had no money, but he would let him have some notes to the extent of $30,000, and Mr. Snyder replied that he would. If the notes were good he would use them, and would carry the balance for a time. No time was stated, however. Mr. McComb told Mr. Snyder to come down to a meeting that was to be held,—as to the time of the meeting I have no recollection; if he would come there he would fix it up with him."

Further than that, on October 25, 1873, Edmund F. Cutter wrote to McComb:

"Are the interests of F. S. & C. in the Southern R. R'd Association, on which you advanced 60 M dollars, still intact, and are they worth the loan and principal? How does the 60 M of Mr. Snyder's stand affected?"

To which McComb replied as follows:

"Wilmington, Del., October 27, 1873. E. F. Cutter, Esq., Boston, Mass.—Dear Sir: The South'n R. R. Association stands all right, and everybody's interest stands upright and square. Yours, truly, H. S. McComb, Pres."

In June, 1875, Snyder began an action against McComb, in the city of New York. It was an action at law to recover $75,000 on account of the alleged conversion by McComb of this trust property to his own use. Mr. McComb's testimony was taken as follows:

"Question. What has become of the original subscription mentioned in this letter? Answer. It is still in my possession or under my control.

"Q. In what shape is it now? A. Stock of the company, as it was then.

*639 "Q. In what name does it stand? A. H. S. McComb, trustee.

"Q. Has it stood so ever since this paper was written? Continuously? A. Yes, sir.

"Q. I ask you how that subscription was paid? A. I presume it was paid by Mr. Bardwell to the company."

Subsequently the action was voluntarily dismissed by plaintiff.

Putting all these things together, there can be no reasonable doubt as to the nature of the transaction. There was an absolute and unqualified declaration of trust given by McComb to Snyder for the amount of this subscription so far as it had been paid, and the circuit court did not err in so finding.

Again, it is insisted that the matters in dispute between the parties have been once determined by a court of competent jurisdiction, and the principle of res judicata is invoked as a defense to this action. It appears that, after the voluntary dismissal of the action in the New York court, Snyder, in October, 1875, commenced a like action at law in the supreme judicial court of Massachusetts, which was tried without a jury, and resulted in a judgment in favor of the defendant, on December 23, 1888. The original declaration was in five counts. To this the defendant filed an answer denying "each and every allegation in each and every count of the plaintiff's declaration," and specifically denying any indebtedness; and, for a further defense, he demurred to the first four counts. Thereafter, by leave of the court, these first four counts were stricken out, and two substituted in their place. To this amended declaration the defendant filed an answer denying the allegations in the first two counts, —the new portions of the declaration; and also, as a further defense, a demurrer to the third count,—that being the fifth count in the original declaration. This amended declaration, in substance, alleged that the defendant, on July 16, 1869, had in his possession $45,000 belonging to the plaintiff; that in consideration of plaintiff permitting such sum to remain in his (defendant's) hand, he would purchase for plaintiff stock in the Southern Railroad Association; and, further, that he would, if requested, take the said shares of stock from plaintiff and pay him $45,000, with interest; that, relying upon such promise and agreement, the plaintiff left the sum of $45,000 with defendant, but that he failed to purchase stock in the association; and that he, plaintiff, thereupon demanded payment of the sum of $45,000 and interest, which was refused. The second count was "for money had and received," the bill of particulars attached being as follows:

Bill of Particulars.

(1) To cash retained by you to be applied to purchase of stock in the Southern Railroad Association	$45,000 00
(2) To interest on same, July 15, 1869, to October 29, 1875.....	16,978 50
	$61,978 50

The third count, being the fifth in the original declaration, was an allegation of the conversion of 600 shares of stock, and in these words:

"And the plaintiff further says that the defendant has converted to his own use six hundred shares of the capital stock of the Southern Railroad Association, a corporation duly established by the laws of the states of Mississippi and Tennessee, the property of the plaintiff."

The record of the proceedings in the supreme court of Massachusetts fails to show any ruling of the court on the demurrer to this third count, and one of the counsel for the plaintiff in that action testified that by mutual consent this third count was abandoned, testimony which seems to be supported by an extract from the brief of the defendant's counsel, in which it is stated "the count in tort has been abandoned." On the trial of that case the plaintiff made application to amend his declaration into a bill in equity, a bill founded upon this trust, but such application was denied by the court, such denial being, within the statutes of Massachusetts as well as the general practice, a *641 matter of discretion.* So that the case, as finally determined, was simply one at law for breach of a contract to invest in the stock of the Southern Railroad Association.

This mere recital of the facts concerning that action at law seems sufficient answer to the plea of res judicata, for among the essentials of an estoppel by judgment is identity of the cause of action. Atchison, T. & S. F. R. Co. v. Commissioners of Jefferson Co., 12 Kan. 127; 2 Bouv. Law Dict. tit. "Res Judicata." When an action at law for breach of a contract to invest in stocks fails because the testimony develops that the investment was made and a declaration of trust given in respect to the stock so purchased, it would seem strange to hold that such judgment is a bar to a suit in equity for a breach of the trust, especially when it appears from the records in the law case that an application to change the declaration into a bill in equity in respect to the trust was denied. As was said in Cromwell v. County of Sac, 94 U. S. 351, 353: "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action." What might have been determined in the Massachusetts court if the amendment of the declaration had been permitted can only be conjectured; what was determined was that no such contract as charged existed, or, if it existed, was broken. Copious extracts were in evidence in this case from the brief of the defendant's counsel in the Massachusetts case, which show that the defense relied upon was that no action at law could be maintained in consequence of the disclosure of the trust receipt. It is enough to quote these, which are but samples of others:

"It is, of course, unnecessary to give any consideration to the 'trust receipt,' except as it disproves the agreement alleged, because—

"(1) It is not the contract alleged and declared on, and for breach of which money is sought.

*642 * "(2) Because its only scope and effect is to create a trust, for the enforcement of which no action of law can be brought, but only a remedy sought in equity.

* * * * * * * *

"It becomes wholly unnecessary, as it is entirely impracticable, to inquire, consider, or determine what anybody's rights may be under the trust created or declared on in this transaction.

"When, if ever, a bill in equity shall be brought, and all parties in interest brought into court, that may be an interesting, as it will be a necessary, question. Till then it is enough that the trust created and acted upon for more than six years by all parties clearly negatives any other agreement concerning this original subscription, and necessitates a judgment for the defendant in this suit."

Properly, therefore, the circuit court held against this claim of res judicata.

It is suggested that the plaintiffs have been guilty of laches; but in view of the fact that defendant, when called as a witness in the first law action, testified that the stock stood as it always had stood, and of the further fact that no breach of the trust was discovered until just before the commencement of this suit, this defense is also without merit.

The final question is as to the measure of damages. The court charged the defendant with the amount invested by plaintiff, and recognized by the declaration of trust, to wit, $42,000, and interest. Both parties challenge the question of correctness of this amount. The plaintiffs insist that McComb sold his own stock for $125 a share, and that, therefore, in the accounting he should be charged for the 800 shares held by him in trust for Snyder at that price per share, for which sum, together with interest to date, a decree should be passed. The defendant claims that McComb never did anything with this trust stock, other than in the fair discharge of his duties as trustee; that, owing to causes over which he had no control, and for which he was not responsible, the stock

finally ceased to be of any value, and, therefore, that his estate should not be called upon to account for anything. It becomes *643 necessary to see exactly what McComb did with this stock. The Southern Railroad Association was the lessee of the Mississippi Central Railroad Company, and was incorporated for the purpose of taking a lease of and operating said road. This road extended from Jackson, Tenn., to Canton, Miss.; there it connected with the New Orleans, Jackson & Great Northern railroad, running from that place to New Orleans, La. McComb was a large holder of stock in that company. On November 8, 1871, he made an arrangement by which he sold to the Pennsylvania Company 14,000 shares in the New Orleans, Jackson & Great Northern Railroad Company, at $50 per share, and 5,000 shares in the Southern Railroad Association at $125 a share. At the same time he transferred to the Pennsylvania Company an additional 14,000 shares in the New Orleans, Jackson & Great Northern railroad, and 5,000 shares in the Southern Railroad Association. Included in this last 5,000 shares was the 800 shares standing in the name of McComb as trustee, which were transferred by an indorsement on the certificates, vesting apparently an absolute title in the Pennsylvania Company.

The stock which he sold was his own, and the whole cash payment, $1,325,000, passed to him, and, so far as appears, was appropriated to his own uses. By means of this transfer the Pennsylvania Company obtained control of the Southern Railroad Association, as well as of the New Orleans, Jackson & Great Northern Railroad Company. The transaction between McComb and the Pennsylvania Company is evidenced by three documents, executed on November 8, 1871; but though evidenced by these separate instruments, there was manifestly but a single transaction by which McComb transferred to the *644 Pennsylvania Company the control of these two corporations, accomplishing this vesting of control by the sale of his own stock, at a large price, and a transfer of this trustee and other stock without receiving a dollar. Obviously it was the use of this latter stock that enabled him to sell his own. If this were all, the obligation to account would unquestionably reach to $125 per share; but the purchase of McComb's stock was subject to an obligation to repurchase at the end of two years, at the same price and 30 per cent. advance, less dividends received by the company. This condition may well be deemed to have entered largely into the fixing of the price, and prevents that price from being a fair test of the value. Neither should one or two extravagant statements made by McComb, apparently to quiet any fears on the part of Snyder as to his investment, and to continue his confidence therein, be considered sufficient to justify placing any such valuation on the stock. On the other hand, it is quite clear that the stock was worth at least what it had cost at the time of the trust declaration. Indeed, we do not think this is seriously questioned by the defendant. Little need be said with respect to the contention of defendant that McComb did no more with this stock than a trustee might rightfully do, and that he used it simply to induce the Pennsylvania Company to take hold of this association, and manage it for the best interests of all the stockholders. On the contrary, it is more correct to say that he used this stock to induce the Pennsylvania Company to buy his own, or at least to increase the price at which it bought. Evidently the Pennsylvania Company wanted the control, and for that end a majority of the shares. It might not have been willing to pay $125 a share if it had been compelled to buy the 10,000 shares; but would naturally be willing to pay a larger price for half if the other half could be placed in its hands without cost, and thus the control obtained. Very likely the cestui que trust would have preferred $125 in cash to the promise of even the Pennsylvania Company to manage the interests of the association for the benefit of all stockholders.

We think, taking all the circumstances into consideration, that the circuit court reached as nearly as possible what justice demands when it awarded a return of the amount for which McComb acknowledged himself a trustee, and interest. The decree will, therefore, be affirmed. The costs in this court will be equally divided between the parties.

(149 U. S. 505)

PICKETT et al. v. FOSTER et al.

(May 15, 1893.)

No. 175.

MORTGAGES—RECORDING—INNOCENT PURCHASER—FRAUD.

1. In Louisiana the failure to reinscribe a mortgage within 10 years from its first inscription, as required by the statutory law, renders it without effect as to all persons whomsoever who are not parties thereto; and the failure to so reinscribe the mortgage is not remedied or supplied by the pendency of a suit to foreclose the same. Adams v. Daunis, 29 La. Ann. 315, and Watson v. Bondurant, 30 La. Ann. 1, followed.

2. Defendant bought a plantation which had been mortgaged, but at the time the mortgage stood as canceled on the records of the parish clerk's office. A suit was afterwards brought by the public administrator to enforce the mortgage, defendant being made a party, but the suit was not prosecuted. Subsequently defendant was appointed public administrator, and during his incumbency the 10 years in which mortgages are required to be reinscribed expired without reinscription, and the mortgage thereby became null as to all persons not parties to it, including defendant. Defendant never had charge of the succession of the mortgagee, if any such existed. *Held*, that his appointment as public administrator did not place him in any such fiduciary relation to the descendants of the mortgagee as to make it his duty to have the mortgage reinscribed in proper time.

3. Where a mortgage has been fraudulently canceled of record, one who in good faith, without notice, buys the mortgaged lands, is entitled to protection under the Louisiana laws relating to reinscription, the period for reinscription having expired after his purchase.

4. The appointment of the purchaser of mortgaged lands as public administrator while there was pending in the name of his predecessor in office a suit to collect the mortgage notes, in which such purchaser was cited as a defendant, and the subsequent dismissal of the suit during his incumbency, are facts which, while sufficient to warrant a suspicion of an intent to defeat the mortgage and notes, are yet, standing alone, not sufficient to justify upsetting the purchaser's possession, when it has existed for 12 years before the filing of the bill.

Appeal from the circuit court of the United States for the western district of Louisiana.

Bill by Joseph Desha Pickett and Theodore John Pickett against George Foster, Mary J. Foster, Mrs. Agnes M. Scanlan, Mrs. Narcissa J. Green, Ezra Wheeler, Thomas Rounday, and Augustus Ireland to foreclose a mortgage. The court below dismissed the bill, (36 Fed. Rep. 514,) and complainants appeal. Affirmed.

Statement by Mr. Justice SHIRAS:

*506 *This was a suit in equity, brought in the circuit court of the United States for the western district of Louisiana, to foreclose a mortgage which the complainants alleged to have been given in favor of their ancestor, James C. Pickett, of the District of Columbia, upon a plantation situate in the parish of Carroll, (now East Carroll,) La., by the mediate grantors of the present occupant of the property, Mrs. Mary J. Gwyn, wife of George Foster. The bill charged that the existence of any impediments which might serve to prevent the enforcement at law of their alleged rights in the property was the result of various fraudulent acts and breaches of trust on the part of the defendants; and the defendants denied the allegations of fraud and bad faith, and said that if the mortgage was ever operative upon the property it had become prescribed through the laches of the complainants. As the contentions of the parties are based largely upon the effect of certain litigation previous to the filing of this bill, and upon various mortgages and transfers of property, the facts in relation thereto, as they appear in the record, are stated below in chronological order.

In January, 1866, Mrs. Agnes M. Ricketts and Mrs. Narcissa J. Bell, daughters and devisees of Jonathan Morgan, late of the parish of Carroll, La., then deceased, executed to the order of James C. Pickett, of Washington, D. C., their three joint promissory notes, in the respective amounts of $5,500, $6,000, and $6,500, dated January 1, 1866, and payable, the first in one year, the second in two years, and the third in three years from the date thereof, at the Farmers' Bank of Frankfort, Ky., without interest. To secure the *507 payment of the notes they conveyed, on January 16, 1866, by an act passed before a commissioner of deeds for the state of Louisiana, in the city of Memphis, Tenn., the undivided two-thirds of the said plantation, being described in the deed as all their interest in the property, to Richard C. Ricketts, Sr., of Midway, Ky., in trust. The instrument of conveyance contained the following condition:

"Now, therefore, the condition on which the said grant is made, and on and for which this trust is created, is that the said trustee shall hold the said property in trust for the payment of the said notes in whatsoever hands they may come, and in case they should all be paid at maturity of the same this deed shall be null and void and of no effect in law; otherwise it shall be and remain in full force and vigor, and the said trustee shall have the right, on request of the holder or holders of any of the dishonored paper above named, to take possession of the estate hereby conveyed, and foreclose this deed of trust and the interest of the said grantors in the property aforesaid; and till default in the payment of said notes, or either or any part of them, the said grantors shall have the right to the possession of the said estate hereby conveyed; and in full payment of the said notes it is understood and agreed that the said trustee shall make such reconveyance of said estate hereby conveyed to said grantors as may be necessary under the laws of Louisiana to extinguish the lien of this instrument."

On January 25, 1867, Ferdinand M. Goodrich, of Carroll parish, La., filed petitions in the office of the clerk of the district court of said parish, averring that on or about April 20, 1859, he had filed in that court his account as tutor of Agnes A. Morgan and Narcissa J. Morgan, showing a balance in his hands in their favor of $1,263.21, which account, after due notice, etc., had been regularly homologated, and that between April 20, 1859, and March, 1862, they had become severally indebted to him in the respective amounts of $3,498.71 and $903.79. The reason given by the petitioner for the inequality of the accounts sued upon was that Agnes A. Morgan had left school earlier than Narcissa J. Morgan. He stated that within the period indicated the said devisees of Jonathan Morgan had become emancipated, and had *508 taken possession of their property, and he prayed that the accounts might be duly homologated, and judgments given in his favor for the amounts named, with interest from March 15, 1862, and that his tutorship might be determined and his sureties released. Confessions of judgment in the amounts named in the petitions were filed by the said defendants, each confession embodying a waiver of service of the petition, and of copies of accounts and vouchers, citation, etc., and a full concurrence in the petitioner's prayer. Thereupon the clerk of the district court of the parish entered judgments for the said amounts against Mrs. (Morgan) Ricketts and Mrs. (Morgan) Bell, dated, respectively, January 25 and January

26, 1867, approving and homologating the accounts, releasing the petitioner from his trust as tutor, and canceling his bond. Each judgment concluded as follows: "It is further ordered, adjudicated, and decreed that * * * the legal or tacit mortgage in favor of said tutor be recognized to date from the 3d of December, 1855."

No orders of sale under the judgments appear in the record, but on June 21, 1868, writs of fieri facias, under the seal of the said court, were issued, directing the sheriff of the parish of Carroll to seize and sell the property, real and personal, rights and credits, of Mrs. Agnes M. Ricketts and Mrs. Narcissa J. Bell, (then Green,) to satisfy the judgments, and under those writs their respective interests (described in the sheriff's deeds as eleven-sixteenths) in the said plantation were sold by the sheriff, at public auction, on June 21, 1868. The interest of Mrs. Ricketts was bought by the said Goodrich, at the price of $1,734, and John H. Green became the purchaser of Mrs. Green's interest at the same price. Deeds were executed by the sheriff on September 5, 1868, to the said purchasers.

December 18, 1868, Goodrich conveyed to Mrs. Ricketts the property acquired by him at the sheriff's sale for the sum of $4,000, taking her notes for that amount in payment.

Written in red ink across the face of the said mortgage or deed of trust, recorded in the office of the clerk of the parish of Carroll, appears the following:

* 508 * "Erased in full, evidence the return of the sheriff in suit of Ferd. M. Goodrich, tutor, vs. Agnes M. Ricketts and Narcissa J. Bell, on file in the office of the clerk of the district court, and the demand of Ferd. M. Goodrich that the mortgage be erased. Floyd, La., December 19th, 1868. A. G. Beldon, D'y Recorder."

December 18, 1869, the sheriff of the said parish sold, under writs of fieri facias, the undivided five-sixteenths of the Jonathan Morgan plantation, which had been the interest of Oliver T. Morgan in the same, to Goodrich, for the sum of $915.91, and a deed was executed to Goodrich by the sheriff on the following day. It appears by the record that the issuance of the writs was the result of suits brought against Oliver T. Morgan by the New Orleans Canal and Banking Co., and by Mrs. Rosa Cammack. On May 23, 1870, Goodrich sold to John H. Green one-half of his undivided five-sixteenths interest in about 1,637 acres comprised within the said plantation, for $5,000 cash.

May 23, 1870, Mrs. Agnes M. Scanlan (formerly Ricketts) mortgaged her share in the plantation, described in the conveyance as consisting of about 794 acres, to the firm of Foster & Gwyn, of New Orleans, La. It was stated in the mortgage that it was executed to secure the payment of a debt of $19,000, due by Mrs. Scanlan to the firm, that she had executed her promissory note for that amount, bearing even date with the mortgage, and that the note had been delivered by her to George Foster, a member of the firm. On the same day John H. Green executed a mortgage, in favor of Foster & Gwyn, upon his portion of the plantation, to secure, as the instrument recited, a debt of $10,000 due by him to the firm, evidenced by his promissory note for that amount, dated the same day, and delivered to Foster.

February 5, 1873, Mrs. Scanlan conveyed to Foster a portion of the said plantation, described as containing about 764 acres. It would appear by the description of the property in the deed that there had been a partition between Mrs. Scanlan and John H. Green of their interests in the plantation. Foster states in his testimony in chief in this case that such a partition was made on May 23, 1870. The deed from Mrs. Scanlan to Foster recited that, in accordance with the terms of a contract previously entered into between them, Foster agreed to acquire and make his own a certain debt, secured by mortgage, held against Mrs. Scanlan by the firm of Foster & Gwyn, and certain judgments against her husband held by the firm, and to transfer the judgments against her husband, to be held by her for her own use and benefit. The deed also recited that the sale was made in consideration of the sum of $36,904.94, the total amount of the said debts.

By virtue of a writ of seizure and sale issued out of the circuit court of the United States for the district of Louisiana, at the suit of Ezra Wheeler & Co. v. John H. Green, the United States marshal for that district sold, on August 2, 1873, at public auction, Green's portion of the plantation, described as containing about 872 acres, to Ezra Wheeler & Co., at the price of $10,398. The marshal's deed to the purchasers, dated the same day, recited that the total amount of their mortgage on the property conveyed was $19,533.45, and that after paying the expenses of sale the purchasers retained in their hands the difference between the amount of such expenses and that of the purchase price, to apply to the mortgage debt.

December 23, 1873, B. H. Lanier, public administrator of Carroll parish, commenced an action in the district court of the parish to enforce the sale of the two-thirds interest in the plantation formerly held by Mrs. Scanlan and Mrs. Green, to satisfy the mortgage executed by Mrs. (Ricketts) Scanlan and Mrs. (Bell) Green to James C. Pickett, the petition alleging that the said instrument, though in the form of a deed of trust, was, according to the law of Tennessee, where the common law prevailed, a mortgage. Ezra Wheeler, Thomas Rounday, Augustus Ireland, and John V. Wheeler, composing the firm of Ezra Wheeler & Co., absentees, and C. M. Pilcher, of said parish, who had been appointed curator ad hoc, were cited, as were also Mrs. Agnes M. Scanlan, Mrs. Narcissa J. Green,

and George Foster. The defendants filed an exception, June 2, 1874, alleging that Lanier had no cause of action, as he had never legally qualified as public administrator by taking the oath of office and giving bond, and, further, that there was never any such succession as that claimed to be represented by Lanier, as James C. Pickett had never resided in or owned property in the parish. They therefore prayed that the suit might be dismissed. It appears by a certificate of the secretary of state of Louisiana, copied into the record, that Lanier was appointed public administrator of the parish on August 30, 1871, and that on September 16, 1871, he filed in the office of the secretary of state his oath of office and his official bond.

December 10, 1874, the sheriff of Carroll parish sold Foster's portion of the plantation (about 764 acres) for his unpaid taxes, to W. A. Gwyn, for the sum of $1,505. On the same day the portion of the property purchased at the sheriff's sale of August 2, 1873, by Ezra Wheeler & Co. was sold by the sheriff for unpaid taxes due from Green, to W. A. Gwyn, at the price of $1,001. Deeds were executed to the purchasers on the day of the sales.

April 29, 1875, George Foster was appointed public administrator of Carroll parish, and on the same day he filed in the office of the secretary of state of Louisiana his official bond in the sum of $10,000. On November 29, 1875, Lanier and Foster were called by the said district court of the parish to prosecute the said suit instituted by Lanier to enforce a sale of the property covered by the Pickett mortgage. Lanier answered, through his counsel, that he was no longer public administrator, and Foster answered that he knew of no such succession as was called to be administered. The court then ordered that the suit be dismissed. The case was again called December 4, 1875, for trial. Lanier appeared by counsel, and gave the same answer as before, and Foster answered by counsel that he had never had charge of any such succession as that of James C. Pickett, and knew of no such estate in the parish; whereupon an order of the court was entered dismissing the suit.

By a decree in the case of the Fourth National Bank of New York v. George Foster, in the district court of the parish of East Carroll, (formerly Carroll,) La., dated October 17, 1881, Alexander H. Foster, intervener, obtained judgment against the defendant for the sum of $2,200.

December 5, 1881, Mrs. Mary J. Gwyn, wife of George Foster, commenced an action against him in the district court of East Carroll parish, setting out her marriage to the defendant, and averring that the sum of $2,986.76 standing to her credit in the hands of Foster, Gwyn & Co., of the city of New York, on July 1, 1872, and for which amount she held the firm's note, was due and unpaid; that her husband had received the money and used it for his own purposes, and that owing to the disorder of his affairs she feared he would not be able to repay the amount, and that she would lose it. She, therefore, besought the court to allow the institution of the suit and cause her husband to be cited, and prayed that the community of acquets and gains subsisting between them might be dissolved; that she might be allowed to administer her own affairs free from the control of her husband; and that judgment might be rendered against her husband for the amount of the debt, with interest. The petitioner having been authorized to institute the suit, the defendant answered, admitting the marriage, but denying the other averments of the plaintiff, and prayed for the dismissal of her demand.

December 16, 1881, W. A. Gwyn conveyed the property purchased by him at the said tax sales to Foster, for the sum of $5,000 cash, and on October 24, 1881, Ezra Wheeler, on behalf of the firm of Ezra Wheeler & Co., conveyed the property acquired by them at the said judicial sale thereof, retaining a vendor's lien upon the same, to Foster, for the sum of $7,243, of which, as stated in the conveyance, $2,243 was paid in cash, and the balance in two accepted drafts on A. H. Foster, of Evansville, Ind. The deed from Wheeler to Foster contained a stipulation that it should not be complete, and should not be recorded, until Foster should have executed a mortgage on the property conveyed in favor of the vendors.

December 29, 1881, George Foster mortgaged the property conveyed to him by Gwyn and Wheeler & Co. to John W. Foster, of the District of Columbia, the instrument of mortgage reciting that on that day George Foster had executed his promissory note in favor of the said John W. Foster, in the sum of $6,000, payable January 10, 1885, with interest at 8 per cent. thereon after maturity, and that the mortgage was given to secure the payment of the note.

July 5, 1882, the suit brought by Mrs. Mary J. Gwyn against her husband, George Foster, was called. The case was regularly tried, judgment given for the plaintiff, and the substance of the prayer of the petition embodied in a decree of the court, dated July 6, 1882. The judgment being, on May 5, 1884, unsatisfied, the court on that day ordered that the property of George Foster be sold to satisfy the same, and under a writ of fieri facias the sheriff of the parish sold, at public auction, May 6, 1884, a portion of the said plantation, described as containing about 1,100 acres, to Mrs. Mary J. Gwyn, for the sum of $15,414.93. The sheriff's deed, dated July 8, 1884, stated that this was the amount of the mortgages on the property, and that such amount was retained in the hands of the purchaser to pay the same.

All the above-described deeds and mortgages were duly recorded in the office of the clerk of the district court of the said parish.

It does not appear in the record that any of the mortgages were ever reinscribed, except the one executed in favor of James C. Pickett, which was reinscribed in the said office on November 4, 1885.

The suit in equity now before the court was commenced in the circuit court of the United States for the district of Louisiana, on November 30, 1885, by Joseph Desha Pickett and Theodore John Pickett, citizens of Kentucky, against George Foster and his wife, Mary J. Foster, citizens of Louisiana, Mrs. Agnes M. Scanlan and Mrs. Narcissa J. Green, citizens of Missouri, and Ezra Wheeler, Thomas Rounday, and Augustus Ireland, composing the firm of Ezra Wheeler & Co., citizens of New York. The plaintiffs averred in their bill that they were the heirs at law of James C. Pickett, who died intestate in December, 1872, and that the suit was brought to foreclose a mortgage *514 which had been held by their ancestor upon the said plantation, which had been given by Mrs. Scanlan and Mrs. Green to secure the unpaid promissory notes above described. They allege that Foster's conduct as public administrator was fraudulent and in bad faith, in that he failed to prosecute, as it was his duty to do, the foreclosure proceedings in the action of Lanier against Wheeler & Co., and others, of which proceedings he had knowledge, having been cited as one of the defendants therein; that he sought and obtained the office of public administrator solely for the purpose of dismissing the suit, and did procure the dismissal thereof; that, having so caused the suppression of that suit, for the purpose of destroying the rights of the Pickett succession, resulting from the mortgage upon the plantation, he refused to institute any other proceedings to foreclose the mortgage, and withheld from the complainants all information with regard to the enforcement of their claim; and that, while public administrator, he purposely neglected to reinscribe the mortgage, and refused to take any steps, after procuring the dismissal of the said suit, to prevent the complainants' claim from being barred by the statute of limitations. It was alleged that Foster, by virtue of his appointment as public administrator, obtained absolute control over the said claim, and occupied towards the complainants the relation of trustee; that by the laws of Louisiana his official bond operated as a legal mortgage on all the immovable property owned by him since May 6, 1875, when the bond was recorded; and that the complainants were entitled to the benefit of such mortgage for the purpose of making up any discrepancy that might exist between the amount of their debt, with interest, and the present value, namely $20,000, of the property covered by the Pickett mortgage. The complainants averred that they had no knowledge of the unlawful conduct of Foster in reference to their claim upon the property, and could get no information concerning the same, until October 31, 1885, when Joseph D. Pickett sent his son from Kentucky to East Carroll parish, La., to examine the matter.

Other averments and allegations of the bill were substantially as follows: That Foster procured the sale of his property for his taxes; that the sale was irregular and illegal, and that the reconveyance from Gwyn to Foster was a part of a scheme of fraud between them, the object of which was that Gwyn should hold the title for Foster's benefit until sufficient time should elapse for the prescription of the complainants' claim, and then reconvey the property to Foster. That the title taken in the name of Ezra Wheeler & Co. was a mere show, and the result of a fraudulent effort on Foster's part to disguise the fact that he was claiming to own the property, and to prevent the plantation from being subjected to sale under the said mortgage. That the mortgage executed by Foster in favor of his brother John W. Foster, and the judicial mortgage in favor of his brother Alexander H. Foster, as well as a mortgage executed on November 30, 1881, in favor of Ezra Wheeler & Co., were fraudulent and collusive, and were concocted by Foster and his brothers and Ezra Wheeler & Co. for the purpose of putting the plantation beyond the reach of the complainants' demand, and that Ezra Wheeler & Co. never pretended to be the owners of the property. That the judgment obtained by Mrs. Foster in her suit against her husband was the result of a scheme concocted by Foster and his wife, in the interest of Foster, for the purpose of screening the plantation from the operation of the said mortgage and from such demands as the complainants had against Foster on account of his fraudulent acts as public administrator. That as the sheriff's sales to Goodrich and Green in 1868 were made for a less sum than the amount of the Pickett mortgage, they were in contravention of a prohibitory law of Louisiana, and therefore nullities. That Foster had been in actual possession of the plantation, as owner of the same, since February 5, 1873.

The complainants further alleged that they had no relief at law, but in equity ought to be relieved against the frauds, collusions, and combinations of Foster, his wife, his brothers, Ezra Wheeler & Co., and his wife's brother, W. A. Gwyn. They, therefore, asked the court to decree that Foster and his wife held the property described in the Pickett mortgage subject to the same; that that mortgage was and had been a subsisting mortgage dating from January 16, 1866; that the property be sold and the proceeds of sale be paid to the complainants, in priority over all claims of the defendants; that an account be taken of the rents and profits made, or which might have been made, by Foster since he acquired possession of the mortgaged property; that Foster, in his capacity as public administrator, be ad-

judged to pay of such rents and profits any balance remaining due the complainants upon their mortgage debt after the proceeds of the sale had been applied thereto; and that the complainants had a general mortgage upon the whole of the property to secure the amounts aforesaid, as provided by the laws of Louisiana in reference to the liability of public administrators upon their official bonds.

To the bill demurrers were filed by Foster and his wife, on January 30, 1886, which were dismissed on March 8, 1886, by consent of the defendants, and on April 5, 1886, they filed answers. The answer of Foster alleged that as the laws of Louisiana prohibited the creation of trust estates, the registry of the Pickett mortgage or deed of trust in the mortgage books of the parish of Carroll did not so operate upon the property therein described as to affect third persons; that the effect of the judgment in the actions brought by Goodrich, which actions and judgment were in all respects bona fide and regular, was to prevent the operation of all subsequent incumbrances upon the property so sold, and pass the same free and unincumbered to the purchasers. The defendant averred that the sheriff of the parish caused, as by law he was bound to do, the pretended mortgage or deed of trust to be erased from the mortgage records of the parish, and that the same was not thereafter borne upon the records as notice to third persons of the existence of any claim in favor of Pickett or the cestui que trust named in the instrument; that Goodrich and Green were purchasers at the said sales in good faith, and for valuable consideration, and went into possession of the property under deeds duly executed and recorded, and that the said purchasers and their subsequent vendees have had actual and adverse possession of the property since September 5, 1868. The defendant Foster *517 pleaded, therefore, the prescription of ten years in *bar of the complainant's action to annul the effect of such possession, and the prescription of five years in bar of their action to annul the said sales by reason of the failure of the sheriff to observe any formality with relation thereto.

The answer described Foster's connection with the property as follows: At and before the time of the sale, by Goodrich to Mrs. Rickets, of the undivided portion of the property purchased by Goodrich at the sheriff's sale, Foster was a member of the firm of Foster & Gwyn, cotton factors, of New Orleans. That firm entered into business relations with Mrs. Ricketts, and, in good faith, and without any knowledge whatever of the suit by Goodrich, or of the pretended mortgage or deed of trust upon the property, advanced and loaned to her, in money and supplies to be used in the cultivation of the plantation, the sum of $19,000. In recognition of this debt Mrs. Scanlan, with the authority of her husband, executed her promissory note for the amount thereof, dated May 23, 1870, payable one year after date, with interest at 6 per cent., and to secure the payment of the same she executed, on the same day, a mortgage upon the property in favor of the firm. Fruitless efforts having been made by the firm, prior to February 5, 1873, to collect the debt, a compromise of the differences between the parties was entered into, by which it was agreed, among other things, that Foster should acquire the entire interest of the firm in the debt and mortgage against Mrs. Scanlan, and buy up a certain judgment and mortgage held by the firm against her husband, and release the debt held against her personally, and transfer the judgment and mortgage against her husband, to be held for her own use and benefit, in consideration of which she agreed to transfer to Foster all said property. On February 5, 1873, this agreement was carried into effect by an authentic act passed before a notary of the parish of Carroll, by which, for the said consideration, aggregating in amount $36,904.94, Mrs. Scanlan, by the authorization of her husband, transferred to Foster the property acquired by her from Goodrich. The said advances were made to Mrs. Scanlan in good faith, in the due course of business, and in the full belief that she had *518 an unincumbered title to *the property. If Foster had been aware that there was any cloud upon her title, his firm would not have made the advances, and he would not have expended a large sum of money in the acquisition of the property. The firm of Foster & Gwyn had also been engaged in business transactions with John H. Green, who purchased at the sheriff's sale the interest of Mrs. Narcissa J. Green in the plantation. In the full faith that Green held an unincumbered title to the property, the firm made large advances to him, and he, on May 23, 1870, executed his promissory note in their favor for the amount thereof, namely, $10,000, payable 12 months after date, and to secure the payment of the same mortgaged to Foster & Gwyn, or any future holders of the note, the said property. He also executed two additional mortgages in favor of the firm, the one dated July 14, 1871, and the other March 11, 1872, to secure the payment of promissory notes for the respective amounts of $3,723.60 and $3,009.55. The said firm was indebted to Ezra Wheeler & Co., of the city of New York, and transferred to them the notes belonging to Foster & Gwyn as collateral security, both firms believing the notes to be secured by the said mortgages. The notes not having been paid when due, the firm of Ezra Wheeler & Co. proceeded lawfully to enforce the sale of the property under the mortgages, and at the sale thereof purchased the property for the sum of $10,398.20, which amount, less expenses, was

entered as a credit upon the writ of seizure and sale. Foster & Gwyn were indebted to Ezra Wheeler & Co. in a much larger sum than that amount, and on or about October 6, 1873, Ezra Wheeler & Co. agreed with Foster that upon the payment by him of the principal and interest of the debt due them they would sell and transfer the property to him; and, in order to enable him to pay the debt, they agreed that he should have the benefit of the rents and revenues of the property, such profits to be applied to the interest of the debt. On the day the agreement was made, Ezra Wheeler, representing the firm of Ezra Wheeler & Co., executed a written power of attorney, under which Foster, as the agent of the firm of Ezra Wheeler & Co., was authorized to take possession of the property and to collect the rents and revenues thereof. By virtue of this power of attorney Foster took possession of the property and occupied it until October, 1881, at which time, he having paid the debt due by Foster & Gwyn to Ezra Wheeler & Co., with the exception of $7,250.43, the firm of Ezra Wheeler & Co., in consideration of that amount, sold and transferred the property to him. Part of the purchase price, namely, $2,243, was paid in cash, and the balance in duly accepted drafts on A. H. Foster, secured by a vendor's lien on the property conveyed. This transaction was conducted in good faith, for the purpose of carrying out the commercial contracts and agreements between the parties thereto.

It was denied in the answer that Lanier was ever appointed administrator of the estate of James C. Pickett, or ever qualified as such; that any inventory was made or any other act done to show the existence of such estate in Louisiana; that such estate could have been legally opened in that state, for the reason that James C. Pickett was not a resident thereof, and left no property therein; that that suit was dismissed through any fraudulent design on the part of Foster to suppress the same, or to defraud the estate or heirs of James C. Pickett; that Foster concealed from the complainants any information in relation to the notes or property; that he was bound to give them any information in regard to the same; that the complainants were relying upon Foster, as public administrator, or upon any other administrator, to enforce the payment of the notes; and that Foster obtained the office of public administrator for the purposes alleged in the complainants' bill. The answer averred the facts to be that the name of Lanier, as public administrator, in the suit instituted to enforce the payment of the notes, was used by the party in possession of the notes for the purpose of bringing suit on the same without any legal authority for so doing, and that Lanier himself had no official power to act in the matter; that Foster was absent from the state at the time the suit was called out and dismissed, and that his attorney refused to prosecute the same or to make him party thereto for the reasons that no such estate as that of James C. Pickett had been opened in the parish of Carroll, that the public administrator had not been appointed to take charge of or administer any such estate, and that the notes were not on file in the suit; that if the said notes were in the parish of Carroll at that time, they were in the possession of the owners thereof, who returned them to the persons from whom they had received them, with full information of what had been done and the existing condition of the claim and of the property, and that the owners of the notes were advised and believed that under the laws of Louisiana the pretended mortgage was void and could not be enforced; that Foster was not aware who were the owners of the claim or of the names or residence of the complainants, and that he had no authority to prosecute the said suit for the reasons above stated; that Foster only accepted the office of public administrator of the parish of Carroll at the earnest solicitation of citizens thereof.

The charges in the bill of fraud on the part of Foster in connection with the tax sales to Gwyn were denied, as were also similar charges with reference to the suit brought against Foster by Mrs. Mary J. Gwyn, his wife. The answer averred that that suit was instituted and defended in good faith; that Foster owed his wife the amount sued for, which fact he averred was established by competent and credible evidence; that the proceedings were fairly and legally conducted, and that the judgment was rendered in accordance with the laws of the state of Louisiana. It was denied that Foster had, since the execution of the judgment, been in possession of the property, except as the agent of his wife.

Finally, the answer averred that all the allegations of the bill charging Foster's transaction with Ezra Wheeler & Co., A. H. Foster, and John W. Foster, as being fraudulent, were false and untrue, and that all those transactions were conducted in good faith, without fraudulent intent, and without any reference to the claim of the complainants.

The answer of Mrs. Foster averred that she was no party to the suits of Goodrich against Mrs. Ricketts and Mrs. Bell; that at the time she acquired the property at the sheriff's sale under her judgment against Foster he was, as she believed, the lawful owner thereof; that by her purchase under that judgment she had obtained and had since held the actual possession of the property; and that the proceedings and judgment in her suit against her husband were in all respects regular and bona fide, and free from fraud or collusion. She alleged that she acquired her title to the property free from any latent defects therein, and that under the

laws of Louisiana the mortgage or deed of trust sued upon by the plaintiffs was void and of no effect against third persons. She pleaded the prescription of five years as against the validity of the notes sued upon by the complainants, upon the ground that no suit was instituted within that time to enforce their payment, and the prescription of ten years as against the mortgage, which she averred was not reinscribed until she became the owner of the property. She also, for cause of demurrer, alleged that any proceedings to avoid the sales made to Goodrich and Green of the property of Mrs. Ricketts and Mrs. Bell were barred by the prescription of five years, as, she said, would appear by the complainants' own showing. For further cause of demurrer she alleged that the good faith of Goodrich and Green in making the said purchases was not denied by the bill, and that Goodrich and Green having acquired good titles, and their vendees having had actual possession of the property for more than ten years before the institution of the complainants' suit, all actions to annul the titles of the said vendees became barred by the lapse of ten years from the date of their several purchases.

Mrs. Scanlan and Mrs. Green admitted, in the answer filed by them on April 12, 1886, that they borrowed the money, and executed the mortgage, as alleged in the bill; that legal proceedings were instituted against them to collect the notes; and that they were unable to pay that debt, as well as others. They averred that long ago they were dispossessed of the property under judicial proceedings, and they denied all manner of unlawful combination and confederacy on their part.

The case was duly heard in the said court upon bill, answer, and evidence, and on October 23, 1888, the bill was dismissed; whereupon the complainants were allowed an appeal to this court.

Robert E. De Forest, N. L. Jeffries, and Wm. E. Earle, for appellants. S. F. Phillips and Frederic D. McKenney, for appellees.

*523 *Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

Upon the facts disclosed by the pleadings and evidence it is plain that the complainants are not entitled to a reversal of the decree below, dismissing their bill, unless they have sustained their allegations of fraud on the part of George Foster, as public administrator of Carroll parish, and of such knowledge and complicity therein on the part of Mrs. Mary J. Foster as to deprive her of her alleged title as a bona fide purchaser of her husband's interest at a sheriff's sale.

The answer of Foster explicitly denied the charges of fraud contained in the bill, and the answer of Mary J. Foster was, in effect, *524 a plea that she was a bona fide purchaser, for a valuable consideration, without notice. Although answers under oath were waived in the bill, and the defendants' responsive answers cannot, therefore, be treated as evidence in their favor, still, upon the issues thus raised, the burden of proof was upon the complainants.

To sustain their side of the case the complainants put in evidence the promissory notes, and the deed of trust securing them, bearing date January, 1866. They proved the death of James C. Pickett on July 10, 1872; that Joseph D. Pickett, one of said complainants, was on the 20th of May, 1873, appointed his administrator; and that said Joseph D. Pickett and Theodore John Pickett, the other complainant, were the sole heirs at law of James C. Pickett. Joseph D. Pickett testified that on September 27, 1873, he put the notes and deed of trust into the hands of R. M. Scanlan and J. H. Green, who were then the husbands of the makers of the notes, and entered into a written agreement with them, whereby they were authorized to employ attorneys to collect said notes, and also gave them a letter proposing to give the lawyers who should undertake the collection of the claim two-thirds of whatever they should recover, and that the Pickett estate should not be subjected to any expense whatever. Pickett further testified that he understood that R. M. Scanlan and J. H. Green, in pursuance of this arrangement, employed J. W. Montgomery, a lawyer resident in Carroll parish, to enforce payment of the claim; that Montgomery procured Lanier, as public administrator, to bring a suit in the district court of the parish; that he, Pickett, was not kept advised of the progress of the suit, and that he never knew that said suit was dismissed until he saw the record of the court, showing such dismissal in September, 1885; that he had no personal knowledge of the history of the suit; that, upon learning that the Lanier suit had been dismissed, he sent W. H. Pickett, as his attorney, to Louisiana, who received the notes and mortgage deed from Montgomery, and employed W. G. Wyly to bring the present suit. He further testified that he had never seen or known Foster till the latter called on him, at his office in Frankfort, Kentucky, on the first day of June, 1886.

*525 *Theodore John Pickett, the other complainant, testified that he had no personal knowledge of the suit brought by Lanier; that he did not know that such suit had been brought, nor did he know that the suit had been dismissed on December 4, 1875, till he was so informed by Joseph D. Pickett in September, 1885; and that he never saw George Foster.

William H. Pickett testified that he was present at the interview between Joseph D. Pickett and R. M. Scanlan and J. H. Green, when the agreement was made about the collection of the notes in September, 1873; that in November, 1885, he went, as attorney for

complainants, to Louisiana, and inspected the record of the district court of Carroll parish, showing that a suit had been brought by B. H. Lanier, as public administrator, and that the same had been dismissed in December, 1875; that he procured the notes and mortgage from J. W. Montgomery, who had been employed by Scanlan and Green, and employed Mr. Wyly to bring the present suit. He does not profess to have any personal knowledge whatever of the facts of the case, except what he acquired by examining the record of the Lanier suit.

J. W. Montgomery testified that he had been employed by R. M. Scanlan to bring suit on the Pickett notes and mortgage; that he procured Lanier, as public administrator, to bring the suit; that when Lanier was superseded by the appointment of George Foster to be public administrator he ceased to have anything further to do with the suit; that he was not Foster's attorney, and that the first he knew of Foster's appointment was the dismissal of the suit shown by the judgment rendered by the court; and that the notes were never in the actual possession of George Foster, nor did he have any control of the suit filed on them after he became administrator.

William G. Wyly and Jesse D. Tompkins testified that they knew George Foster, and that he seemed to be and to act for years past as owner of the Morgan plantation.

In addition to this testimony complainants put in evidence the record of the oath taken by George Foster, as public administrator, and his bond, in $10,000, as such. Also the records of the suits of one Goodrich against Mrs. Ricketts and Mrs. Bell, afterwards Scanlan and Green, and in which it appeared that Goodrich, as tutor of the said defendants, had entered judgments confessed by them in his favor, and had levied on their interests in the Morgan plantation, and sales and conveyances by the sheriff to said Goodrich of the interest of Mrs. Ricketts, and to John H. Green of the interest of Mrs. Green. Also proceedings and deeds whereby these interests finally became vested in George Foster.

Upon the facts so shown by the complainants, it is difficult to hold that charges of fraud against George Foster, and of complicity therein on the part of Mary J. Foster, can be said to be made out with sufficient clearness to warrant a court of equity in granting the relief prayed for in the bill.

The long periods of time within which the events disclosed in the evidence took place, and the open and avowed character of the several suits and conveyances whereby at last the title to the property became vested in Mary J. Foster, should be considered. Apart from the legal effects of the lapse of time, which we shall consider hereafter, there seems to have been unaccountable delay in the successive steps taken by the holders of these notes and mortgage.

No effort was made by James C. Pickett in his lifetime to collect the notes, although the notes were overdue for several years. His administrator apparently took no steps to collect the notes until visited and aroused to action by the husbands of the makers of the notes, with whom he made a contract by which he agreed to give an attorney unknown an unnamed two-thirds of the amount which might be collected. He then—although as he himself states he was not informed of what his agents and attorneys were doing—took no further action, and made no inquiries till September, 1885, a period of 12 years. He even says that he did not know into whose hands his agents, Scanlan and Green, had put the notes for collection.

It is no doubt true that the appointment of George Foster as public administrator of Carroll parish, while there was pending a suit, in the name of Lanier, his predecessor in office, to collect these notes, and in which he had been cited as one of the defendants, and the subsequent dismissal of that suit, are facts which, if unexplained, might warrant a suspicion that he was aiming to defeat the Pickett mortgage and notes. Still, such a suspicion or inference would not, standing alone, justify upsetting the possession of George Foster, which had existed for a period of 12 years before the filing of the bill, much less could the rights of Mary J. Foster be thereby overthrown.

Moreover, the character of complainants' claim, upon their own evidence, does not appeal to a court of equity. The fact that Joseph D. Pickett put the notes and mortgage for collection into the hands of Scanlan and Green, the husbands of the makers of the notes, and agreed to give them, or any attorney they might select, two-thirds of the amount that might be recovered, is remarkable. So, too, the fact that Foster's title to the larger part of the plantation came to him by means of a deed of conveyance, dated February 5, 1873, from Mrs. Scanlan, for an alleged consideration of $36,904.94, and the further fact that Mrs. Scanlan did not, in her answer in the present case, repudiate or deny the genuineness or good faith of such deed, suggest very serious doubts of the fairness of the plaintiffs' claim.

But whether or not the plaintiffs' bill could be regarded as sustained by their evidence, if uncontradicted, the case comes before us with a large body of evidence on behalf of the defendants.

George Foster testified that he was a member of the firm of Foster, Gwyn & Co., doing business as cotton factors and commission merchants in the city of New York, and in the firm name of Foster & Gwyn, in the city of New Orleans; that he became acquainted with Mrs. Scanlan and Mrs. Green in 1868; that the New Orleans house did business with them, and advanced them large sums of money and supplies to maintain

their plantation; that these transactions commenced in 1868 and continued until some time in 1871; that at that time the plantation belonged to Mrs. Scanlan and John H. Green; that Mrs. Scanlan was indebted to *528 Foster & Gwyn in* the sum of $19,000, for which, in 1870, she gave them her note, secured by a mortgage on her plantation; that John H. Green likewise became indebted to the firm in a sum exceeding $15,000, for which Green gave his notes, secured by a mortgage on his part of the said Morgan plantation; that at the time his firm took these mortgages from Mrs. Scanlan and J. H. Green they knew nothing about plaintiffs' claim, and thought the title to the plantation was good and unincumbered; that his firm in New York borrowed a large sum of money from Ezra Wheeler & Co., of that city, and to secure them Foster & Gwyn transferred to them the notes and mortgages of John H. Green. He further testified that on February 5, 1873, Mrs. Scanlan and her husband conveyed to him the part of the Morgan plantation that belonged to Mrs. Scanlan, for $36,904, composed in part of her indebtedness to Foster & Gwyn; and that, after Ezra Wheeler & Co. had purchased the interest of John H. Green in the Morgan plantation at a United States marshal's sale, he purchased such interest from them, paying about $2,200 in cash, and giving a mortgage on the plantation to secure notes for about $5,000, at one and two years. He further testified that he was never appointed by the court to be administrator of James C. Pickett; that he never knew of such an estate; that he was never asked, as public administrator, to prosecute or institute any suit for the complainants, nor did they, or any one, ever ask any information from him; that he did not know them or where they resided; that he did not consider that he had ever assumed any responsibility for the complainants; and that he was not present when the Lanier suit was called and dismissed, but was in Cincinnati, and did not know that the attorneys intended to call out the suit and have it dismissed. He testified that the first he ever knew of any deed of trust against the Morgan plantation was long after his firm had made the large advances to Mrs. Scanlan and John H. Green, and at that time the deed of trust had been erased or satisfied of record,—to confirm which latter statement he put in evidence a certified copy of such erasure.

529 The testimony of Mary J. Foster was to the effect that she had loaned money, received by her from her sister's estate, to the firm of Foster, Gwyn & Co., for which she took their note for $2,986.76, two years prior to her marriage to George Foster. This was the debt which was the subject of the suit she brought against George Foster, whereby she became purchaser of his interest in the plantation before the bringing of the present suit.

Edward J. Delony, the judge of the eighth judicial district of Louisiana, testified on behalf of the defendants that when B. H. Lanier resigned his position as public administrator of Carroll parish, he, the witness, interested himself to get a capable man to succeed him, and persuaded George Foster to apply for and receive the appointment. He says that it required much persuasion to induce Foster to take the office, and only upon the witness agreeing to take principal charge of the business. He appeared for Foster when the Lanier case was called, and as no one appeared the suit was dismissed. That he inquired of Lanier about the notes set up in the suit instituted by him as public administrator, and that Lanier informed him that he did not have, nor had he ever seen, them. This witness further testified that he never knew of any such estate as that of Pickett, and knew of no property or credits belonging to it, and that he never could find that Lanier, as public administrator, had ever offered any such succession during his term of office as public administrator.

The evidence of both parties, taken as a whole, leaves the allegations of fraud as against George Foster unproved. It is contended that those proceedings of Goodrich against his wards were part of a scheme to defeat the Pickett claims. If this were so, it is very singular that the husbands of those ladies should afterwards be employed as agents by the complainants to enforce these very notes.

Failing to find satisfactory proof of fraud on the part of George Foster, or of participation therein, if fraud there were, by Mary J. Foster, we have then to consider the legal aspects of the case, apart from the allegations of the bill on the subject of fraud.

530 It is contended, on behalf of the defendants, that the instrument given to secure the promissory notes held by James C. Pickett was not a mortgage within the meaning of the laws of Louisiana, but was a deed of trust, and that accordingly it was not properly inscribed or recorded as a mortgage, and constituted no such lien or incumbrance upon the Morgan plantation as to affect third persons.

To sustain this contention, the case of Thibodaux v. Anderson, 34 La. Ann. 797, is cited. Our reading of that case inclines us to regard it as authority for the defendants' contention, but, in the view we take of the present case, it is not necessary to so decide.

Even if it be conceded that the instrument in question was a valid mortgage, and was duly inscribed as such on March 12, 1866, yet, in order to keep it alive to affect third parties, the statutory law required that it should be reinscribed within 10 years, but

the complainants' evidence shows that it was not reinscribed until November 4, 1885. The supreme court of Louisiana has decided that, under the positive law of that state, as contained in the code and statutes, nothing supplies the place of registry, or dispenses with it, so far as those are concerned who are not parties to it, and that when 10 years have elapsed from the date of inscription without reinscription the mortgage is without effect as to all persons whomsoever who are not parties to the mortgage. Adams v. Daunis, 29 La. Ann. 315.

The same court has held that a failure to reinscribe a mortgage within the statutory limit is not remedied or supplied by the pendency of a suit to foreclose the same. Watson v. Bondurant, 30 La. Ann. 1.

This court has held that those decisions of the supreme court of Louisiana establish a rule of property binding on the federal courts, and that accordingly the circuit court of the United States for the district of Louisiana did not err in holding that a mortgage of lands has no effect as to third persons, unless it be reinscribed within 10 years from the date of its original inscription, and that the pendency of a suit to foreclose does not dispense with the necessity of so reinscribing it. Bondurant v. Watson, 103 U. S. 281.

*831 *As the complainants have failed in making out a case of actual or intentional fraud on the part of George Foster, we cannot hold that, because in 1875 he accepted the office of public administrator, it became his duty to take notice of the Pickett mortgage and to cause it to be reinscribed. He testifies that he knew nothing about it except as the record showed an erased mortgage; and, whether the erasure was or was not a proper one, he was under no official duty to inquire into its validity. The notes which the mortgage had been given to secure were all prescribed by lapse of time 16 months before he was appointed public administrator, and we are unable to see that his acceptance of the office put him in any fiduciary relation to the holders of these notes, even if he had known there were such notes, and who were their holders,—a knowledge which he disclaims. Even if the Goodrich suits and sale and the subsequent erasure of the mortgage could be viewed as a fraudulent contrivance between Goodrich and the makers of the notes, no knowledge or participation therein is brought home to Foster except by mere conjecture. Hence, if he, in good faith, relied on that erasure, and dealt with Mrs. Scanlan and J. H. Green as the owners of an unincumbered plantation, he must be deemed a third party entitled to the protection of the laws requiring reinscription. Mrs. Scanlan and her husband conveyed her portion of the plantation to Foster for a large consideration on February 5, 1873, 12 years before the institution of this suit. Mrs. Green never repudiated her own act in confessing a judgment to Goodrich, on whose sale her husband became the purchaser, and, whether such judgment and sale were in accordance with law or not, the proceedings must, in the circumstances of this case, be deemed as, at all events, equivalent to a conveyance by her through the sheriff, and as a complete estoppel against her. Her vendees, or those who subsequently became owners for a valuable consideration, without notice, of her part of the plantation, are fairly to be deemed third parties, entitled to the protection of the presumptions arising from lapse of time and failure to reinscribe.

Upon the whole, we are of opinion that the decree of the court below dismissing the bill was right, and it is accordingly affirmed.

(149 U. S. 473)

PORTER et al. v. SABIN et al.

(May 15, 1893.)

No. 221.

CORPORATIONS — INSOLVENCY — RECEIVERS — ACTION AGAINST OFFICERS — STATE AND FEDERAL JURISDICTION.

1. Where a corporation becomes insolvent, and a receiver is appointed by a court of competent jurisdiction, the right of action against the officers of the corporation for fraudulent misappropriation of its property vests in him; and if he fails or refuses to sue he should properly be made a defendant to any such suit brought by the stockholders in the right of the corporation. 36 Fed. Rep. 475, affirmed.

2. Where such receiver has been appointed by a state court of competent jurisdiction, and that court refuses to permit him either to sue or to be sued on such cause of action, the federal courts have no jurisdiction to entertain the suit. 36 Fed. Rep. 475, affirmed.

Appeal from the circuit court of the United States for the district of Minnesota.

In equity. Suit by Henry H. Porter and Ransom R. Cable against Dwight M. Sabin, Joseph C. O'Gorman, the Northwestern Manufacturing & Car Company, and the Minnesota Thresher Manufacturing Company. The lower court dismissed the bill, (see 36 Fed. Rep. 475,) and the complainants appeal. Affirmed.

Statement by Mr. Justice GRAY:

This was a bill in equity, filed September 9, 1887, and amended January 7, 1888, in the circuit court of the United States for the district of Minnesota, by Henry H. Porter and Ransom R. Cable, citizens of Illinois, and stockholders in the Northwestern Manufacturing & Car Company, a corporation of Minnesota, in behalf of themselves and of all other stockholders in that corporation, against Dwight M. Sabin, its former president, and Joseph C. O'Gorman, its former auditor and treasurer, and both citizens of Minnesota. The amended bill made that corporation and the Minnesota Thresher Manufacturing Company, also a corporation of

Minnesota, parties defendant, and alleged, in substance, as follows:

That Sabin and O'Gorman, as such officers of the Northwestern Company, during the period from 1882 to May 10, 1884, had the entire control and management of its business, and without the authority or knowledge of the corporation, or of its board of directors, or of these plaintiffs, fraudulently issued large amounts of its commercial paper for the benefit of other companies, and, in order to conceal their fraudulent transactions, made false entries in the books of the corporation, by reason of all which it became insolvent, and its capital was wholly lost.

*474 *That on May 10, 1884, upon proceedings commenced against the corporation by some of its creditors in a court of the state of Minnesota, Edward S. Brown was appointed receiver of its estate and effects, and had since had the custody and possession thereof.

That on September 6, 1887, the plaintiffs caused to be presented to the state court a petition of the receiver, stating that he had been requested by the plaintiffs and others to commence a suit against Sabin and O'Gorman to recover from them such sums of money, and the value of such property, as had been lost to the corporation by their official misconduct, and did not deem it expedient to do so without the sanction of the court, and praying the court to make such order in the premises as it might deem expedient. That the petition of the receiver was opposed by a majority of the stockholders of the corporation, acting under the influence and in the interest of Sabin and O'Gorman, and was denied by the court.

"That because of the unauthorized and fraudulent acts of said officers as aforesaid, and of the loss sustained by the Northwestern Manufacturing & Car Company in consequence thereof, a right of action exists, in favor of said corporation, against said officers to recover the amount of such loss. That upon the appointment of a receiver of said corporation, as aforesaid, such receiver was primarily the proper person to bring such a suit. That having made application to said receiver to bring such suit, which application has been duly presented to the court, and authority to bring such action having been refused," these plaintiffs, "acting in their own behalf, and in behalf of the other stockholders of said corporation, if they should choose to come in, and be made parties to these proceedings, have the right to maintain said action for the common benefit of all parties interested in the result thereof."

That after the filing of the original bill, and on the same day, the plaintiffs applied to the state court for an order permitting the receiver to be made a party to the bill. That the application was opposed by Henry D. Hyde, claiming to represent creditors and stockholders, and particularly the *Minnesota Thresher Manufacturing Company, and that the court denied that application, as well as a further application then made by the plaintiffs to exclude, from a contemplated order of sale then pending before it, the cause of action set out in the bill, and all other actions which stockholders might maintain in right of the corporation. *475

That the Northwestern Company had never been dissolved by any legal authority, and was still in existence; but that all its property and tangible assets had been placed in the hands of the receiver appointed by the state court, and, under an order of that court, had been sold, by public auction, as a whole, and delivered to the purchaser.

That the Minnesota Thresher Manufacturing Company was organized, under a general statute of Minnesota, for the purpose of purchasing at judicial sale all the stock and assets of the Northwestern Company, including its good will, and of continuing the business of that company, except the manufacture of cars. That Sabin and O'Gorman, for the purpose of suppressing inquiry into their official acts and misconduct, obtained control of the direction and management of the Minnesota Company, and procured that company to apply to the state court for an order directing the sale of the assets and rights of action of the Northwestern Company, as a whole. That the court, notwithstanding the plaintiffs "protested against such sale of all of said assets, and particularly the sale of such rights of action as the stockholders would have a right to maintain in the name of said corporation if the corporation itself was unable or unwilling to do so, or if the receiver was not authorized to do so," made an order for the sale of the entire assets of the corporation, as a whole, described in the order of sale as follows: "All the stock, property, things in action, and effects of the defendant the Northwestern Manufacturing and Car Company, of which E. S. Brown has been appointed receiver in this action, or to which the receiver may be entitled, as the same shall exist at the time of such sale, including all real estate, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured, or in process of manufacture, cash in hand, book accounts, letters patent, choses in action, bills receivable, and all other property, assets, claims, liens, and demands of every name and nature, either in law or equity, and wherever situate." That said property was accordingly sold on October 27, 1887, to Hyde, as agent and trustee for the Minnesota Company, for the sum of $1,105,000. That the court afterwards confirmed the sale, and directed the receiver, upon payment of the purchase money, to deliver to the purchaser all the assets included in the order of sale which had not yet been delivered; and that the Minnesota Company was a party to the *476

fraudulent scheme of Sabin and O'Gorman, and was not a purchaser in good faith, and acquired no title to the right of action involved in this suit.

"That the rights of action involved in this suit are of such a character that they can only be prosecuted by the corporation or its receiver, or some one or more of its stockholders; and that it is not such an action or right of action as the corporation itself, or its receiver, acting under the direction of the court, could sell or transfer to a purchaser, so as to qualify such purchaser with the right to maintain such action, and thereby deprive the stockholders of their rights in the premises."

The bill prayed for an account against Sabin and O'Gorman, and for payment and distribution of the sums thereupon found due, and that the Minnesota Company be declared to have no interest in this cause of action, or, at most, an interest subordinate to that of the plaintiffs and other stockholders who might become parties, and for further relief.

The defendants demurred to the bill (1) for want of jurisdiction, because the state court which appointed the receiver was the only court having jurisdiction in the premises; (2) for want of equity; (3) because the receiver was a necessary party.

The circuit court sustained the demurrer, and dismissed the bill. 36 Fed. Rep. 475. The plaintiffs appealed to this court.

James M. Flower, for appellants. C. K. Davis and F. B. Kellogg, for appellees.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

*478 *The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation, and it is only when the corporation will not bring the suit that it can be brought by one or more stockholders in behalf of all. Hawes v. Oakland, 104 U. S. 450. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. Davenport v. Dows, 18 Wall. 626. If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this, and all other rights of property of the corporation, vests in the receiver; and he is the proper party to bring suit, and, if he does not himself sue, should properly be made a defendant to any suit by stockholders in the right of the corporation. All this is admitted in the plaintiffs' bill, as well as in the brief and argument submitted in their behalf.

*479 *The grounds on which they attempt to maintain this suit are that the court which appointed the receiver has denied his petition for authority to bring it, as well as an application of the plaintiffs for leave to make him a party to this bill.

Their position rests on a misunderstanding of the nature of the office and duties of a receiver appointed by a court exercising chancery powers, and of the extent of the jurisdiction and authority of the court itself.

In Brinckerhoff v. Bostwick, 88 N. Y. 52, and Ackerman v. Halsey, 37 N. J. Eq. 356, cited for the plaintiffs, in which stockholders of a national bank were permitted to bring such a suit when a receiver had refused to bring it, the receiver was not appointed by a judicial tribunal, but by the comptroller of the currency,—an executive officer.

When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate. The possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver, as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. Wiswall v. Sampson, 14 How. 52, 65; Peale v. Phipps, Id. 368, 374; Booth v. Clark, 17 How. 322, 331; Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. Rep. 1013; Thompson v. Insurance Co., 136 U. S. 287, 297, 10 Sup. Ct. Rep. 1019.

It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. Barton v. Barbour, 104 U. S. 126; Railway Co. v. Cox, 145 U. S. 593, 601, 12 Sup. Ct. Rep. 905.

*480 *The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of

the estate has been completed, and the receivership terminated, no court of the one government can, by collateral suit, assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. Wiswall v. Sampson, Peale v. Phipps, and Barton v. Barbour, above cited; Williams v. Benedict, 8 How. 107; Pulliam v. Osborne, 17 How. 471, 475; Bank v. Calhoun, 102 U. S. 256; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. Rep. 135; Ex parte Tyler, 13 Sup. Ct. Rep. 785.

The state court, upon further hearing or information, may hereafter reconsider its former orders, so far as no rights have lawfully vested under them, and may permit its receiver to sue or be sued upon any controverted claim. But, should it prefer not to do so, the right of action of the corporation against its delinquent officers, like other property and rights of the corporation, will remain within the exclusive jurisdiction of that court, so long as the receivership exists.

It is not material to the decision of this case whether the sale of the entire assets of the corporation by order of the state court did or did not pass this right of action to the purchaser. If it did, neither the corporation nor the receiver, nor any other person asserting this right in its behalf, can maintain an action thereon. If it did not, the right of action remains part of the estate of the corporation, within the exclusive custody and jurisdiction of the state court.

Decree affirmed.

(149 U. S. 593)

HILL v. UNITED STATES.

(May 15, 1893.)

No. 108.

CLAIMS AGAINST THE UNITED STATES—ACTIONS FOR TORTS—JURISDICTION.

1. The United States have never, either by the act of March 3, 1887, (24 Stat. 506, c. 359,) or by any other law, permitted themselves to be sued for torts committed by their officers, as, for instance, a trespass on private lands; and the settled distinction in this respect cannot be evaded by framing the claim so as to count upon an implied contract to compensate for use and occupation.

2. The United States, while they may be sued, as upon an implied contract, for the value of land actually appropriated to public use, when the title of the plaintiff is admitted, are yet not subject to such suit when plaintiff's title has never been acknowledged, but, on the contrary, the government pleads that it has a paramount right to use the lands; for, in the latter case, the injury, if any, constitutes a tort by the government agents, for which the United States is not suable. Mr. Justice Shiras, dissenting.

In error to the circuit court of the United States for the district of Maryland. Reversed.

J. Alex. Preston, for plaintiff in error. Atty. Gen. Miller, for the United States.

Mr. Justice GRAY delivered the opinion of the court.

This was a suit, brought November 1, 1888, in the circuit court of the United States for the district of Maryland, under the act of March 3, 1887, (chapter 359,) by Nicholas S. Hill, a citizen of Maryland, against the United States, for the use and occupation of land for a lighthouse.

The petition alleged that the plaintiff, since February 14, 1873, had been seised and possessed in fee simple of certain *tracts of land* 594 in Baltimore county, in the state of Maryland, fronting upon Chesapeake bay, (as shown upon a plat, and specifically described in a deed of that date to him from Thomas Donaldson, copies of both of which were annexed to the petition,) "with all the riparian rights attached thereto under the law of this state;" that since his acquisition of said land and rights "a valuable part thereof has been used and occupied by the United States government" for "the erection and maintenance of a lighthouse, known generally as the 'Miller's Island Lighthouse,'" "without any compensation to your petitioner for such use and occupation, and without the consent thereto of your petitioner or his predecessors in title;" and that "by the use and occupancy by the government as aforesaid of his property he has been prevented from using the same within the limits above mentioned, and from erecting buildings thereupon, and using the same for fishing and gunning purposes." The plaintiff "claims, as damages, for the use and occupation of his said property as aforesaid, the sum of $9,999 from November 1, 1885, until November 1, 1888, and prays the judgment and decree of this honorable court thereupon on the facts and the law."

The United States pleaded three pleas:

(1) A former judgment. The plaintiff replied that there was no such judgment, and the United States joined issue on the replication.

(2) "That the land referred to and described in the petition filed in this cause is submerged land, and part of the bottom of the Chesapeake bay, one of the navigable waters of the United States; and that the said defendant, under the law, for the purposes of a lighthouse, has a paramount right to its use as against the plaintiff or any other person." To this plea the plaintiff demurred.

(3) "That the defendant did not commit the wrongs alleged." The plaintiff joined issue on this plea.

On June 22, 1889, the circuit court overruled the demurrer to the second plea, and gave judgment thereon for the United States, with costs, and filed a written opinion, which is published in 39 Fed. Rep. 172.

On June 27, 1889, the circuit judge filed 595

findings of facts and conclusions of law, which are copied in the margin.[1]

*The act of March 3, 1887, c. 359, § 7, provides that "it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts." 24 Stat. 506. But in the case at bar the only judgment entered, and upon which this writ of error was sued out, appears to have been given for the United States on the plaintiff's demurrer to the second plea, which presented an issue of law only, upon which the findings of fact can have no possible bearing or effect. It would seem to follow that the findings of facts cannot be taken into consideration by this court upon this record. But this is comparatively unimportant, because those findings do but state in greater detail the facts alleged and admitted by the petition, the second plea, and the demurrer to that plea.

The land in question upon which the United States have built and maintain a lighthouse is below low-water mark, and under the tide waters of Chesapeake bay. Both parties assume that by the common law of England, which was the common law of Maryland, the title in land below high-water mark of tide waters was in the king, and upon the Declaration of Independence passed to the state of Maryland, and remained in the state after the adoption of the constitution of the United States, except so far as any right in such land was surrendered to the United States by virtue of the grant to congress of the power to regulate commerce with foreign nations and among the several states, including as a necessary incident the exclusive right to regulate and control the building and maintenance of lighthouses for the protection of navigation, and except, also, so far as any right on such lands has been lawfully granted by the state of Maryland to private persons.

By the statute of Maryland of 1862, c. 129, article 54 of the Public General Laws of the state was amended by adding the following sections:

"Sec. 37. The proprietor of land bounding on any of the navigable waters of this state is hereby declared to be entitled to all accretions to said land by the recession of said water, whether heretofore or hereafter formed or made, by natural causes or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable.

"Sec. 38. The proprietor of land bounding on any of the navigable waters of this state is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land. Such improvements and other accretions, as above provided for, shall pass to the successive owners of the land to which they are attached, as incident to their respective es-

[1] Findings of Facts.

(1) I find that copies of the plaintiff's petition were, in compliance with the requirements of the act of March 3, 1887, (chapter 359,) duly served on the United States district attorney and the attorney general of the United States, and said law in all respects complied with.

(2) I find that the plaintiff, since February 14, 1873, has been seised and possessed in fee simple of the tract of land described in these proceedings, and known as "Miller's Island," and of all the riparian rights attached thereto under the laws of the state of Maryland.

(3) I find that no part of the fast land included in the deed of the plaintiff has been used or occupied by the United States; but that a site for the rear range light of Craighill channel, situated about 200 yards from the shore line of the plaintiff's land, has been occupied and used by the United States; that the said site is submerged land in the Chesapeake bay, one of the public navigable waters of the United States, and within the ebb and flow of the tide, and in water about 2 feet deep at low tide.

(4) I find that Craighill channel is a channel in Chesapeake bay, constructed by the United States, and used by ocean vessels in their approach to the port of Baltimore; and that the lighthouse constructed by the United States in the year 1874 on the site in question is an important and necessary aid to the navigation of said channel.

(5) I find that the United States took possession of said site for the purpose of building the lighthouse in question, without condemnation, or the payment of any compensation to the plaintiff or any other person, in the year 1874.

(6) I find that the land of Miller's island, belonging to the plaintiff, was heretofore used and is chiefly valuable on account of the gunning for geese, swan, and ducks, and for the fishing privileges with nets; and that since the erection of the lighthouse adjoining the shore the value of the land has decreased greatly; and that the plaintiff's testimony tended to show that said decrease is due to the erection of said lighthouse; and that the island formerly rented for $3,000 per annum, but since the erection of the lighthouse the rent has decreased to $500 per annum.

Conclusions of Law.

That the legal title to the site of the lighthouse in question is in the state of Maryland, subject to the riparian rights of the plaintiff under the act of 1862, chapter 129, of the Laws of Maryland.

That under article 1, § 8, Const. U. S., which provides that congress shall have the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes," both the title of the state of Maryland and the riparian rights of the plaintiff are subject to the paramount right of the United States to use and occupy the site in question for the purposes of commerce, which includes navigation, without condemnation or compensation; the submerged land forming the site of the lighthouse being, as to such a use by the United States, public, and not private, property.

I therefore overrule the demurrer of the plaintiff to the second plea of the United States, and I do give judgment under said plea for the United States, with costs, to include what has been actually incurred for witnesses and for summoning the same and fees paid to the clerk of the court.

tates; but no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made.

"Sec. 39. No patent hereafter issued out of the land office shall impair or affect the rights of riparian proprietors, as explained and declared in the two sections next preceding this section, and no patent shall hereafter issue for land covered by navigable waters."

The plaintiff contends that the entire title in the land below high tide, with the right to improve and build upon the same, remained in the state after the adoption of the constitution; that by the statute of 1862 the title to such land, at the place in question, or at least the exclusive right of building thereon, was vested in the plaintiff; and that the title or right so acquired by him was his private property, which, by the fifth amendment of the constitution, could not be taken by the United States for the erection and maintenance of a lighthouse for the public use, without just compensation.

*598 *The United States, on the other hand, assert, and the court below has held, that the United States, upon the adoption of the constitution, acquired the paramount right to the use of this submerged land for a lighthouse, without making any compensation therefor; and that any title or right conferred on the plaintiff by the subsequent statute of the state was necessarily subject to this paramount right of the United States.

The question thus presented is of such importance to the United States, as well as to owners of lands bounding on tide waters, that it becomes this court, before expressing any opinion upon it, to inquire whether the courts have jurisdiction to determine the question in this form of proceeding against the United States.

The whole effect of the act of March 3, 1887, (chapter 359,) under which this suit was brought, was to give the circuit and district courts of the United States jurisdiction, concurrently with the court of claims, of suits to recover damages against the United States in cases not sounding in tort. U. S. v. Jones, 131 U. S. 1, 16, 18, 9 Sup. Ct. Rep. 669.

The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract. Gibbons v. U. S., 8 Wall. 269, 274; Langford v. U. S., 101 U. S. 341, 346; U. S. v. Jones, above cited.

An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious, and makes the defendant a trespasser. Lloyd v. Hough, 1 How. 153, 159; Carpenter v. U. S., 17 Wall. 489, 493.

In Langford v. U. S. it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it *599 belonged to the government, the United States could not be charged upon an implied obligation to pay for its use and occupation.

It has since been held that if the United States appropriate to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. U. S. v. Great Falls Manuf'g Co., 112 U. S. 645, 5 Sup. Ct. Rep. 306, and Id., 124 U. S. 581, 8 Sup. Ct. Rep. 631. It has likewise been held that the United States may be sued in the court of claims for the use of a patent for an invention, the plaintiff's right in which they have acknowledged. Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. Rep. 717; U. S. v. Palmer, 128 U. S. 262, 9 Sup. Ct. Rep. 104. But in each of these cases the title of the plaintiff was admitted, and in none of them was any doubt thrown upon the correctness of the decision in Langford's Case. See Schillinger v. U. S., 24 Ct. Cl. 278.

The case at bar is governed by Langford's Case. It was not alleged in this petition nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a lighthouse. The United States positively and precisely pleaded that the land was submerged under the waters of Chesapeake bay, one of the navigable waters of the United States; and that the United States, "under the law, for the purpose of a lighthouse, has a paramount right to its use as against the plaintiff or any other person;" and the plaintiff demurred to this plea. The circuit court, instead of rendering judgment for the United States upon the demurrer, should have dismissed the suit for want of jurisdiction.

Judgment reversed, and case remanded to the circuit court, with directions to dismiss it for want of jurisdiction.

Mr. Justice JACKSON, not having been a member of the court when this case was argued, took no part in its decision.

*600 * Mr. Justice SHIRAS, dissenting.

When the fifth amendment of the constitution of the United States declares that "private property shall not be taken for public

use without just compensation," a compact or contract of the highest degree of obligation is thereby established between the American people of the one part and each and every citizen of the other part. In and by that constitutional provision every citizen agrees that his property may be taken for public use whenever the nation, through its legislative department, demands it; and the United States agree that, when the property of the citizen is so taken, just compensation shall be made.

Whenever a case arises in which that constitutional provision is invoked, two questions present themselves: First, is the property dealt with the private property of the party claiming it? and, secondly, has it been taken by the United States for public use?

If the property to be affected is not that of the claimant, of course his appeal to the constitutional protection will be vain. But it is equally plain that the question of title is not one to be decided by the party claimant, or by the legislative or executive departments of the United States. That is a judicial question. Accordingly if, in a given case, it is either admitted or proposed to be shown that the property concerned belongs to a party before a court having jurisdiction to deal with the subject, then the only question that remains is whether such property has been taken by the United States for public use. In such a case the United States cannot, by a plea denying the plaintiff's title, make it the duty of the court to dismiss the plaintiff's suit. Such a denial cannot be treated, in face of the constitutional compact, as an exercise of sovereign power, whereby the right of the citizen to assert his property rights is forbidden, but it merely raises a judicial issue, to be determined by the court.

If the court shall determine that the property in question is the private property of the claimant, then the second question comes up,—whether the United States have taken it for public use.

*109 *If it shall appear that, in point of fact, the United States have not taken the plaintiff's property for public use, and that all that the plaintiff has to complain of is that some persons, known or unknown, but claiming to be officers or agents of the United States, have committed a trespass upon his property, and it does not appear that the acts complained of were in pursuance of any law of the United States, or that they have been ratified by the United States, by taking possession of and occupying the property for public use, then the plaintiff's case will fall within the doctrine of Langford v. U. S., 101 U. S. 341, and must be treated as an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being themselves torts.

But if it shall be shown or be admitted that the United States, by law, either authorized their agents to appropriate the property of the plaintiff, or have ratified the action of their agents by taking possession of the property and subjecting it to public use, then the constitutional duty of the court is to pronounce judgment for the plaintiff, and to award him just compensation.

These views do not overlook the well-settled doctrine that unless and until congress shall, by adequate legislation, provide a legal remedy, private rights against the government may be in abeyance. But when congress, in obedience to the behest of the constitution, has provided such a remedy, then there is no legal obstacle to the plaintiff's recovery. That congress has provided such a remedy is seen in the act of March 3, 1887, (chapter 359,) whereby it is enacted that the court of claims, and, concurrently, the district and circuit courts of the United States, "shall have jurisdiction to hear and determine all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

This legislation perhaps originated in the regret expressed by this court in Langford's Case, that "congress has made no provision by general law for ascertaining and paying this just compensation." That was a suit brought in the court of claims, under section 1059 of the Revised Statutes, in which there is no remedy provided for claims founded upon the constitution of the United States, and was, in the language of the court, the case of "an unequivocal tort."

The later case of U. S. v. Great Falls Manufacturing Co., 112 U. S. 656, 5 Sup. Ct. Rep. 306, is, in some respects, like the present one. It was there held that it was clear "that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecut-

ing it until provision was made for securing in some way payment of the compensation required by the constitution,—upon which question we express no opinion,—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of ancient domain, demand just compensation. In that view we are of opinion that the United States, having, by their agents, proceeding under the authority of an act of congress, taken the property of the claimant for public use, are under an obligation imposed by the constitution to make compensation. The law will *603 imply a promise to make the required compensation *where property, to which the government asserts no title, is taken pursuant to an act of congress, as private property to be applied for public use. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court or claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

Having distinguished the case from that of Langford, the court proceeded to say: "In such a case it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of congress is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially denies it, by asserting, as is done in the petition in this case, that the government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."

It will be noticed that this decision, in terms so applicable to the present case, was made before the act of March 3, 1887, in which, for the first time, an express remedy was given for "all claims founded upon the constitution of the United States," and in "respect to claims for which the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

In the present case, although no express proceedings have been instituted by the United States to condemn the property for public use, yet it is admitted in the pleas that the United States have taken possession of it for a public use or purpose; and by various acts of congress, of which we can take judicial notice, large sums of money have been granted to construct and maintain the lighthouse on the site in question.

The opinion of the court seeks to withdraw *604 the case from *the operation of the constitution and the act of 1887, and to bring it within the decision of the Langford Case, by contending that, because the United States by their pleas deny the plaintiff's right to recover, the acts complained of are thereby shown to have been sheer torts, and therefore expressly exempted from judicial cognizance. I am unable to see the force of this reasoning. The statute having provided that all claims founded upon provisions of the constitution shall be enforceable, surely a district attorney of the United States cannot by a mere plea, not denying the plaintiff's title to his land, but claiming that the land is legally subject to a servitude in favor of the United States, which exonerates them from making compensation, deprive the plaintiff of his right under the statute to have his claim adjudicated. Can it be possible that, after congress, in recognition of the constitutional provision and of the repeated suggestions of this court, has provided a legal remedy, a subordinate legal functionary can by a plea, either of matter of fact or of law, defeat the beneficent purpose of congress, deprive the plaintiff of his remedy, and convert the United States, against their will, as expressed in the constitution and the act of congress, into a wrongdoer? I cannot accept the proposition that, by a plea putting the plaintiff upon proof of his claim, the United States thereby escape from their constitutional covenant, and nullify the statute which provides a remedy.

The question presented by the second plea in the court below is, no doubt, one of difficulty and importance, which, if and when it comes before this court, will demand serious consideration; but that question is waived by the opinion of the court, and any discussion of it in this opinion would be out of place.

I therefore have a right to assume that the property of the plaintiff below, though held subject to the right of eminent domain, is entitled to the protection of the constitution; that there is no kind of private property, whatever may be its nature or origin, that can be taken for public use without just compensation being made.

Hence it follows that the court below *605 erred in overruling *the demurrer to the second plea. I think the judgment of the court below should be reversed, and the cause be remanded to the circuit court to proceed therein in exercise of the jurisdiction conferred upon it in such ample terms by the act of March 3, 1887.

(149 U. S. 698)

FONG YUE TING v. UNITED STATES et al. WONG QUAN v. SAME. LEE JOE v. SAME.

(May 15, 1893.)

Nos. 1,345, 1,346, 1,347.

CHINESE — POWER OF EXCLUSION AND EXPULSION — INTERNATIONAL AND CONSTITUTIONAL LAW — TREATIES.

1. It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Nishimura Ekiu v. U. S., 12 Sup. Ct. Rep. 336, 142 U. S. 651; Chae Chan Ping v. U. S., 9 Sup. Ct. Rep. 623, 130 U. S. 581; Knox v. Lee, 12 Wall. 457,—followed.

2. The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

3. The political department of the federal government, through the constitutional grant to it of control over international relations, has authority to expel aliens who have taken no steps to become citizens, even though they are subjects of a friendly power, and have acquired a domicile in this country. Mr. Chief Justice Fuller, Mr. Justice Field, and Mr. Justice Brewer, dissenting.

4. Chinese laborers who came to this country after the making of the Chinese treaties of July 28, 1868, and November 17, 1880, (16 Stat. 740; 22 Stat. 826,) acquired no right thereunder, or under the acts of congress in relation to the Chinese, as denizens or otherwise, to remain in this country, except by the license, permission, and sufferance of congress, to be withdrawn whenever, in its opinion, the public welfare might require it. Mr. Chief Justice Fuller, Mr. Justice Field, and Mr. Justice Brewer, dissenting. Chae Chan Ping v. U. S., 9 Sup. Ct. Rep. 623, 130 U. S. 581, followed.

5. Chinese laborers residing in the United States are entitled, like all other aliens, so long as they are permitted by the government to remain in the country, to all the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility; but, as they have taken no steps to become citizens, and are incapable of becoming such under the naturalization laws, they remain subject to the power of congress to order their expulsion or deportation whenever, in its judgment, such a measure is necessary or expedient for the public interest. Mr. Chief Justice Fuller, Mr. Justice Field, and Mr. Justice Brewer, dissenting.

6. The act of May 5, 1892, requires in section 6 that all Chinese laborers entitled to remain in this country shall within one year from the date of the act obtain from the collector of internal revenue of the districts in which they reside, free of cost, a certificate of residence, which shall be in the nature of a passport enabling him to go into all parts of the United States, and which shall be recorded in the office of the collector; and provides that Chinese laborers who neglect to obtain such certificates, or are found in the United States without them, "shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge." The act makes it the duty of the judge to order that such laborer be deported from the United States, "unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of the court, by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act." *Held*, that the proceeding here provided for is in no proper sense a trial and sentence for crime, nor is the order of deportation a banishment in the technical sense, but the whole proceeding is merely a method of enforcing the return to his own country of an alien who fails to comply with the conditions prescribed for his continued residence here; and the provisions of the constitution requiring due process of law and trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application. Mr. Chief Justice Fuller, Mr. Justice Field, and Mr. Justice Brewer, dissenting.

7. The provision which puts the burden of proof upon a Chinese laborer arrested for having no certificate, as well as the requirement of proof by one credible white witness that he was a resident of the United States at the time of the passage of the act, is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government.

8. The provisions of an act of congress passed in the exercise of its constitutional authority must prevail even if they contravene the express stipulations of an earlier treaty.

Appeals from the circuit court of the United States in and for the southern district of New York. Affirmed.

* Statement by Mr. Justice GRAY:

These were three writs of habeas corpus, granted by the circuit court of the United States for the southern district of New York, upon petitions of Chinese laborers arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the act of May 5, 1892, c. 60, which is copied in the margin.[1]

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[1] An act to prohibit the coming of Chinese persons into the United States.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.

Sec. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: provided, that in any case where such other country, of which such Chinese person shall claim to be a citizen or subject, shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

Sec. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

Sec. 4. That any such Chinese person or per-

The rules and regulations made and promulgated by the secretary of the treasury under section 7 of that act prescribe forms for applications for certificates of residence, for affidavits in support thereof, and for the certificates themselves; contain the provisions copied in the margin;[2] and also provide* for recording duplicates of the certificates in the office of the collector of internal revenue.

The first petition alleged that the petitioner was a person of the Chinese race, born in China, and not a naturalized citizen of the United States; that in or before 1879 he came to the United States, with the intention of remaining and taking up his residence therein, and with no definite intention of returning to China, and had ever since been a permanent resident of the United States, and for more than a year last past had resided in the city, county, and state of New York, and within the second district for the collection of internal revenue in that state; that he had not, since the passage of the act of 1892, applied to the collector of internal revenue of that district for a

son of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided.

Sec. 5. That after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly, without unnecessary delay.

Sec. 6. And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence; and any Chinese laborer within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as hereinbefore provided, unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted, upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained, and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it; and in such cases the cost of said arrest and trial shall be in the discretion of the court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge.

Sec. 7. That immediately after the passage of this act the secretary of the treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants. Such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence, and occupation of the applicant, and such other description of the applicant as shall be prescribed by the secretary of the treasury; and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application.

Sec. 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the penitentiary for a term of not more than five years.

Sec. 9. The secretary of the treasury may authorize the payment of such compensation in the nature of fees to the collectors of internal revenue, for services performed under the provisions of this act, in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.

[2] Collectors of internal revenue will receive applications on the following form, at their own offices, from such Chinese as are conveniently located thereto, and will cause their deputies to proceed to the towns or cities in their respective divisions where any considerable number of Chinese are residing, for the purpose of receiving applications. No application will be received later than May 5, 1893.

Collectors and deputies will give such notice, through leading Chinese, or by notices posted in the Chinese quarter of the various localities, as will be sufficient to apprise all Chinese residing in their districts of their readiness to receive applications, and the time and place where they may be made. All applications received by deputies must be forwarded to the collector's office, from whose office all certificates of residence will be issued, and sent to the deputy for delivery.

The affidavit of at least one credible witness of good character to the fact of residence and lawful status within the United States must be furnished with every application. If the applicant is unable to furnish such witness satisfactory to the collector or his deputy, his application will be rejected, unless he shall furnish other proof of his right to remain in the United States, in which case the application, with the proofs presented, shall be forwarded to the commissioner of internal revenue for his decision. The witness must appear before the collector or his deputy, and be fully questioned in regard to his testimony before being sworn.

In all cases of loss or destruction of original certificates of residence, where it can be established to the satisfaction of the collector of the district in which the certificate was issued that such loss or destruction was accidental, and without fault or negligence on the part of the applicant, a duplicate of the original may be issued under the same conditions that governed the original issue.

certificate of residence, as required by section 6, and was, and always had been, without such certificate of residence; and that he was arrested by the marshal, claiming authority to do so under that section, without any writ or warrant. The return of the marshal stated that the petitioner was found by him within the jurisdiction of the United States and in the southern district of New York, without the certificate of residence required by that section; that he had, therefore, arrested him, with the purpose and intention of taking him before a United States judge within that district; and that the petitioner admitted to the marshal, in reply to questions put through an interpreter, that he was a Chinese laborer, and was without the required certificate of residence.

The second petition contained similar allegations, and further alleged that the petitioner was taken by the marshal before the district judge for the southern district of New York, and that "the said United States *703 judge, without any hearing of any kind, thereupon ordered that your petitioner be remanded to the custody of the marshal in and for the southern district of New York, and deported forthwith from the United States, as is provided in said act of May 5, 1892, all of which more fully appears by said order, a copy of which is hereto annexed and made a part hereof," and which is copied in the margin;[1] and that he was detained by virtue of the marshal's claim of authority and the judge's order. The marshal returned that he held the petitioner under that order.

In the third case the petition alleged, and the judge's order showed, the following state of facts: On April 11, 1893, the petitioner applied to the collector of internal revenue for a certificate of residence. The collector refused to give him a certificate, on the ground that the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race, and not credible witnesses, and required of him to produce a witness other than a Chinaman to prove that he was entitled to the certificate, which he was unable to do, because there was no person other than one of the Chinese race who knew and could truthfully swear that he was lawfully within the United States on May 5, 1892, and then entitled to remain therein; and because of such unavoidable cause he was unable to produce a certificate of residence, and was now without one. The petitioner was arrested by the marshal, and taken before the judge, and clearly established to the satisfaction of the judge that he was unable to procure a certificate of residence by reason of the unavoidable cause aforesaid; and also established to the judge's satisfaction, by the testimony of a Chinese resident of New York, that the petitioner was a resident of the United States at the time of the passage of the act; but, having failed to establish this fact clearly to the satisfaction of the court by at least one credible white witness, as required by the statute, the judge ordered the petitioner to be remanded to the custody of the marshal, and to be deported from the United States, as provided in the act.

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the act of May 5, 1892, was unconstitutional and void.

In each case the circuit court, after a hearing upon the writ of habeas corpus and the return of the marshal, dismissed the writ of habeas corpus, and allowed an appeal of the petitioner to this court, and admitted him to bail pending the appeal. All the proceedings, from the arrest to the appeal, took place on May 6th.

Jos. H. Choate, J. Hubley Ashton, and Maxwell Evarts, for appellants. Sol. Gen. Aldrich, for appellees.

Mr. Justice GRAY, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to. *704

In the recent case of Nishimura Ekiu v. U. S., 142 U. S. 651, 659, 12 Sup. Ct. Rep. 336, the court, in sustaining the action of the executive department, putting in force an act of congress for the exclusion of aliens, said: "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty,

[1] In the matter of the arrest and deportation of Wong Quan, a Chinese laborer.

Wong Quan, a Chinese laborer, having been arrested in the city of New York on the 6th day of May, 1893, and brought before me, a United States judge, by John W. Jacobus, the marshal of the United States in and for the southern district of New York, as being a Chinese laborer found within the jurisdiction of the United States after the expiration of one year from the passage of the act of congress approved on the 5th day of May, 1892, and entitled "An act to prohibit the coming of Chinese persons into the United States," without having the certificate of residence required by said act; and the said Wong Quan having failed to clearly establish to my satisfaction that by reason of accident, sickness, or other unavoidable cause he had been unable to procure the said certificate, or that he had procured such certificate, and that the same had been lost or destroyed: Now, on motion of Edward Mitchell, the United States attorney in and for the southern district of New York, it is ordered that the said Wong Quan be, and he hereby is, remanded to the custody of the said John W. Jacobus, the United States marshal in and for the southern district of New York; and it is further ordered, that the said Wong Quan be deported from the United States of America in accordance with the provisions of said act of congress approved on the 5th day of May, 1892.

Dated New York, May 6, 1893.

Addison Brown,
United States District Judge for the Southern District of New York.

and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the president and senate or through statutes enacted by congress."

The same views were more fully expounded in the earlier case of Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. Rep. 623, in which the validity of a former act of congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field in behalf of the court it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604, 9 Sup. Ct. Rep. 629.

*706 It was also said, repeating the language of Mr. Justice Bradley in Knox v. Lee, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments." 130 U. S. 605, 9 Sup. Ct. Rep. 629. And it was added: "For local interests, the several states of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606, 9 Sup. Ct. Rep. 630.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation; and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make *707 complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607, 9 Sup. Ct. Rep. 631. This statement was supported by many citations from the diplomatic correspondence of successive secretaries of state, collected in Whart. Int. Law Dig. § 206.

The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in dispatches referred to by the court in Chae Chan Ping's Case. In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the state, are too clearly within the essential attributes of sovereignty to be seriously contested." Whart. Int. Law Dig. § 206; 130 U. S. 607, 9 Sup. Ct. Rep. 630.

The statements of leading commentators on the law of nations are to the same effect.

Vattel says: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner." "Thus, also, it *708 has a right to send them elsewhere, if it has just cause to *fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates." Vatt. Law Nat. lib. 1, c. 19, §§ 230, 231.

Ortolan says: "The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force. In France no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power." Ortolan, Diplomatie de la Mer, (4th Ed.) lib. 2, c. 14, p. 297.

Phillimore says: "It is a received maxim of international law that the government of a state may prohibit the entrance of strangers into the country, and may, therefore, regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it." 1 Phillim. Int. Law, (3d Ed.) c. 10, § 220.

Bar says: "Banishment and extradition must not be confounded. The former is simply a question of expediency and humanity, since no state is bound to receive all foreigners, although, perhaps, to exclude all would be to say good-bye to the international union of all civilized states; and although in some states, such as England, strangers can only be expelled by means of special acts of the legislative power, no state has renounced its right to expel them, as is shown by the alien bills which the government of England has at times used to invest itself with the right of expulsion." "Banishment is regulated by rules of expediency and humanity, and is a matter for the police of *709 the state. No doubt the police can apprehend any foreigner who refuses to quit the country in *spite of authoritative orders to do so, and convey him to the frontier." Bar, Int. Law, (Gillespie's Ed. 1883,) 708, note, 711.

In the passages just quoted from Gillespie's translation of Bar, "banishment" is evidently used in the sense of expulsion or deportation by the political authority on the ground of expediency, and not in the sense of transportation or exile by way of punishment for crime. Strictly speaking, "transportation," "extradition," and "deportation," although each has the effect of removing a person from the country, are different things, and have different purposes. "Transportation" is by way of punishment of one convicted of an offense against the laws of the country. "Extradition" is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. "Deportation" is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.

In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament, which passed several acts on the subject between 1793 and 1848. 2 Inst. 57; 1 Chalm. Op. 26; 1 Bl. Comm. 260; Chit. Prerog. 49; 1 Phillim. Int. Law, c. 10, § 220, and note; 30 Parl. Hist. 157, 167, 188, 217, 229; 34 Hans. Deb. (1st Series) 441, 445, 471, 1065–1071; 6 Law Rev. Quar. 27.

Eminent English judges, sitting in the judicial committee of the privy council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.

In 1837, in a case arising in the island of Mauritius, which had been conquered by Great Britain from France in 1810, and in which the law of France continued in force, Lord *Lyndhurst, Lord Brougham, and Justices Bosanquet and Erskine, although considering it a case of great hardship, sustained the validity of an order of the English governor, deporting a friendly alien, who had long resided and carried on business in the island, and had enjoyed the privileges and exercised the rights of a person duly domiciled, but who had not, as required by the French law, obtained from the colonial government formal and express authority to establish a domicile there. In re Adam, 1 Moore, P. C. (N. S.) 460.

In a recent appeal from a judgment of the supreme court of the colony of Victoria, a collector of customs, sued by a Chinese immigrant for preventing him from landing in the colony, had pleaded a justification under the

order of a colonial minister claiming to exercise an alleged prerogative of the crown to exclude alien friends, and denied the right of a court of law to examine his action, on the ground that what he had done was an act of state; and the plaintiff had demurred to the plea. Lord Chancellor Halsbury, speaking for himself, for Lord Herschell, (now lord chancellor,) and for other lords, after deciding against the plaintiff on a question of statutory construction, took occasion to observe: "The facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien, excluded from any part of her majesty's dominions by the executive government there, can maintain an action in a British court, and raise such questions as were argued before their lordships on the present appeal,—whether the proper officer for giving or refusing access to the country has been duly authorized by his own colonial government, whether the colonial government has received sufficient delegated authority from the crown to exercise the authority which the crown had a right to exercise through the colonial government if properly communicated to it, and whether the crown has the right, without parliamentary authority, to exclude an alien. Their lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the crown and parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their lordships are of opinion that it would be impossible, upon the facts which the demurrer admits, for an alien to maintain an action." Musgrove v. Chun Teeong Toy, [1891] App. Cas. 272, 282, 283.

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the constitution.

The United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective. The only government of this country which other nations recognize or treat with is the government of the Union, and the only American flag known throughout the world is the flag of the United States.

The constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the president the executive power; has made him the commander in chief of the army and navy; has authorized him, by and with the consent of the senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The constitution has granted to congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. And the several states are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another state, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to the other departments of the government.

As long ago said by Chief Justice Marshall, and since constantly maintained by this court: "The sound construction of the constitution must allow to the national leg-

islature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties *713 assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." McCulloch v. Maryland, 4 Wheat. 316, 421, 423; Juilliard v. Greenman, 110 U. S. 421, 440, 450, 4 Sup. Ct. Rep. 122; Ex parte Yarbrough, 110 U. S. 651, 658, 4 Sup. Ct. Rep. 152; In re Rapier, 143 U. S. 110, 134, 12 Sup. Ct. Rep. 374; Logan v. U. S., 144 U. S. 263, 283, 12 Sup. Ct. Rep. 617.

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene.

In Nishimura Ekiu's Case, it was adjudged that, although congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet congress might intrust the final determination of those facts to an executive officer; and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660, 12 Sup. Ct. Rep. 336.

The power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of congress, therefore, to expel, like the power to exclude, aliens, or *714 any specified class of aliens, from the country, may be exercised entirely through executive officers; or congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.

It is no new thing for the lawmaking power, acting either through treaties made by the president and senate, or by the more common method of acts of congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as congress may see fit to authorize or permit.

For instance, the surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the president alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate. Such was the case of Jonathan Robbins, under article 27 of the treaty with Great Britain of 1794, in which the president's power in this regard was demonstrated in the masterly and conclusive argument of John Marshall in the house of representatives. 8 Stat. 129; Whart. State Tr. 392; U. S. v. Nash, Bee, 286, 5 Wheat. append. 3. But provision may be made, as it has been by later acts of congress, for a preliminary examination before a judge or commissioner; and in such case the sufficiency of the evidence on which he acts cannot be reviewed by any other tribunal, except as permitted by statute. Act Aug. 12, 1848, c. 167, (9 Stat. 302;) Rev. St. §§ 5270-5274; Ex parte Metzger, 5 How. 176; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. Rep. 1240; In re Luis Oteiza y Cortes, 136 U. S. 330, 10 Sup. Ct. Rep. 1031.

So claims to recover back duties illegally exacted on imports may, if congress so provides, be finally determined by the secretary of the treasury. Cary v. Curtis, 3 How. 236; Curtis v. Fiedler, 2 Black, 461, 478, 479; Arnson v. Murphy, 109 U. S. 238, 240, 3 Sup. Ct. Rep. 184. But congress may, as it did for long periods, permit them to be tried by suit against the collector of customs; or it may, as by the existing statutes, provide for their determination by a board of general appraisers, and allow the decisions of that board to be reviewed by the courts in such particulars only as may be prescribed by law. Act June 10, 1890, c. 407, §§ 14, 15, 25, (26 Stat. 137, 138, 141;) In re Fassett, 142 U. S. 479, 486, 487, 12 Sup. Ct. Rep. 295; Passavant v. U. S., 148 U. S. 214, 13 Sup. Ct. Rep. 572.

To repeat the careful and weighty words uttered by Mr. Justice Curtis in delivering a unanimous judgment of this court upon the question what is due process of law:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity or admiralty, nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Murray v. Hoboken, etc., Co., 18 How. 272, 284.

Before examining in detail the provisions of the act of 1892, now in question, it will be convenient to refer to the previous statutes, treaties, and decisions upon the subject.

The act of congress of July 27, 1868, c. 249, (re-enacted in sections 1999-2001, Rev. St.,) began with these recitals: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship." It then declared that *any order or decision of any officer of the United States to the contrary was inconsistent with the fundamental principles of this government; enacted that "all naturalized citizens of the United States, while in foreign states, shall be entitled to and shall receive from this government the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances;" and made it the duty of the president to take measures to protect the rights in that respect of "any citizen of the United States." 15 Stat. 223, 224.

That act, like any other, is subject to alteration by congress whenever the public welfare requires it. The right of protection which it confers is limited to citizens of the United States. Chinese persons, not born in this country, have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws. Rev. St. (2d Ed.) §§ 2165, 2169; Acts April 14, 1802, c. 28, (2 Stat. 153;) May 26, 1824, c. 186, (4 Stat. 69;) July 14, 1870, c. 254, § 7, (16 Stat. 256;) Feb. 18, 1875, c. 80, (18 Stat. 318;) In re Ah Yup, 5 Sawy. 155; Act of May 6, 1882, c. 126, § 14, (22 Stat. 61.)

The treaty made between the United States and China on July 28, 1868, contained the following stipulations:

"Art. 5. The United States of America and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to the other, for purposes of curiosity, of trade, or as permanent residents.

"Art. 6. Citizens of the United States visiting or residing in China, * * * and, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." 16 Stat. 740.

After some years' experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests, and therefore requested and obtained from China a modification of the treaty. Chew Heong v. U. S., 112 U. S. 536, 542, 543, 5 Sup. Ct. Rep. 255; Chae Chan Ping v. U. S., 130 U. S. 581, 595, 596, 9 Sup. Ct. Rep. 623.

On November 17, 1880, a supplemental treaty was accordingly concluded between the two countries, which contained the following preamble and stipulations:

"Whereas, the government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit:

"Article 1. Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a

character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

*715 "Art. 2. Chinese subjects, whether proceeding to the *United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

"Art. 3. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the government of the United States will exert all its power to devise measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." 22 Stat. 826, 827.

The act of May 6, 1882, c. 126, entitled "An act to execute certain treaty stipulations relating to Chinese," and amended by the act of July 5, 1884, c. 220, began with the recital that, "in the opinion of the government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territories thereof;" and, in section 1, suspended their coming for 10 years, and enacted that it should "not be lawful for any Chinese laborer to come from any foreign port or place, or, having so come, to remain within the United States;" in section 3, that this provision should not apply to Chinese laborers who were in the United States on November 17, 1880, or who came here within 90 days after the passage of the act of 1882, and who should produce evidence of that fact, as afterwards required by the act, to the master of the vessel and to the collector of the port; and, in section 4, that "for the purpose of properly identifying Chinese laborers who were in the United States" at such time, "and in order to furnish them with the proper evidence of their right to go from and come to the United States," as provided by that act and by the treaty of November 17, 1880, the collector of customs of the district from *716 which any Chinese laborers should depart from *the United States by sea should go on board the vessel, and make and register a list of them, with all facts necessary for their identification, and should give to each a corresponding certificate, which should entitle him "to return to and re-enter the United States, upon producing and delivering the same to the collector of customs" to be canceled. The form of certificate prescribed by the act of 1884 differed in some particulars from that prescribed by the act of 1882, and the act of 1884 added that "said certificate shall be the only evidence to establish his right of re-entry." Each act further enacted, in section 5, that any such Chinese laborer, being in the United States, and desiring to depart by land, should be entitled to a like certificate of identity; and, in section 12, that no Chinese person should be permitted to enter the United States by land without producing such a certificate, and that "any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." The act of 1884 further enacted, in section 16, that a violation of any of the provisions of the act, the punishment of which was not therein otherwise provided for, should be deemed a misdemeanor, and be punishable by fine not exceeding $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. 22 Stat. 58–60; 23 Stat. 115–118.

Under those acts this court held, in Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. Rep. 255, that the clause of section 4 of the act of 1884, making the certificate of identity the only evidence to establish a right to re-enter the United States, was not applicable to a Chinese laborer who resided in the United States at the date of the treaty of 1880, departed by sea before the passage of the act of 1882, remained out of the United States until after the passage of the act of 1884, and then returned by sea; and in U. S. v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. Rep. 663, that a Chinese laborer, who resided in *717 the United *States at the date of the treaty of 1880, and until 1883, when he left San Francisco for China, taking with him a certificate of identity from the collector of the port in the form provided by the act of 1882, which was stolen from him in China, was entitled to land again in the United States in 1885, on proving by other evidence these facts, and his identity with the person described in the register kept by the collector of customs as the one to whom that certificate was issued.

Both those decisions proceeded upon a consideration of the various provisions of the acts of 1882 and 1884, giving weight to the presumption that they should not, unless unavoidably, be construed as operating retrospectively, or as contravening the stipulations of the treaty. In the first of those cases Justices Field and Bradley, and in the second case Justices Field, Harlan, and Lamar, dissented from the judgment, being of opinion that the necessary construction of those acts was against the Chinese laborer; and in none of the opinions in either case was it suggested that the acts in question, if

construed as contended by the United States, and so as to contravene the treaty, would be unconstitutional or inoperative.

In our jurisprudence it is well settled that the provisions of an act of congress, passed in the exercise of its constitutional authority, on this, as on any other, subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty. As was said by this court in Chae Chan Ping's Case, following previous decisions: "The treaties were of no greater legal obligation than the act of congress. By the constitution, laws made in pursuance thereof, and treaties made under authority of the United States, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of congress, it can be deemed in that particular *721 only the equivalent of a legislative act, to be repealed or *modified at the pleasure of congress. In either case the last expression of the sovereign will must control." "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country it is subject to such acts as congress may pass for its enforcement, modification, or repeal." 130 U. S. 600, 9 Sup. Ct. Rep. 623. See, also, Foster v. Neilson, 2 Pet. 253, 314; Edye v. Robertson, 112 U. S. 580, 597–599, 5 Sup. Ct. Rep. 247; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. Rep. 456.

By the supplementary act of October 1, 1888, c. 1064, it was enacted, in section 1, that "from and after the passage of this act it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States;" and, in section 2, that "no certificates of identity, provided for in the fourth and fifth sections of the act to which this is a supplement, shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." 25 Stat. 504.

In the case of Chae Chan Ping, already often referred to, a Chinese laborer, who had resided in San Francisco from 1875 until June 2, 1887, when he left that port for China, having in his possession a certificate issued to him on that day by the collector of customs, according to the act of 1884, and in terms entitling him to return to the United States, returned to the same port on October 8, 1888, and was refused by the collector permission to land, because of the provisions of the act of October 1, 1888, above cited. It was strongly contended in his behalf that by his residence in the United States for 12 years preceding June 2, 1887, in accordance with the fifth article of the treaty of 1868, he had now a lawful right to be in the United States, and had a vested right to return to the United States, which could not be taken from him by any exercise of mere legislative power by *congress; that he *722 had acquired such a right by contract between him and the United States, by virtue of his acceptance of the offer contained in the acts of 1882 and 1884, to every Chinese person then here, if he should leave the country, complying with specified conditions, to permit him to return; that, as applied to him, the act of 1888 was unconstitutional, as being a bill of attainder and an ex post facto law; and that the depriving him of his right to return was punishment, which could not be inflicted except by judicial sentence. The contention was thus summed up at the beginning of the opinion: "The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress." 130 U. S. 584–589, 9 Sup. Ct. Rep. 624.

Yet the court unanimously held that the statute of 1888 was constitutional, and that the action of the collector in refusing him permission to land was lawful; and, after the passages already quoted, said: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure." "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, ca-

723 pable of sale and transfer or other disposition; not such as are personal and untransferable in their character." "But far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant, or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes." 130 U. S. 609, 610, 9 Sup. Ct. Rep. 631.

It thus appears that in that case it was directly adjudged, upon full argument and consideration, that a Chinese laborer, who had been admitted into the United States while the treaty of 1868 was in force, by which the United States and China "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to the other," not only for the purpose of curiosity or of trade, but "as permanent residents," and who had continued to reside here for 12 years, and who had then gone back to China, after receiving a certificate, in the form provided by act of congress, entitling him to return to the United States, might be refused readmission into the United States, without judicial trial or hearing, and simply by reason of another act of congress, passed during his absence, and declaring all such certificates to be void, and prohibiting all Chinese laborers who had at any time been residents in the United States, and had departed therefrom and not returned before the passage of this act, from coming into the United States.

In view of that decision, which, as before observed, was a unanimous judgment of the court, and which had the concurrence of all the justices who had delivered opinions in the cases arising under the acts of 1882 and 1884, it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of congress, any right, as a denizen, or otherwise, to be and remain in *724 this country, except by the license, permission, and sufferance of congress, to be* withdrawn, whenever, in its opinion, the public welfare might require it.

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vatt. Law Nat. lib. 1, c. 19, § 213; 1 Phillim. Int. Law, c. 18, § 321; Mr. Marcy, in Koszta's Case, 2 Whart. Int. Law Dig. § 198. See, also, Lau Ow Bew v. U. S., 144 U. S. 47, 62, 12 Sup. Ct. Rep. 517; Merl. Repert. "Domicile," § 13, quoted in the case above cited, of In re Adam, 1 Moore, P. C. (N. S.) 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest.

Nothing inconsistent with these views was decided or suggested by the court in Chy Lung v. Freeman, 92 U. S. 275, or in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, cited for the appellants.

In Chy Lung v. Freeman, a statute of the state of California, restricting the immigration of Chinese persons, was held to be unconstitutional and void, because it contravened the grant in the constitutional congress of the power to regulate commerce with foreign nations.

In Yick Wo v. Hopkins the point decided was that the fourteenth amendment of the constitution of the United States, forbidding any state to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, was violated by a municipal ordinance of San Francisco, which conferred upon the board of supervisors arbitrary power, without regard to competency of persons or to fitness of places, to grant or refuse licenses to carry on public laundries, and which was executed by the supervisors by refusing licenses to all Chinese residents, and granting them to other persons under like circumstances. The question there was of the power of a state over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country.

The act of May 5, 1892, c. 60, is entitled "An act to prohibit the coming of Chinese persons into the United States;" and provides, in section 1, that "all laws now in force, prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, are hereby continued in force for a period of ten years from the passage of this act."

The rest of the act (laying aside, as immaterial, section 5, relating to an application for a writ of habeas corpus "by a Chinese person seeking to land in the United States, to whom that privilege has been denied") deals with two classes of Chinese persons: First, those "not entitled to be or remain in the United States;" and, second, those "entitled to remain in the United States." These words of description neither confer nor take away any right, but simply designate the Chinese persons who were not, or who were, authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of this act, but subject, nevertheless, to the power of the United States, absolutely or conditionally, to withdraw the permission, and to terminate the authority to remain.

726 Sections 2–4 concern Chinese "not lawfully entitled to be or remain in the United States," and provide that, after trial before a justice, judge, or commissioner, a "Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States," shall be imprisoned at hard labor for not more than a year, and be afterwards removed to China, or other country of which he appears to be a citizen or subject.

The subsequent sections relate to Chinese laborers "entitled to remain in the United States" under previous laws. Sections 6 and 7 are the only sections which have any bearing on the cases before us, and the only ones, therefore, the construction or effect of which need now be considered.

The manifest objects of these sections are to provide a system of registration and identification of such Chinese laborers, to require them to obtain certificates of residence, and, if they do not do so within a year, to have them deported from the United States.

Section 6, in the first place, provides that "it shall be the duty of all Chinese laborers, within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence." This provision, by making it the duty of the Chinese laborer to apply to the collector of internal revenue of the district for a certificate, necessarily implies a correlative duty of the collector to grant him a certificate, upon due proof of the requisite facts. What this proof shall be is not defined in the statute, but is committed to the supervision of the secretary of the treasury by section 7, which directs him to make such rules and regulations as may be necessary for the efficient execution of the act, to prescribe the necessary forms, and to make such provisions that certificates may be procured in localities convenient to the applicants, and without charge to them; and the secretary of the treasury has, by such rules and regulations, provided that the fact of residence shall be proved by "at least one credible witness of good character," or, in case of necessity, by other proof. The statute and the regulations, in order to make sure that every *727 such Chinese laborer may have a certificate, in the nature of a passport, with which he may go into any part of the United States, and that the United States may preserve a record of all such certificates issued, direct that a duplicate of each certificate shall be recorded in the office of the collector who granted it, and may be issued to the laborer upon proof of loss or destruction of his original certificate. There can be no doubt of the validity of these provisions and regulations, unless they are invalidated by the other provisions of section 6.

This section proceeds to enact that any Chinese laborer within the limits of the United States, who shall neglect, fail, or refuse to apply for a certificate of residence within the year, or who shall afterwards be found within the jurisdiction of the United States without such a certificate, "shall be deemed and adjudged to be unlawfully within the United States." The meaning of this clause, as shown by those which follow, is not that this fact shall thereupon be held to be conclusively established against him, but only that the want of a certificate shall be prima facie evidence that he is not entitled to remain in the United States; for the section goes on to direct that he "may be arrested by any customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge;" and that it shall thereupon be the duty of the judge to order that the laborer "be deported from the United States" to China, (or to any other country which he is a citizen or subject of, and which does not demand any tax as a condition of his removal to it,) "unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained, and judgment suspended a reasonable time, to enable him to procure a duplicate from the officer granting it; and in such *728 cases the cost of said arrest and trial shall be in the discretion of the court."

For the reasons stated in the earlier part of this opinion, congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence

to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But congress has not undertaken to do this.

The effect of the provisions of section 6 of the act of 1892 is that, if a Chinese laborer, after the opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States that an officer of the customs, or a collector of internal revenue, or a marshal, or a deputy of either, may arrest him, not with a view to imprisonment or punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination of the only facts which, under the act of congress, can have a material bearing upon the question whether he shall be sent out of the country, or be permitted to remain.

The powers and duties of the executive officers named being ordinarily limited to their own districts, the reasonable inference is that they must take him before a judge within the same judicial district; and such was the course pursued in the cases before us.

The designation of the judge, in general terms, as "a United States judge," is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of habeas corpus, or warrants to arrest persons accused of crime. Rev. St. §§ 752, 1014.

When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case,—a complainant, a defendant, and a judge,—actor, reus, et judex. 3 Bl. Comm. 25; Osborn v. Bank, 9 Wheat. 738, 819. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute.

If no evidence is offered by the Chinaman, the judge makes the order of deportation as upon a default. If he produces competent evidence to explain the fact of his not having a certificate, it must be considered by the judge; and if he thereupon appears to be entitled to a certificate, it is to be granted to him. If he proves that the collector of internal revenue has unlawfully refused to give him a certificate, he proves an "unavoidable cause," within the meaning of the act, for not procuring one. If he proves that he had procured a certificate, which has been lost or destroyed, he is to be allowed a reasonable time to procure a duplicate thereof.

The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof "by at least one credible white witness that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Ogden v. Saunders, 12 Wheat. 213, 262, 349; Pillow v. Roberts, 13 How. 472, 476; Cliquot's Champagne, 3 Wall. 114, 143; Ex parte Fisk, 113 U. S. 713, 721, 5 Sup. Ct. Rep. 724; Holmes v. Hunt, 122 Mass. 505, 516–519. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of congress, which congress may, at its discretion, modify or repeal. Rev. St. §§ 858, 1977. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here at the time of the passage of the act "by at least one credible white witness," may have been the experience of congress, as mentioned by Mr. Justice Field in Chae Chan Ping's Case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath." 130 U. S. 598, 9 Sup. Ct. Rep. 627. And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for 77 years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, "by the oath or affirmation of citizens of the United States." Acts March 22, 1816, c. 32, § 2, (3 Stat. 259;) May 24, 1828, c. 116, § 2, (4 Stat. 311;) Rev. St. § 2165, cl. 6; 2 Kent, Comm. 65.

The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a

banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.

*731 *The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.

The three cases now before us do not differ from one another in any material particular.

In the first case the petitioner had wholly neglected, failed, and refused to apply to the collector of internal revenue for a certificate of residence, and, being found without such a certificate after a year from the passage of the act of 1892, was arrested by the United States marshal, with the purpose, as the return states, of taking him before a United States judge within the district; and thereupon, before any further proceeding, sued out a writ of habeas corpus.

In the second case the petitioner had likewise neglected, failed, and refused to apply to the collector of internal revenue for a certificate of residence, and, being found without one, was arrested by the marshal, and taken before the district judge of the United States, who ordered him to be remanded to the custody of the marshal, and to be deported from the United States, in accordance with the provisions of the act. The allegation in the petition that the judge's order was made "without any hearing of any kind" is shown to be untrue by the recital in the order itself (a copy of which is annexed to and made part of the petition) that he had failed to clearly establish to the judge's satisfaction that by reason of accident, sickness, or other unavoidable cause he had been unable to procure a certificate, or that he had procured one, and it had been lost or destroyed.

In the third case the petitioner had, within the year, applied to a collector of internal revenue for a certificate of residence, and had been refused it, because he produced, and could produce, none but Chinese witnesses, to prove the residence necessary to entitle him to a certificate. Being found without a certificate of residence, he was arrested by the *marshal, and taken before the *732 United States district judge, and established to the satisfaction of the judge that, because of the collector's refusal to give him a certificate of residence, he was without one by an unavoidable cause; and also proved, by a Chinese witness only, that he was a resident of the United States at the time of the passage of the act of 1892. Thereupon the judge ordered him to be remanded to the custody of the marshal, and to be deported from the United States, as provided in that act.

It would seem that the collector of internal revenue, when applied to for a certificate, might properly decline to find the requisite fact of residence upon testimony which, by an express provision of the act, would be insufficient to prove that fact at a hearing before the judge. But if the collector might have received and acted upon such testimony, and did, upon any ground, unjustifiably refuse a certificate of residence, the only remedy of the applicant was to prove by competent and sufficient evidence at the hearing before the judge the facts requisite to entitle him to a certificate. To one of those facts—that of residence—the statute, which, for the reasons already stated, appears to us to be within the constitutional authority of congress to enact, peremptorily requires at that hearing the testimony of a credible white witness; and it was because no such testimony was produced that the order of deportation was made.

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the constitution and laws of the United States, and with the previous decisions of this court, is that in each of these cases the judgment of the circuit court dismissing the writ of habeas corpus is right, and must be affirmed.

Mr. Justice BREWER, dissenting.

I dissent from the opinion and judgment of the court in these cases, and, the questions being of importance, I deem it not improper to briefly state my reasons therefor. *732

*I rest my dissent on three propositions: First, that the persons against whom the penalties of section 6 of the act of 1892 are directed are persons lawfully residing within the United States; secondly, that as such they are within the protection of the constitution, and secured by its guaranties against oppression and wrong; and, third, that section 6 deprives them of liberty, and imposes punishment, without due process of law, and in disregard of constitutional guaranties, especially those found in the 4th, 5th, 6th, and 8th articles of the amendments.

And, first, these persons are lawfully residing within the limits of the United States. By the treaty of July 28, 1868, (16 Stat. 740,) commonly known as the "Burlingame Treaty," it was provided, (article 5:) "The United States of America and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." And, (article 6:) "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation." At that time we sought Chinese emigration. The subsequent treaty of November 17, 1880, (22 Stat. 826,) which looked to a restriction of Chinese emigration, nevertheless contained, in article 2, this provision:

"Art. 2. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall *734 be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

While, subsequently to this treaty, congress passed several acts—May 6, 1882, (22 Stat. 58;) July 5, 1884, (23 Stat. 115;) October 1, 1888, (25 Stat. 504)—to restrict the entrance into this country of Chinese laborers, and while the validity of this restriction was sustained in the Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. Rep. 623, yet no act has been passed, denying the right of those laborers who had once lawfully entered the country to remain, and they are here not as travelers, or only temporarily. We must take judicial notice of that which is disclosed by the census, and which is also a matter of common knowledge. There are 100,000 and more of these persons living in this country, making their homes here, and striving by their labor to earn a livelihood. They are not travelers, but resident aliens.

But, further, this section 6 recognizes the fact of a lawful residence, and only applies to those who have such; for the parties named in the section, and to be reached by its provisions, are "Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States." These appellants, therefore, are lawfully within the United States, and are here as residents, and not as travelers. They have lived in this country, respectively, since 1879, 1877, and 1874,—almost as long a time as some of those who were members of the congress that passed this act of punishment and expulsion.

That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in, it, has long been recognized by the law of nations. It was said by this court in the case of The Venus, 8 Cranch, 253, 278: "The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel 'domicile,' which he defines to be 'a habitation fixed in any place, with an intention of always staying there.' Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicile, he continues, is not established unless the person makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. Vatt. Law Nat. pp. 92, 93. Grotius nowhere uses the word 'domicile,' but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates 'strangers,' and the latter, 'subjects.'" The rule is thus laid down by Sir Robert Phillimore: "There is a class of persons which cannot be, strictly speaking, included in either of these denominations of naturalized or native citizens, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode in another. These are domiciled inhabitants. They have not put on a new citizenship through some formal mode enjoined by the law of the new country. They are de facto, though not de jure, citizens of the country of their domicile." 1 Phillim. Int. Law, c. 18, p. 347.

In the Koszta Case it was said by Secretary Marcy: "This right to protect persons having a domicile, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the

country of his residence, and, if he breaks them, incurs the same penalties. He owes the same obedience to the civil laws. His property is in the same way, and to the same extent, as theirs, liable to contribute to the support of the government. In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable." 2 Whart. Int. Law Dig. § 198.

*736 *And in Lau Ow Bew v. U. S., 144 U. S. 47, 61, 12 Sup. Ct. Rep. 521, this court declared that, "by general international law, foreigners who have become domiciled in a country other than their own acquire rights, and must discharge duties, in many respects the same as possessed by and imposed upon the citizens of the country, and no restriction on the footing upon which such persons stand, by reason of their domicile, is to be presumed."

Indeed, there is force in the contention of counsel for appellants that these persons are "denizens," within the true meaning and spirit of that word as used in the common law. The old definition was this:

"A denizen of England by letters patent for life, entayl or in fee, whereby he becomes a subject in regard of his person." Craw v. Ramsey, Vaughan, 278.

And again:

"A denizen is an alien born, but who has obtained ex donatione regis letters patent to make him an English subject. * * * A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both of them." 1 Bl. Comm. 374.

In respect to this, after quoting from some of the early constitutions of the states, in which the word "denizen" is found, counsel say: "It is claimed that the appellants in this case come completely within the definition quoted above. They are alien born, but they have obtained the same thing as letters patent from this country. They occupy a middle state between an alien and a native. They partake of both of them. They cannot vote, or, as it is stated in Bacon's Abridgment, they have no 'power of making laws,' as a native-born subject has, nor are they here as ordinary aliens. An ordinary alien within this country has come here under no prohibition and no invitation, but the appellants have come under the direct request and invitation, and under the 'patent,' of the federal government. They have been guarantied 'the same privileges, immunities, and exemptions in respect to * * * residence' (Burlingame Treaty, concluded July 28, 1868) as that enjoyed in the United States by the citizens and *737 subjects of the most favored nation. They have been told that if they would come here they would be treated just the same as we treat an Englishman, an Irishman, or a Frenchman. They have been invited here, and their position is much stronger than that of an alien, in regard to whom there is no guaranty from the government, and who has come not in response to any invitation, but has simply drifted here because there is no prohibition to keep him out. They certainly come within the meaning of 'denizen,' as used in the constitutions of the states."

But, whatever rights a resident alien might have in any other nation, here he is within the express protection of the constitution, especially in respect to those guaranties which are declared in the original amendments. It has been repeated so often as to become axiomatic that this government is one of enumerated and delegated powers; and, as declared in article 10 of the amendments, "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as *738 punishment for crime; but among the powers reserved to the people, and not delegated to the government, is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.

Whatever may be true as to exclusion,—and as to that see Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. Rep. 623, and Nishimura Ekiu v. United States, 142 U. S 651, 12 Sup. Ct. Rep. 336,—I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. What, it may be asked, is the reason for any difference? The answer is obvious. The constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions; and it may be that the national government, having full

control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders, and absolutely forbid aliens to enter. But the constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the constitution. In the case of Monongahela Navigation Company v. United States, 148 U. S. 312, 336, 13 Sup. Ct. Rep. 630, it was said: "But, like the other powers granted to congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation." And, if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication.

*739 When the first 10 amendments were presented for adoption, they were preceded by a preamble stating that the conventions of many states had at the time of their adopting the constitution expressed a desire, "in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added." It is worthy of notice that in them the word "citizen" is not found. In some of them the descriptive word is "people," but in the fifth it is broader, and the word is "person," and in the sixth it is the "accused," while in the third, seventh, and eighth there is no limitation as to the beneficiaries suggested by any descriptive word.

In the case of Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 Sup. Ct. Rep. 1070, it was said: "The fourteenth amendment of the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." The matter considered in that case was of a local nature, a municipal ordinance for regulating the carrying on of public laundries, something fairly within the police power of a state; and yet, because its provisions conflicted with the guaranties of the fourteenth amendment, the ordinance was declared void.

If the use of the word "person" in the fourteenth amendment protects all individuals lawfully within the state, the use of the same word, "person," in the fifth must be equally comprehensive, and secures to all persons lawfully within the territory of the United States the protection named therein; and a like conclusion must follow as to the sixth.

I pass, therefore, to the consideration of my third proposition: Section 6 deprives of "life, liberty, and property without due process of law." It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another. Notice its provisions: It first commands all to register. He who does not register violates that law, and may be punished; and so the section goes on to say that one who has not complied with its requirements, and has no certificate of residence, "shall be deemed and adjudged to be unlawfully within the United States," and then it imposes as a penalty his deportation from the country. Deportation is punishment. It involves—First, an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property. In 1 Rap. & L. Law Dict. p. 109, "banishment" is thus defined: "A punishment by forced exile, either for years or for life, inflicted principally upon political offenders; 'transportation' being the word used to express a similar punishment of ordinary criminals." In 4 Bl. Comm. 377, it is said: "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation." In Vattel we find that "banishment is only applied to condemnation in due course of law." Note to section 228 in 1 Vattel.

But it needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel. Apt and just are the words of one of the framers of this constitution,—President Madison,—when he says, (4 Elliot Deb. 555:) "If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he

can elsewhere hope for; * * * if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar *741 casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked,—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."

But punishment implies a trial: "No person shall be deprived of life, liberty, or property without due process of law." Due process requires that a man be heard before he is condemned, and both heard and condemned in the due and orderly procedure of a trial, as recognized by the common law from time immemorial. It was said by this court in Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 708, 4 Sup. Ct. Rep. 667: "Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice, and an opportunity to be heard." And by Mr. Justice Bradley, in defining "due process of law" in Davidson v. New Orleans, 96 U. S. 97, 107: "If found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" And no person who has once come within the protection of the constitution can be punished without a trial. It may be summary, as for petty offenses and in cases of contempt, but still a trial, as known to the common law. It is said that a person may be extradited without a previous trial, but extradition is simply one step in the process of arresting and securing for trial. He may be removed by extradition from California to New York, or from this country to another, but such proceeding is not oppressive or unjust, but suitable and necessary, and therefore due process of law. But here the Chinese are not arrested and extradited for trial, but arrested, and, without a trial, punished by banishment.

Again, it is absolutely within the discretion of the collector to give or refuse a certificate to one who applies therefor. Nowhere is it provided what evidence shall be furnished to the collector, and nowhere is it made mandatory upon him to grant a certificate on the production of such evidence. *742 It cannot be due process of law to impose punishment on any person for failing to have that in his possession, the possession of which he can obtain only at the arbitrary and unregulated discretion of any official. It will not do to say that the presumption is that the official will act reasonably, and not arbitrarily. When the right to liberty and residence is involved, some other protection than the mere discretion of any official is required. Well was it said by Mr. Justice Matthews in the case of Yick Wo v. Hopkins, 118 U. S., on page 369, 6 Sup. Ct. Rep., on page 1071: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

Again, a person found without such certificate may be taken before a United States judge. What judge? A judge in the district in which the party resides or is found? There is no limitation in this respect. A Chinese laborer in San Francisco may be arrested by a deputy United States marshal, and taken before a judge in Oregon; and, when so taken before that judge, it is made his duty to deport such laborer, unless he proves his innocence of any violation of the law, and that, too, by at least one credible white witness. And how shall he obtain that witness? No provision is made in the statute therefor. Will it be said that article 6 of the amendments gives to the accused a right to have a compulsory process for obtaining witnesses in his favor? The reply is that if he is entitled to one part of that article he is entitled to all, and among them is the right to a speedy and public trial by an impartial jury of the state and district. The only theory upon which this proceeding can be sustained is that he has no right to any benefits of this article 6; and if he has no right thereto, and the statute has made no provision for securing his witnesses, or limiting the proceeding to a judge of the district where he resides, the results follow inevitably, as stated, that he may be arrested by any one of the numerous officials named in the statute, and carried before any judge in *743 the United States that such official may select, and then, unless he proves that which he is given no means of proving, be punished by removal from home, friends, family, property, business, to another country.

It is said that these Chinese are entitled while they remain to the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, but that they continue to be aliens, subject to the absolute power of congress to forcibly remove them. In other words, the guaranties of "life, liberty, and property," named in the constitution, are theirs by sufferance, and not of right. Of what avail are such guaranties?

Once more: Supposing a Chinaman from San Francisco, having obtained a certificate, should go to New York or other place in pursuit of work, and on the way his certificate be lost or destroyed. He is subject to arrest and detention, the cost of which is in the discretion of the court, and judgment of

deportation will be suspended a reasonable time to enable him to obtain a duplicate from the officer granting it. In other words, he cannot move about in safety without carrying with him this certificate. The situation was well described by Senator Sherman in the debate in the senate: "They are here ticket-of-leave men. Precisely as, under the Australian law, a convict is allowed to go at large, upon a ticket-of-leave, these people are to be allowed to go at large, and earn their livelihood, but they must have their tickets-of-leave in their possession." And he added: "This inaugurates in our system of government a new departure; one, I believe, never before practiced, although it was suggested in conference that some such rules had been adopted in slavery times to secure the peace of society."

It is true this statute is directed only against the obnoxious Chinese, but, if the power exists, who shall say it will not be exercised to-morrow against other classes and other people? If the guaranties of these amendments can be thus ignored in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to? Profound and wise were the observations of Mr. Justice Bradley, speaking for the court in Boyd v. U. S., 116 U. S. 616, 635, 6 Sup. Ct. Rep. 535: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches, and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, 'obsta principiis.'"

In the Yick Wo Case, in which was presented a municipal ordinance fair on its face, but contrived to work oppression to a few engaged in a single occupation, this court saw no difficulty in finding a constitutional barrier to such injustice. But this greater wrong, by which a hundred thousand people are subject to arrest and forcible deportation from the country, is beyond the reach of the protecting power of the constitution. Its grievous wrong suggests this declaration of wisdom coming from the dawn of English history: "Verily, he who dooms a worse doom to the friendless and the comer from afar than to his fellow, injures himself." The Laws of King Cnut, 1 Thorp, Anc. Laws Eng. p. 397.

In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, "Why do they send missionaries here?"

Mr. Justice FIELD, dissenting.

I also wish to say a few words upon these cases, and upon the extraordinary doctrines announced in support of the orders of the court below.

With the treaties between the United States and China, and the subsequent legislation adopted by congress to prevent the immigration of Chinese laborers into this country, resulting in the exclusion act of October 1, 1888, the court is familiar. They have often been before us, and have been considered in almost every phase. The act of 1888 declared that after its passage it should be unlawful for any Chinese laborer —who might then or thereafter be a resident of the United States, who should depart therefrom, and not return before the passage of the act—to return or remain in the United States. The validity of this act was sustained by this court. Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. Rep. 623. In the opinion announcing the decision we considered the treaties with China, and also the legislation of congress, and the causes which led to its enactment. The court cited numerous instances in which statesmen and jurists of eminence had held that it was the undoubted right of every independent nation to exclude foreigners from its limits whenever, in its judgment, the public interests demanded such exclusion.

"The power of exclusion of foreigners," said the court, "being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition, and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be

made to the political department of our government, which is alone competent to act upon the subject."

I had the honor to be the organ of the court in announcing this opinion and judgment. I still adhere to the views there expressed, in all particulars; but between legislation for the exclusion of Chinese persons,—that is, to prevent them from entering the country,—and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference. The power of the government to exclude foreigners from this country,—that is, to prevent them from entering it,—whenever the public interests, in its judgment, require such exclusion, has been repeatedly asserted by the legislative and executive departments of our government, and never denied; but its power to deport from the country persons lawfully domiciled therein by its consent, and engaged in the ordinary pursuits of life, has never been asserted by the legislative or executive departments, except for crime, or as an act of war, in view of existing or anticipated hostilities, unless the alien act of 1798 can be considered as recognizing that doctrine. 1 Stat. p. 570, c. 58. That act vested in the president power to order all such aliens as he should adjudge dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect were concerned in any treasonable or secret machinations against the government, to depart out of the territory of the United States within such time as should be expressed in his order; and in case any alien when thus ordered to depart should be found at large within the United States after the term limited in the order, not having obtained a license from the president to reside therein, or, having obtained such license, should not have conformed thereto, he should, on conviction thereof, be imprisoned for a term not exceeding three years, and should never afterwards be admitted to become a citizen of the United States, with a proviso that if *747 the alien thus ordered to depart should prove to the satisfaction of the president, by evidence to be taken before such person or persons as he should direct, that no injury or danger to the United States would arise from suffering him to reside therein, the president might grant a license to him to remain within the United States for such time as he should judge proper, and at such place as he should designate. The act also provided that the president might require such alien to enter into a bond to the United States, in such penal sum as he might direct, with one or more sureties, to the satisfaction of the person authorized by the president to take the same, conditioned for his good behavior during his residence in the United States, and not to violate his license, which the president might revoke whenever he should think proper. The act also provided that it should be lawful for the president, whenever he deemed it necessary for the public safety, to order to be removed out of the territory of the United States any alien in prison in pursuance of the act, and to cause to be arrested, and sent out of the United States, such aliens as may have been ordered to depart, and had not obtained a license, in all cases where, in the opinion of the president, the public safety required a speedy removal, and that if any alien thus removed or sent out of the United States should voluntarily return, unless by permission of the president, such alien, being convicted thereof, should be imprisoned so long as, in the opinion of the president, the public safety might require.

The passage of this act produced great excitement throughout the country, and was severely denounced by many of its ablest statesmen and jurists as unconstitutional and barbarous, and among them may be mentioned the great names of Jefferson and Madison, who are throughout our country honored and revered for their lifelong devotion to principles of constitutional liberty. It was defended by its advocates as a war measure. John Adams, the president of the United States at the time, who approved the bill, and against whom the responsibility for its passage was charged, states in his correspondence that the bill was intended as a measure of that character. Volume 9 of his works, p. 291. The state of Virginia denounced it in severe terms. Its general assembly passed resolutions upon the act, and *748 another act of the same session of congress, known as the "Sedition Act." Upon the first —the alien act—one of the resolutions declared that it exercised a power nowhere delegated to the federal government, and which, by uniting legislative and judicial powers to those of executive, subverted the general principles of free government, as well as the particular organization and positive provisions of the federal constitution. 4 Elliot, Deb. 528. The resolutions upon both acts were transmitted to the legislatures of different states, and their communications in answer to them were referred to a committee of the general assembly of Virginia, of which Mr. Madison was a member, and upon them his celebrated report was made. With reference to the alien act, after observing that it was incumbent in this, as in every other exercise of power by the federal government, to prove from the constitution that it granted the particular power exercised, and also that much confusion and fallacy had been thrown into the question to be considered by blending the two cases of aliens, members of a hostile nation, and aliens, members of friendly nations, he said: "With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the constitution having expressly delegated to congress

the power to declare war against any nation, and, of course, to treat it and all its members as enemies. With respect to aliens who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of congress is denied to be constitutional, and it is accordingly against this act that the protest of the general assembly is expressly and exclusively directed." Id. 554.

"Were it admitted, as is contended, that the 'act concerning aliens' has for its object, not a penal, but a preventive, justice, it would still remain to be proved that it comes within the constitutional power of the federal legislature, and, if within its power, that the legislature has exercised it in a constitutional manner. * * * But it can never be admitted that the removal of aliens, authorized by *749 the act, is to be considered, not as punishment for an offense, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; * * * if a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied. And, if it be a punishment, it will remain to be inquired whether it can be constitutionally inflicted, on mere suspicion, by the single will of the executive magistrate, on persons convicted of no personal offense against the laws of the land, nor involved in any offense against the law of nations, charged on the foreign state of which they are members." 4 Elliot, Deb. 555. "It does not follow because aliens are not parties to the constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the constitution, yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage. If aliens had no rights under the constitution, they might not only be banished, but even capitally punished, without a jury, or the other incidents to a fair trial. But, so far has a contrary principle been carried, in every part of the United States, that, except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury, of which one-half may be also aliens.

"It is said, further, that, by the law and practice of nations, aliens may be removed, at discretion, for offenses against the law of nations; that congress are authorized to define and punish such offenses; and that to be dangerous to the peace of society is, in aliens, one of those offenses.

"The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offenses against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only." 4 Elliot, Deb. 556.

Massachusetts, evidently considering the alien act as a war measure, adopted in anticipation of probable hostilities, said, in answer to the resolutions of Virginia, among other things, that "the removal of aliens is the usual preliminary of hostility, and is justified by the invariable usages of nations. Actual hostility had, unhappily, been long experienced, and a formal declaration of it the government had reason daily to expect." Id. 535.

The duration of the act was limited to two years, and it has ever since been the subject of universal condemnation. In no other instance, until the law before us was passed, has any public man had the boldness to advocate the deportation of friendly aliens in time of peace. I repeat the statement that in no other instance has the deportation of friendly aliens been advocated as a lawful measure by any department of our government. And it will surprise most people to learn that any such dangerous and despotic power lies in our government,—a power which will authorize it to expel at pleasure, in time of peace, the whole body of friendly foreigners of any country domiciled herein by its permission; a power which can be brought into exercise whenever it may suit the pleasure of congress, and be enforced without regard to the guaranties of the constitution intended for the protection of the rights of all persons in their liberty and property. Is it possible that congress can, at its pleasure, in disregard of the guaranties of the constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized?

Notwithstanding the activity of the public authorities in enforcing the exclusion act of 1888, it was constantly evaded. Chinese laborers came into the country by water and by land; they came through the open ports, and by rivers reaching the seas, and they came by the way of the Canadas and Mexico. New means of ingress were discovered, and, in spite of the vigilance of the police and customs officers, great numbers clandestinely found their way into the country. Their resemblance to each other rendered

it difficult, and often impossible, to prevent this evasion of the laws. It was under these circumstances that the act of May 5, 1892, was passed. It had two objects in view. There were two classes of Chinese persons in the country,—those who had evaded the laws excluding them and entered clandestinely, and those who had entered lawfully, and resided therein under the treaty with China.

The act of 1892 extended, for the period of 10 years from its passage, all laws then in force, prohibiting and regulating the coming into the country of Chinese persons, or persons of Chinese descent; and it provided that any person, when convicted or adjudged under any of those laws of not legally being or remaining in the United States, should be removed therefrom to China, or to such other country as it might appear he was a subject of, unless such other country should demand a tax as a condition of his removal thereto, in which case he should be removed to China. The act also provided that a Chinese person arrested under its provisions, or the provisions of the acts extended, should be adjudged to be unlawfully within the United States, unless he should establish by affirmative proof his lawful right to remain within the United States, and that any Chinese person, or persons of Chinese descent, "convicted and adjudged not lawfully entitled to be or remain in the United States, should be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." With this class of Chinese, and with the provisions of law applicable to them, we have no concern in the present case. We have only to consider the provisions of the act applicable to the second class of Chinese persons,—those who had a lawful right to remain in the United States. By the additional articles to the treaty of 1858, adopted in 1868, generally called the "Burlingame Treaty," the governments of the two countries recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents;" and accordingly the treaty, in the additional articles, provided that citizens of the United States visiting or residing in China, and Chinese subjects visiting or residing in the United States, should reciprocally enjoy the same privileges, immunities, and exemptions in respect to travel or residence as should be enjoyed by citizens or subjects of the most favored nation, in the country in which they should, respectively, be visiting or residing. 16 Stat. 739, 740. The supplemental treaty of November 17, 1880, providing for the limitation or suspension of the emigration of Chinese laborers, declared that "the limitation or suspension shall be reasonable, and apply only to Chinese who may go to the United States as laborers,—other classes not being included in the limitation,"—and that "Chinese subjects, whether residing in the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who were then in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

There are many thousands of Chinese laborers who came to the country, and resided in it, under the additional articles of the treaty adopted in 1868, and were in the country at the time of the adoption of the supplemental treaty of November, 1880. To these laborers, thus lawfully within the limits of the United States, section 6 of the act of May 5, 1892, relates. That section, so far as applicable to the present cases, is as follows:

"Sec. 6. And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer within the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as hereinbefore provided, unless he shall establish clearly, to the satisfaction of the said judge, that by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted, upon his paying the cost. Should it appear that said Chinaman had procured a certificate which had been lost or destroyed, he shall be detained, and judgment suspended, a reasonable time, to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court."

The purpose of this section was to secure

the means of readily identifying the Chinese laborers present in the country, and entitled to remain, from those who may have clandestinely entered the country in violation of its laws. Those entitled to remain, by having a certificate of their identification, would enable the officers of the government to readily discover, and bring to punishment, those not entitled to enter, but who are excluded. To procure such a certificate was not a hardship to the laborers, but a means to secure full protection to them, and at the same time prevent an evasion of the law.

*754 This object being constitutional, the only question for our consideration is the lawfulness of the procedure provided for its accomplishment; and this must be tested by the provisions of the constitution and laws intended for the protection of all persons against encroachment upon their rights. Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent,—and such consent will always be implied when not expressly withheld, and, in the case of the Chinese laborers before us, was, in terms, given by the treaty referred to,—he becomes subject to all their laws, is amenable to their punishment, and entitled to their protection. Arbitrary and despotic power can no more be exercised over them, with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote, or hold any public office. As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is, in my judgment, to ignore the teachings of our history, the practice of our government, and the language of our constitution. Let us test this doctrine by an illustration: If a foreigner who resides in the country by its consent commits a public offense, is he subject to be cut down, maltreated, imprisoned, or put to death by violence, without accusation made, trial had, and judgment of an established tribunal, following the regular forms of judicial procedure? If any rule in the administration of justice is to be omitted or discarded in his case, what rule is it to be? If one rule may lawfully be laid aside in his case, another rule may also be laid aside, and all rules may be discarded. In such instances a rule of evidence may be set aside in one case, a rule of pleading in another; the testimony of eye-witnesses may be rejected, and hearsay adopted; or no evidence at all may be received, but simply an inspection of the accused, as is often the case in tribunals of Asiatic countries, where personal caprice and not settled rules prevail. That would be to establish a pure, simple, undisguised despotism and tyranny, with respect to foreigners resident in the country by its consent, and such an exercise of power is not permissible, under our constitution. Arbitrary and tyrannical power has no place in our system. As said by this court, speaking by Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U. S. 366, 369, 6 Sup. Ct. Rep. 1064: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to man the blessings of civilization under the reign of just and equal laws." What once I had occasion to say of the protection afforded by our government, I repeat: "It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them, however humble, come from what quarter it may, 'is caught upon the broad shield of our blessed constitution and our equal laws.'" Ah Kow v. Nunan, 5 Sawy. 552–563.

I utterly dissent from, and reject, the doctrine expressed in the opinion of the majority, that "congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country."[4] An arrest in that way, for that purpose, would not be a reasonable seizure of the person, within the meaning of the fourth article of the amendments of the constitution. It would be brutal and oppressive. The existence of the power thus stated is only consistent with the admission that the government is one of unlimited and despotic power, so far as aliens domiciled in the country are concerned. According to this theory, congress might have ordered executive officers to take the Chinese laborers to the ocean, and put them into a boat, and set them adrift, or to take them to the borders of Mexico, and turn them loose there, and in both cases without any means of support. Indeed, it might have sanctioned towards these laborers the most

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[4] These words were originally printed in the opinion of the court, to which the dissent was directed. In the revision of the opinion the phraseology is changed.

shocking brutality conceivable. I utterly repudiate all such notions, and reply that brutality, inhumanity, and cruelty cannot be made elements in any procedure for the enforcement of the laws of the United States.

The majority of the court have, in their opinion, made numerous citations from the courts and the utterances of individuals upon the power of the government of an independent nation to exclude foreigners from entering its limits, but none, beyond a few loose observations, as to its power to expel and deport from the country those who are domiciled therein by its consent. The citation from the opinion in the recent case of Nishimura Ekiu v. U. S., (the Japanese Case,) 142 U. S. 651, 12 Sup. Ct. Rep. 336; the citation from the opinion in Chae Chan Ping v. U. S., (the Chinese Exclusion Case,) 130 U. S. 603, 604, 606, 9 Sup. Ct. Rep. 623; the citation in the case before the judiciary committee of the privy council,—all have reference to the exclusion of foreigners from entering the country. They do not touch upon the question of deporting them from the country after they have been domiciled within it by the consent of its government, which is the real question in the case. The citation from Vattel is only as to the power of exclusion; that is, from coming into the country. The citation from Phillimore is to the same effect. As there stated, the government allowing the introduction of aliens may prescribe the conditions on which they shall be allowed to remain, the conditions being imposed whenever they enter the country. There is no dispute about the power of congress to prevent the landing of aliens in the
*757 country. The question is as to the power
* of congress to deport them, *without regard to the guaranties of the constitution. The statement that in England the power to expel aliens has always been recognized, and often exercised, and the only question that has ever been as to this power is whether it could be exercised by the king without the consent of parliament, is, I think, not strictly accurate. The citations given by Mr. Choate in his brief show conclusively, it seems to me, that deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities. But, even if that power were exercised by every government of Europe, it would have no bearing in these cases. It may be admitted that the power has been exercised by the various governments of Europe. Spain expelled the Moors; England, in the reign of Edward I., banished 15,000 Jews;[1] and Louis XIV., in 1685, by revoking the edict of Nantes, which gave religious liberty to Protestants in France, drove out the Huguenots. Nor does such severity of European governments belong only to the distant past. Within three years, Russia has banished many thousands of Jews, and apparently intends the expulsion of the whole race,—an act of barbarity which has aroused the indignation of all Christendom. Such was the feeling in this country that, friendly as our relations with Russia had always been, President Harrison felt compelled to call the attention of congress to it in his message in 1891, as a fit subject for national remonstrance. Indeed, all the instances mentioned have been condemned for their barbarity and cruelty, and no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the constitution.

The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty. There is a great deal of confusion in the use of the word "sov-
*758 eignty" * by law writers. Sovereignty or
* supreme power is in this country vested in the people, and only in the people. By them certain sovereign powers have been delegated to the government of the United States, and other sovereign powers reserved to the states or to themselves. This is not a matter of inference and argument, but is the express declaration of the tenth amendment to the constitution, passed to avoid any misinterpretation of the powers of the general government. That amendment declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." When, therefore, power is exercised by congress, authority for it must be found in express terms in the constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.

It will be seen by its provisions that the sixth section recognizes the right of certain Chinese laborers to remain in the United States, but to render null that right it declares that if, within one year after the passage of the act, any Chinese laborer shall have neglected, failed, or refused to comply with the provisions of the act to obtain a certificate of residence, or shall be found within the jurisdiction of the United States without a certificate of residence, he shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, unless he

[1] The Jews during his reign were cruelly despoiled, and in 1290 ordered, under penalty of death, to quit England forever, before a certain day. 6 Amer. & Eng. Enc. Law, p. 434.

shall establish clearly, to the satisfaction of the judge, that by reason of accident, sickness, or other unavoidable cause, he has been unable to secure his certificate, and to the satisfaction of the judge, by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act. His deportation is thus imposed for neglect to obtain a certificate of residence, from which he can only escape by showing his inability to secure it from *759 one of the causes named. That is the punishment for his neglect, and that, being of an infamous character, can only be imposed after indictment, trial, and conviction. If applied to a citizen, none of the justices of this court would hesitate a moment to pronounce it illegal. Had the punishment been a fine, or anything else than of an infamous character, it might have been imposed without indictment; but not so now, unless we hold that a foreigner from a country at peace with us, though domiciled by the consent of our government, is withdrawn from all the guaranties of due process of law prescribed by the constitution, when charged with an offense to which the grave punishment designated is affixed.

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family, and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business. Mr. Madison well pictures its character in his powerful denunciation of the alien law of 1798, in his celebrated report upon the resolutions, from which we have cited, and concludes, as we have seen, that if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Again, when taken before a United States judge, he is required, in order to avoid the doom declared, to establish clearly, to the satisfaction of the judge, that by reason of accident, sickness, or other unavoidable cause he was unable to secure his certificate, and that he was a resident of the United States at the time, by at least one credible white witness. Here the government undertakes to exact of the party arrested the testimony of a witness of a particular color, though conclusive and incontestable testimony from *760 others may be adduced. The law might as well have said that unless the laborer should also present a particular person as a witness, who could not be produced, from sickness, absence, or other cause, such as the archbishop of the state, to establish the fact of residence, he should be held to be unlawfully within the United States.

There are numerous other objections to the provisions of the act under consideration. Every step in the procedure provided, as truly said by counsel, tramples upon some constitutional right. Grossly it violates the fourth amendment, which declares that "the right of the people to be secure in their persons * * * against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the * * * persons * * * to be seized."

The act provides for the seizure of the person without oath or affirmation or warrant, and without showing any probable cause by the officials mentioned. The arrest, as observed by counsel, involves a search of his person for the certificate which he is required to have always with him. Who will have the hardihood and effrontery to say that this is not an "unreasonable search and seizure of the person?" Until now it has never been asserted by any court or judge of high authority that foreigners domiciled in this country by the consent of our government could be deprived of the securities of this amendment; that their persons could be subjected to unreasonable searches and seizures, and that they could be arrested without warrant upon probable cause, supported by oath or affirmation.

I will not pursue the subject further. The decision of the court, and the sanction it would give to legislation depriving resident aliens of the guaranties of the constitution, fill me with apprehensions. Those guaranties are of priceless value to every one resident in the country, whether citizen or alien. I cannot but regard the decision as a blow against constitutional liberty, when it declares that congress has the right to disregard the guaranties of the constitution intended for the protection of all men domiciled in the country with the consent of the government, in their rights of person and *761 property. How far will its legislation go? The unnaturalized resident feels it to-day, but if congress can disregard the guaranties with respect to any one domiciled in the country with its consent, it may disregard the guaranties with respect to naturalized citizens. What assurance have we that it may not declare that naturalized citizens of a particular country cannot remain in the United States after a certain day, unless they have in their possession a certificate that they are of good moral character, and attached to the principles of our constitution, which certificate they must obtain from a collector of internal revenue upon the testimony of at least one competent witness of a class or nationality to be designated by the government?

What answer could the naturalized citizen in that case make to his arrest for deportation, which cannot be urged in behalf of the Chinese laborers of to-day?

I am of the opinion that the orders of the court below should be reversed, and the petitioners should be discharged.

Mr. Chief Justice FULLER, dissenting.

I also dissent from the opinion and judgment of the court in these cases.

If the protection of the constitution extends to Chinese laborers who are lawfully within, and entitled to remain in, the United States, under previous treaties and laws, then the question whether this act of congress, so far as it relates to them, is in conflict with that instrument, is a judicial question, and its determination belongs to the judicial department.

However reluctant courts may be to pass upon the constitutionality of legislative acts, it is of the very essence of judicial duty to do so, when the discharge of that duty is properly invoked.

I entertain no doubt that the provisions of the fifth and fourteenth amendments, which forbid that any person shall be deprived of life, liberty, or property without due process of law, are, in the language of Mr. Justice Matthews, already quoted by my Brother Brewer, "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality;" and although in Yick Wo's Case, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, only the validity of a municipal ordinance was involved, the rule laid down as much applies to congress, under the fifth amendment, as to the states, under the fourteenth. The right to remain in the United States, in the enjoyment of all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation, is a valuable right, and certainly a right which cannot be taken away without taking away the liberty of its possessor. This cannot be done by mere legislation.

The argument is that friendly aliens, who have lawfully acquired a domicile in this country, are entitled to avail themselves of the safeguards of the constitution only while permitted to remain, and that the power to expel them, and the manner of its exercise, are unaffected by that instrument. It is difficult to see how this can be so, in view of the operation of the power upon the existing rights of individuals; and to say that the residence of the alien, when invited and secured by treaties and laws, is held in subordination to the exertion against him, as an alien, of the absolute and unqualified power asserted, is to import a condition not recognized by the fundamental law. Conceding that the exercise of the power to exclude is committed to the political department, and that the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel, the manner in which the right to remain may be terminated, rests on different ground, since limitations exist or are imposed upon the deprivation of that which has been lawfully acquired. And while the general government is invested, in respect of foreign countries and their subjects or citizens, with the powers necessary to the maintenance of its absolute independence and security throughout its entire territory, it cannot, in virtue of any delegated power, or power implied therefrom, or of a supposed inherent sovereignty, arbitrarily deal with persons lawfully within the peace of its dominion. But the act before us is not an act to abrogate or repeal treaties or laws in respect of Chinese laborers entitled to remain in the United States, or to expel them from the country, and no such intent can be imputed to congress. As to them, registration for the purpose of identification is required, and the deportation denounced for failure to do so is by way of punishment to coerce compliance with that requisition. No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial. It is, in effect, a legislative sentence of banishment, and, as such, absolutely void. Moreover, it contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written constitution by which that government was created, and those principles secured.

(149 U. S. 662)

CURTNER et al. v. UNITED STATES.

(May 15, 1893.)

No. 258.

PUBLIC LANDS—RAILROAD GRANTS — LISTINGS TO STATE—CANCELLATION—LIMITATIONS—LACHES.

Certain lands granted to a railroad company were erroneously listed to a state as indemnity school selections, and by it patented to private persons. Discovering its mistake, the land department refused to issue patents to the railroad company, until the erroneous listings were canceled. The company constantly urged upon the department the duty of obtaining the cancellation of such listings and patents, but the government delayed beyond the period of the state statute of limitations. *Held*, that the government's obligation to make patents to the railroad company constituted a sufficient interest to warrant it in maintaining a suit for that purpose, and that the railroad company's continuous claims upon the department prevented the running of the statute or the accrual of laches as against it. Per Mr. Justice Field, dissenting.

For majority opinion, see 13 Sup. Ct. Rep. 985.

*677 *Mr. Justice FIELD, dissenting.

I am not able to agree with the majority of the court in their decision of this case. The lands in controversy fall within the limits of the grant to the Central Pacific Railroad Company, but by mistake and inadvertence of the land department they were listed to the state of California. Discovering its mistake, the department refused to issue to the company a patent for the lands to which it was entitled until the erroneous listing to the state was set aside and annulled. The present bill was filed by the attorney general for that purpose, and because of this proceeding, and the delay of the company in waiting on its issue, instead of taking steps to enforce its rights at law for the lands, this court now holds that it has lost the right to them; and that, as the United States have no interest in the property, except to clear it of the cloud of the listings wrongly made, they cannot maintain the suit. The result, which produces simple injustice to the railroad company without wrong on its part, ought not, in my judgment, to be upheld.

*678 *In U. S. v. Hughes, 11 How. 568, a patent had been issued by mistake to Hughes in disregard of the prior rights of one Goodbee and of parties deriving title under him. The United States filed an information in the nature of a bill in equity against Hughes for the repeal and surrender of his patent, on the ground that its existence impaired the ability of the government to fulfill its engagements to Goodbee. The case was before this court originally on demurrer, and it was held that the court had jurisdiction to annul the patent thus improvidently issued. When here a second time, (4 Wall. 232,) the court, reaffirming its first decision, said: "When this case was here on demurrer the patent was considered by the court to be a valid instrument, conveying the fee of the United States, and, until annulled, as rendering them incapable of complying with their engagement to Goodbee or his alienees. Whether regarded in that aspect, or as a void instrument, issued without authority, it prima facie passed the title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of congress. The power of a court of equity by its decree to vacate and annul the patent, under the circumstances of this case, is undoubted. Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisprudence."

Upon this doctrine the court below proceeded in this case, in order that the government might discharge its obligation to the railroad company. It is a case where the government admits the error of its officers of the land department, acknowledges its obligation to correct it, and seeks to remove from its records the inadvertent and erroneous certification to the state of the lands, so that it may be able to issue a clear title to the railroad company, the right of that company having been finally determined, and thus carry out the pledge of its grant.

There was at no time an admission by the railroad company* of the correctness of the original action of the land department, or any acquiescence therein, but, insisting always upon the error of its proceedings, the company urged upon the department to correct them, and issue to it the patent which the law authorized.

The case is not, in my judgment, within the doctrine of U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. Rep. 1083, which would exclude the interference of the United States, but is within the doctrine which there recognizes and upholds it. In that case the original claimant had rested on the action of the land department, and sought the assistance of the United States only after the lapse of nearly half a century, and it was held that the interference of the government, after such a lapse of time, was simply a proceeding to avoid the laches of the claimant, and to give to him the benefit of its exemption from them. But it declared that a suit of the United States would lie to set aside a patent where the government was under an obligation respecting the relief invoked. In this case the railroad company has not remained inactive, but, upon a decision in its favor by the department, asked for its promised patent, which was only withheld because of the previous inadvertent and mistaken action of the government's officers in issuing a certificate to the state. In such circumstances the government, it seems to me, ought not to be debarred the right to correct the mistake of its officers, by which alone the intention of the law was defeated. I think the decree below should be affirmed.

THE ALTENOWER v. CHURCHILL et al.

(July 14, 1892.)

No. 114.

Appeal from the circuit court of the United States for the eastern district of Louisiana.

J. P. Hornor, for appellant. J. McConnell, for appellees.

No opinion. Dismissed, pursuant to the twenty-eighth rule.

In re AMERICAN CONSTRUCTION CO.

(April 3, 1893.)

No. 15.

Petition for writ of mandamus or certiorari.

William B. Hornblower, William Pennington, and E. Stevenson, for petitioner. John G. Johnson, C. M. Cooper, J. C. Cooper, and Thomas Thacher, for respondent.

No opinion. Petition dismissed, on motion of William A. Hornblower, for petitioner.

AMOSKEAG NAT. BANK et al. v. FAIRBANKS.

(December 20, 1892.)

No. 209.

Appeal from the circuit court of the United States for the district of New Hampshire. See 53 Fed. Rep. 341.

T. L. Livermore and F. P. Fish, for appellants H. G. Wood, for appellee.

No opinion. Decree reversed, with costs, per stipulation, and cause remanded for further proceedings in conformity with law.

BACKER v. MEYER et ux.

(April 11, 1893.)

No. 306.

Appeal from the circuit court of the United States for the eastern district of Arkansas. See 43 Fed. Rep. 702.

Morris M. Cohn, for appellant. John S. Duffie, for appellees.

No opinion. Dismissed, per stipulation.

BERRETT et al. v. MIDDLETON et al.

(October 11, 1892.)

No. 1,201.

Appeal from the supreme court of the District of Columbia.

No opinion. Docketed and dismissed, with costs, on motion of John Ridout, for appellees.

BILLINGS et al. v. ASPEN MINING & SMELTING CO. et al.

(November 28, 1892.)

No. 1,218.

Petition for a writ of certiorari to the United States circuit court of appeals for the eighth circuit. See 53 Fed. Rep. 561.

Calderon Carlisle, for petitioners. T. A. Green, for respondent Billings and others.

No opinion. Petition denied.

BLACKBURN et al. v. OSBORNE.

(December 5, 1892.)

No. 672.

Error to the supreme court of the state of Wisconsin. See 47 N. W. Rep. 175.

Fayette Marsh, for plaintiffs in error. A. T. Britton and A. B. Browne, for defendant in error.

No opinion. Dismissed, with costs, per stipulation, on motion of A. B. Browne, for defendant in error.

BOSTON SAFE-DEPOSIT & TRUST CO. v. CITY OF GRAND HAVEN.

(January 18, 1893.)

No. 113.

Appeal from the circuit court of the United States for the western district of Michigan.

Andrew Howell, for appellant. L. D. Norris and Mark Norris, for appellee.

No opinion. Decree affirmed, with costs, by consent.

BRACKENRIDGE v. LANSING.

(January 17, 1893.)

No. 313.

Error to the circuit court of the United States for the southern district of New York.

T. G. Shearman, for plaintiff in error.

No opinion. Dismissed, with costs, on authority of counsel for plaintiff in error.

BROWN et al. v. BEALE et al.

(December 7, 1892.)

No. 90.

Error to the supreme court of the District of Columbia.

Henry Wise Garnett and Conway Robinson, Jr., for plaintiffs in error. Walter D. Davidge, for defendants in error.

No opinion. Judgment affirmed, with costs, per stipulation, on motion of Mr. Walter D. Davidge, for defendants in error.

BRUNER v. SHANNON.

(January 3, 1893.)

No. 97.

Appeal from the circuit court of the United States for the eastern district of Missouri. 33 Fed. Rep. 289, affirmed.

F. N. Judson and George H. Knight, for appellant. U. M. Young, for appellee.

No opinion. Decree affirmed, with costs, by a divided court.

BRUSH et al. v. OWEN et al.

(December 6, 1892.)

No. 86.

Appeal from the circuit court of the United States for the district of Indiana.

M. D. Leggett, L. L. Leggett, and H. A. Seymour, for appellants. R. S. Taylor, for appellees.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

BURTON v. WITTERS.

(October 24, 1892.)

No. 593.

Appeal from the circuit court of the United States for the district of Vermont.

Albert P. Cross and Kitredge Haskins, for appellant. C. W. Witters, for appellee.

No opinion. Dismissed, per stipulation.

BYERS v. COLEMAN et al.

(November 30, 1892.)

No. 808.

Appeal from the circuit court of the United States for the southern district of New York. See 46 Fed. Rep. 224.

James C. Carter, for appellant. David J. Dean, for appellees.

No opinion. Dismissed, per stipulation.

CAMPBELL v. O'NEILL. SAME v. QUIGLEY. SAME v. HOFFMAN. SAME v. OLIVER. SAME v. BEATTIE. SAME v. SANDERS. SAME v. GRIMKE. SAME v. OLIVER. SAME v. REHKOPF. SAME v. PETERSON. SAME v. DOTHAGE. SAME v. LAFFAN.

(November 11, 1892.)

Nos. 1,220–1,231.

Error to the court of common pleas of Charleston county, S. C.

No opinion. Docketed and dismissed, with costs, on motion of A. G. Riddle, for defendants in error.

CAMPBELL et al. v. QUIGLEY.

(January 13, 1893.)

No. 1,148.

Error to the court of common pleas of Charleston county, S. C.

William E. Earle, for plaintiffs in error. Samuel W. Melton, for defendant in error.

No opinion. Dismissed, with costs, on motion of William E. Earle, for plaintiffs in error.

CAMPBELL et al. v. WHALEY.

(January 13, 1893.)

No. 1,209.

Error to the court of common pleas of Charleston county, S. C.

William E. Earle, for plaintiffs in error. Samuel W. Melton, for defendant in error.

No opinion. Dismissed, with costs, on motion of William E. Earle, for plaintiffs in error.

CASADO v. SCHELL'S EX'RS.

(December 22, 1892.)

No. 165.

Error to the circuit court of the United States for the southern district of New York. See 33 Fed. Rep. 336.

A. W. Griswold, for plaintiff in error. The Attorney General, for defendants in error.

No opinion. Dismissed, with costs, on motion of Frederic D. McKenny, in behalf of counsel for plaintiff in error.

CHENEY v. COLEMAN et al.

(November 30, 1892.)

No. 810.

Appeal from the circuit court of the United States for the southern district of New York. See 46 Fed. Rep. 224.

James C. Carter, for appellant. David J. Dean, for appellees.

No opinion. Dismissed, per stipulation.

CHICAGO CITY RY. CO. v. NOYES.

(April 25, 1893.)

No. 266.

Error to the circuit court of the United States for the northern district of Illinois.

R. A. Burton and W. J. Haynes, for plaintiff in error.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

CHICAGO, M. & ST. P. RY. CO. v. McGUIRE.

(August 2, 1892.)

No. 69.

Error to the circuit court of the United States for the district of Minnesota. See 37 Fed. Rep. 54.

C. E. Flandrau and J. W. Cary, for plaintiff in error. Aaron B. Jackson, for defendant in error.

No opinion. Dismissed, pursuant to the twenty-eighth rule.

CITY OF AUGUSTA v. JONES et al.

(April 21, 1893.)

No. 147.

Appeal from the circuit court of the United States for the southern district of New York.

J. A. Beall and John W. Weed, for appellant. Joseph H. Choate, for appellees.

No opinion. Dismissed, per stipulation, on motion of Charles C. Beaman, for appellees.

CITY OF RICHMOND et al. v. FIRST NAT. BANK.

(November 30, 1892.)

No. 74.

Appeal from the circuit court of the United States for the eastern district of Virginia.

C. V. Meredith, for appellants.

No opinion. Dismissed, with costs, on authority of counsel for appellants.

CITY OF ST. LOUIS v. KING IRON BRIDGE & MANUF'G CO.

(December 16, 1892.)

No. 657.

Error to the circuit court of the United States for the eastern district of Missouri. See 43 Fed. Rep. 768.

Leverett Bell and W. C. Marshall, for plaintiff in error.

No opinion. Dismissed, with costs, on motion of W. C. Marshall, for plaintiff in error.

CLARK v. FARIS.

(January 3, 1893.)

No. 292.

Appeal from the circuit court of the United States for the western district of Virginia.

Richard C. Dale, for appellant.

No opinion. Dismissed, with costs, on authority of counsel for appellant.

CLARK et al. v. MILLER.

(December 8, 1892.)

No. 1,216.

Appeal from the circuit court of the United States for the district of Connecticut. See 52 Fed. Rep. 900.

W. B. Stoddard, for appellants.

No opinion. Dismissed, with costs, on authority of counsel for appellants.

COFFIN et al. v. DAY et al.

(April 21, 1893.)

No. 249.

Appeal from the circuit court of the United States for the northern district of Illinois. See 34 Fed. Rep. 687.

J. M. Flower, for appellants. H. B. Hopkins, for appellees.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

CONSOLIDATED ELECTRIC LIGHT CO. v. WOOD, (two cases.)

(June 28, 1892.)

Nos. 120, 121.

Error to the circuit court of the United States for the eastern district of New York. See 36 Fed. Rep. 538.

C. C. Bull, for plaintiff in error. H. G. Ward, for defendant in error.

No opinion. Dismissed, pursuant to the twenty-eighth rule.

CONTINENTAL STEAMBOAT CO. v. BURKE.

(February 6, 1893.)

No. 122.

Error to the circuit court of the United States for the district of Rhode Island.

William G. Roelker, for plaintiff in error. Martin F. Morris, for defendant in error.

No opinion. Judgment affirmed, with costs and interest, by a divided court.

COSSITT v. HANCOCK.

(October 17, 1892.)

No. 631.

Appeal from the circuit court of the United States for the western district of Tennessee. See 45 Fed. Rep. 754.

David B. Lyman, for appellant.

No opinion. Dismissed, with costs, on motion of counsel for appellant.

CRAIG et al. v. WARNER.

(June 24, 1892.)

No. 12.

Error to the supreme court of the District of Columbia.

Martin F. Morris, for plaintiffs in error. Calderon Carlisle, for defendant in error.

No opinion. Dismissed, pursuant to the twenty-eighth rule.

CRISSEY v. COLEMAN et al.

(November 30, 1892.)

No. 809.

Appeal from the circuit court of the United States for the southern district of New York. See 46 Fed. Rep. 224.

James C. Carter, for appellant. David J. Dean, for appellees.

No opinion. Dismissed, per stipulation.

CUNARD STEAMSHIP CO., Limited, v. FABRE.

(November 28, 1892.)

No. 1,237.

Petition for a writ of certiorari to the circuit court of appeals of the United States for the second circuit. See decision of circuit court of appeals, 3 C. C. A. —, 1 U. S. App. 614, and 53 Fed. Rep. 288.

Robert D. Benedict, for petitioner.

No opinion. Granted.

CUSHING et al. v. BATELLE.

(April 27, 1893.)

No. 1,183.

Appeal from the supreme court of the District of Columbia.

J. F. Farnsworth, for appellants.

No opinion. Dismissed, with costs, on authority of counsel for appellants.

De MARTIN v. PHELAN et al.

(May 1, 1893.)

No. 1,333.

Petition for a writ of certiorari to the United States circuit court of appeals for the ninth circuit. See 51 Fed. Rep. 865.

George D. Collins, for petitioner De Martin, in support of petition. W. A. Day and W. P. Montague, for Phelan and others, respondents.

No opinion. Petition denied.

DESFORGES v. MECHANICS' NAT. BANK OF PITTSBURG.

(June 27, 1892.)

No. 158.

Error to the circuit court of the United States for the eastern district of Louisiana.

Charles W. Hornor and George A. King, for plaintiff in error. J. D. Rouse and William Grant, for defendant in error.

No opinion. Dismissed, pursuant to the twenty-eighth rule.

DICK et al. v. HUBEL.

(April 12, 1893.)

No. 218.

Appeal from the circuit court of the United States for the eastern district of New York. See 35 Fed. Rep. 414.

A. G. N. Vermilya, for appellants.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

DONNELLY v. DOUGLASS et al.

(March 7, 1893.)

No. 1,019.

Appeal from the supreme court of the District of Columbia.

West Steever, for appellant. George C. Hazelton and S. T. Thomas, for appellees.

No opinion. Dismissed, with costs, per stipulation.

DOWLING v. NATIONAL BANK OF AMERICA.

(November 23, 1892.)

No. 65.

Error to the circuit court of the United States for the western district of Michigan.

Michael Brown, for plaintiff in error. Willard Kingsley, for defendant in error.

No opinion. Judgment reversed, with costs, per stipulation, and cause remanded for a new trial.

EASTERN TOWNSHIPS' BANK v. ST. JOHNSBURY & L. C. R. CO.

(June 13, 1892.)

No. 439.

Error to the circuit court of the United States for the district of Vermont. See 40 Fed. Rep. 423.

A. P. Cross, for plaintiff in error. S. C. Shurtleff, for defendant in error.

No opinion. Dismissed, pursuant to the twenty-eighth rule.

EAST TENNESSEE, V. & G. R. CO. v. McKENNY.

(March 24, 1893.)

No. 174.

Error to the supreme court of the state of Tennessee. See 1 S. W. Rep. 500.

E. M. Johnson and William M. Baxter, for plaintiff in error. H. H. Ingersoll, for defendant in error.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

EDISON et al. v. KLABER.

(October 24, 1892.)

No. 222.

Appeal from the circuit court of the United States for the southern district of New York. See 38 Fed. Rep. 744.

Richard N. Dyer, for appellants.

No opinion. Dismissed, with costs, on motion of counsel for appellants.

ERIN STAVE & LUMBER CO. v. FALLS CITY BANK.

(March 7, 1893.)

No. 573.

Error to the circuit court of the United States for the middle district of Tennessee.

Eppa Hunton, for plaintiffs in error.

No opinion. Dismissed, with costs, on authority of counsel for plaintiffs in error.

EUREKA & P. R. CO. v. UNITED STATES.

(October 11, 1892.)

No. 437.

Error to the circuit court of the United States for the district of Nevada. See 40 Fed. Rep. 419.

Thomas Wren, for plaintiff in error. The Attorney General, for defendant in error.

No opinion. Dismissed, per stipulation, on motion of the solicitor general, for defendant in error.

FARREL v. NATIONAL SHOE & LEATHER BANK.

(May 15, 1893.)

No. 590.

Error to the circuit court of the United States for the district of Connecticut. See 43 Fed. Rep. 123.

S. W. Kellogg, for plaintiff in error. George C. Lay, for defendant in error.

No opinion. Dismissed, per stipulation.

FORT PAYNE COAL & IRON CO. v. SAYLES.

(March 20, 1893.)

No. 1,304.

Petition for a writ of certiorari to the United States circuit court of appeals for the fifth circuit.

J. A. W. Smith, for petitioner. James Norfleet, for respondent.

No opinion. Petition denied.

FRENCH et al. v. STATE OF NORTH CAROLINA.

(April 7, 1893.)

No. 1,028.

Error to the supreme court of the state of North Carolina. See 14 S. E. Rep. 383.

Samuel F. Phillips and Frederic D. McKenny, for plaintiffs in error. Theodore F. Davidson, for defendant in error.

No opinion. Dismissed, with costs, on motion of Samuel F. Phillips, for plaintiffs in error.

FULLER v. AMERICAN EMIGRANT CO.

(April 14, 1893.)

No. 1,192.

Error to the supreme court of the state of Iowa. See 50 N. W. Rep. 48.

Charles A. Clark, for plaintiff in error. Frederic D. McKenny, for defendant in error.

No opinion. Dismissed, with costs, per stipulation, on motion of Frederic D. McKenny, for defendant in error.

In re GARDINER et al.

(May 10, 1893.)

No. 1,340.

Petition for a writ of certiorari to the United States circuit court of appeals for the second circuit. See 53 Fed. Rep. 1013.

Edwin B. Smith, for Gardiner & Bro., for petitioner.

No opinion. Petition denied.

GARDNER et al. v. STATE OF PENNSYLVANIA.

(January 23, 1893.)

No. 339.

Error to the supreme court of the state of Pennsylvania.

John B. Hinkson, for plaintiffs in error.

No opinion. Dismissed, with costs, on authority of counsel for plaintiffs in error.

GEORGIA INFIRMARY FOR RELIEF & PROTECTION OF AGED & AFFLICTED NEGROES v. JONES.

(April 21, 1893.)

No. 146.

Appeal from the circuit court of the United States for the southern district of New York.

J. A. Beall and John W. Weed, for appellant. Joseph H. Choate, for appellees.

No opinion. Dismissed, per stipulation, on motion of Charles C. Beaman, for appellees.

GIOZZA v. TIERNAN.

(March 28, 1893.)

No. 189.

Appeal from the circuit court of the United States for the eastern district of Texas.

J. M. Burroughs, for appellant. J. S. Hogg, for appellee.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

GREGORY et al. v. BRANSFORD.

(January 30, 1893.)

No. 875.

Error to the corporation court of Lynchburg, Va.

W. W. Larkin, for plaintiffs in error. R. Taylor Scott, for defendant in error.

No opinion. Dismissed, with costs, by consent of counsel for plaintiffs in error, on motion of R. Taylor Scott, for defendant in error.

HAGEDON v. SEEBERGER.

(February 6, 1893.)

No. 60.

Error to the circuit court of the United States for the northern district of Illinois. See 38 Fed. Rep. 401.

P. L. Shuman and Henry E. Tremain, for plaintiff in error. The Attorney General, for defendant in error.

No opinion. Dismissed, with costs, on motion of Henry E. Tremain, for plaintiff in error.

HANCOCK INSPIRATOR CO. v. REGESTER et al.

(November 8, 1892.)

No. 46.

Appeal from the circuit court of the United States for the district of Maryland. See 35 Fed. Rep. 61.

Chauncey Smith and E. P. Howe, for appellant. H. T. Fenton, for appellees.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

HARVEY et al. v. TELEGRAPH PRINTING CO.

(April 24, 1893.)

No. 959.

Error to the circuit court of the United States for the southern district of Georgia.

Walter B. Hill, for plaintiffs in error.

No opinion. Dismissed, with costs, on motion of counsel for plaintiffs in error.

HILL et al. v. GORDON et al.

(March 8, 1893.)

No. 703.

Appeal from the circuit court of the United States for the northern district of Florida. See 45 Fed. Rep. 276.

John C. Cooper and W. W. Hampton, for appellants. S. Y. Finley, for appellees.

No opinion. Dismissed, per stipulation.

HOEFINGHOFF v. EDWARDS.

(January 3, 1893.)

No. 256.

Error to the circuit court of the United States for the southern district of Ohio. See 38 Fed. Rep. 635.

Charles H. Stephens and T. D. Lincoln, for plaintiff in error. J. W. Warrington and L. H. Bisbee, for defendant in error.

No opinion. Dismissed, per stipulation.

HOEY et al. v. COLEMAN et al.

(May 1, 1893.)

No. 778.

Appeal from the circuit court of the United States for the southern district of New York. See 46 Fed. Rep. 221.

Clarence A. Seward, for appellants. David J. Dean, for appellees.

No opinion. Dismissed, per stipulation, on motion of J. Hubley Ashton, in behalf of counsel.

HOHENSTEIN v. HEDDEN.

(March 13, 1893.)

No. 136.

Error to the circuit court of the United States for the southern district of New York. See 38 Fed. Rep. 94.

Edwin B. Smith, S. G. Clarke, and Charles Curie, for plaintiff in error. The Attorney General, for defendant in error.

No opinion. Judgment reversed, with costs, upon confession of error by Assistant Attorney General Maury, for defendant in error; this judgment to be entered nunc pro tunc as of January 3, 1893.

HOWARD et al. v. ROBINSON et al.

(April 25, 1893.)

No. 267.

Appeal from the circuit court of the United States for the district of Colorado.

Thomas G. Putnam and S. E. Browne, for appellants. Charles S. Thomas and C. C. Parsons, for appellees.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

HUGHES v. ROBSON.

(January 11, 1893.)

No. 399.

Error to the circuit court of the United States for the northern district of Texas.

J. W. Brown, for plaintiff in error. J. M. McCormick, for defendant in error.

No opinion. Dismissed, per stipulation.

ISAACS v. UNITED STATES.

(March 14, 1893.)

No. 141.

Error to the circuit court of the United States for the eastern district of Louisiana.

J. R. Beckwith, Charles Curie, W. Wickham Smith, and D. Ives Mackie, for plaintiff in error. The Attorney General, for defendant in error.

No opinion. Dismissed, on motion of Wickham Smith, for plaintiff in error.

JOHNSON v. COWLING et al.

(April 17, 1893.)

No. 226.

Error to the supreme court of the District of Columbia.

J. D. Coughlan, for plaintiff in error.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

JONES v. BAER, SEASONGOOD & CO.

(April 17, 1893.)

No. 220.

Error to the United States court for the Indian Territory.

A. H. Garland and H. J. May, for plaintiff in error. D. Goldsmith, L. P. Sandels, and W. T. Hutchings, for defendants in error.

No opinion. Judgment affirmed, with costs and interest, by a divided court.

JONES et al. v. CUNNINGHAM et al.

(October 24, 1892.)

No. 16.

Appeal from the circuit court of the United States for the southern district of Georgia.

George A. Mercer, for appellants. R. G. Erwin, for appellees.

No opinion. Dismissed, with costs, per stipulation.

KENGLA v. OFFUTT.

(May 15, 1893.)

No. 1,143.

Error to the supreme court of the District of Columbia.

William A. Cook, for plaintiff in error. Hugh T. Taggart, for defendant in error.

No opinion. Dismissed, with costs of printing the record and clerk's costs in this court to be paid by defendant in error, per stipulation of counsel.

KENTUCKY & I. BRIDGE CO. v. LOUISVILLE & N. R. CO.

(March 30, 1893.)

No. 204.

Appeal from the circuit court of the United States for the district of Kentucky. See 37 Fed. Rep. 567.

Thomas W. Bullitt, for appellant. Ed. Baxter, for appellee.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

KNAPP et al. v. GARRISON et al., (two cases.)

(January 19, 1893.)

Nos. 118, 119.

Error to the circuit court of the United States for the district of Nevada.

H. F. Bartine, for plaintiffs in error.

No opinion. Dismissed, with costs, on authority of counsel for plaintiffs in error.

KNEELAND v. SALLING.

(April 25, 1893.)

No. 268.

Error to the circuit court of the United States for the western district of Michigan.

N. W. Bliss, for plaintiff in error.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

LANGDON v. RANNEY et al.

(April 5, 1893.)

No. 197.

Appeal from the circuit court of the United States for the district of Minnesota.

S. S. Burdett, for appellant. C. W. Bunn, for appellees.

No opinion. Dismissed, with costs, pursuant to sixteenth rule.

LAPHAM-DODGE CO. v. SEVERIN et al.

(February 6, 1893.)

No. 848.

Appeal from the circuit court of the United States for the district of Indiana. See 40 Fed. Rep. 762.

James Lawrence, for appellant. George H. Lothrop, for appellees.

No opinion. Dismissed, with costs, on authority of counsel for appellant.

LARKIN v. BRANSFORD.

(January 30, 1893.)

No. 1,093.

Error to the circuit court of Lynchburg, Va.

W. W. Larkin, for plaintiff in error. R. Taylor Scott, for defendant in error.

No opinion. Dismissed, with costs, by consent of counsel for plaintiff in error, on motion of R. Taylor Scott, for defendant in error.

LAWSON et al. v. BRANSFORD.

(January 30, 1893.)

No. 876.

Error to the corporation court of Lynchburg, Va.

W. W. Larkin, for plaintiffs in error. R. Taylor Scott, for defendant in error.

No opinion. Dismissed, with costs, by consent of counsel for plaintiffs in error, on motion of R. Taylor Scott, for defendant in error.

LEGG v. HEDDEN.

(November 14, 1892.)

No. 50.

Error to the circuit court of the United States for the southern district of New York. See 37 Fed. Rep. 861.

S. G. Clarke, E. B. Smith, and Charles Curie, for plaintiff in error. The Attorney General, for defendant in error.

No opinion. Judgment reversed, with costs, and cause remanded, with directions to grant a new trial, on motion of the solicitor general, who confessed error on behalf of the defendant in error.

LINCOLN RAPID TRANSIT CO v. RUNDEL.

(December 8, 1892.)

No. 1,127.

Error to the supreme court of the state of Nebraska. See 52 N. W. Rep. 563.

L. C. Burr, for plaintiff in error. T. M. Marquett, for defendant in error.

No opinion. Dismissed, with costs, per stipulation.

LITCHFORD et al. v. DAY.

(January 30, 1893.)

No. 877.

Error to the corporation court of Lynchburg, Va.

W. W. Larkin, for plaintiffs in error. R. Taylor Scott, for defendant in error.

No opinion. Dismissed, with costs, by consent of counsel for plaintiffs in error, on motion of R. Taylor Scott, for defendant in error.

LITTLE ROCK & M. R. CO. v. ST. LOUIS, I. M. & S. RY. CO.

(March 8, 1893.)

No. 329.

Appeal from the circuit court of the United States for the eastern district of Arkansas. See 41 Fed. Rep. 559.

U. M. Rose and G. B. Rose, for appellant. John F. Dillon and Winslow S. Pierce, for appellee.

No opinion. Dismissed, with costs, on motion of counsel for appellant.

LOCKE v. SMITH et al.

(April 24, 1893.)

No. 252.

Appeal from the circuit court of the United States for the district of Massachusetts. See 36 Fed. Rep. 310.

J. E. Maynadier, for appellant. John L. S. Roberts and T. W. Porter, for appellees.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

LOTTIMER et al. v. MAXWELL et al.

(December 22, 1892.)

No. 271.

Error to the circuit court of the United States for the southern district of New York.

A. W. Griswold, for plaintiffs in error. The Attorney General, for defendants in error.

No opinion. Dismissed, with costs, on motion of Frederic D. McKenney, in behalf of counsel for plaintiffs in error.

LOUISVILLE BOARD OF TRADE v. LOUISVILLE.

(December 19, 1892.)

No. 709.

Error to the court of appeals of the state of Kentucky. See 14 S. W. Rep. 408.

Alexander Pope Humphrey and George M. Davie, for plaintiff in error.

No opinion. Dismissed, with costs, on authority of counsel for plaintiff in error.

LOUISVILLE & N. R. CO. v. LOUISVILLE BRIDGE CO.

(April 3, 1893.)

No. 205.

Appeal from the circuit court of the United States for the district of Kentucky.

Walter Evans, for appellant.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

MASON et al. v. SPRY LUMBER CO.

(March 7, 1893.)

No. 303.

Error to the supreme court of the state of Michigan.

F. H. Canfield and G. W. Weadock, for plaintiffs in error. J. H. Goff and C. E. Kremer, for defendant in error.

No opinion. Dismissed, per stipulation.

MAYER et al. v. LOUISIANA NAT. BANK OF NEW ORLEANS.

(August 10, 1892.)

No. 152.

Appeal from the district court of the United States for the northern district of Mississippi.

W. B. Walker and E. H. Bristow, for appellants. E. O. Sykes, for appellee.
No opinion. Dismissed, pursuant to the twenty-eighth rule.

McDONALD v. McLEAN.
(December 7, 1892.)
No. 88.

Appeal from the circuit court of the United States for the southern district of California. See 38 Fed. Rep. 328.
W. W. Morrow, for appellant. S. M. White, for appellee.
No opinion. Dismissed, with costs, pursuant to the tenth rule.

MELETTA v. SCHELL et al.
(December 22, 1892.)
No. 164.

Error to the circuit court of the United States for the southern district of New York.
A. W. Griswold, for plaintiff in error. The Attorney General, for defendants in error.
No opinion. Dismissed, with costs, on motion of Frederic D. McKenney, in behalf of counsel for plaintiff in error.

METTE v. McGUCKIN.
(December 5, 1892.)
No. 2.

Error to the supreme court of the state of Nebraska. See 25 N. W. Rep. 338.
Jefferson Chandler and J. M. Woolworth, for plaintiff in error.
No opinion. Judgment affirmed, with costs, by a divided court.

MEYER v. BACKER.
(April 11, 1893.)
No. 296.

Appeal from the circuit court of the United States for the eastern district of Arkansas. See 43 Fed. Rep. 702.
John S. Duffie, for appellant. Morris M. Cohn, for appellee.
No opinion. Dismissed, per stipulation.

MOORE v. ST. LOUIS & S. F. RY. CO.
(June 28, 1892.)
No. 414.

Error to the circuit court of the United States for the western district of Arkansas.
Ben T. Du Val, for plaintiff in error. A. T. Britton, A. B. Browne, and George R. Peck, for defendant in error.
No opinion. Dismissed, pursuant to the twenty-eighth rule.

MULHOLLAND v. UNITED STATES.
(March 13, 1893.)
No. 1,076.

Appeal from the circuit court of the United States for the district of Kentucky. See 50 Fed. Rep. 413.
Samuel McKee and William Lindsay, for appellant. The Attorney General, for the United States.
No opinion. Dismissed on authority of counsel for appellant, on motion of the solicitor general, for appellee.

NATIONAL CABLE RY. CO. v. MOUNT ADAMS & E. P. INCLINED RY.
(March 7, 1893.)
No. 307.

Appeal from the circuit court of the United States for the southern district of Ohio. See 38 Fed. Rep. 840.
George Harding, for appellant. R. H. Parkinson, for appellee.
No opinion. Dismissed, with costs, on motion of counsel for appellant.

NEW CHESTER WATER CO. et al. v. HOLLY MANUF'G CO.
(December 12, 1892.)
No. 1,255.

Petition for a writ of certiorari to the United States circuit court of appeals for the third circuit. See 53 Fed. Rep. 19.
Richard C. Dale and Samuel Dickson, for petitioners. Richard L. Ashurst, for respondents.
No opinion. Petition denied.

OTTAWA, O. & F. R. V. R. CO. v. MASON.
(April 10, 1893.)
No. 242.

Appeal from the circuit court of the United States for the northern district of Illinois.
Wirt Dexter and John J. Herrick, for appellant. George A. Sanders and T. S. McClelland, for appellee.
No opinion. Dismissed, with costs, per stipulation, on motion of George A. Sanders, for appellee.

PANGBORN v. BRAZEL.
(March 27, 1893.)
No. 186.

Appeal from the circuit court of the United States for the eastern district of Michigan.
Thomas J. Johnston, for appellant. E. M. Marble, for appellee.
No opinion. Dismissed, with costs, pursuant to the tenth rule.

PARKER v. DENNY.
(January 18, 1893.)
No. 126.

Appeal from the supreme court of the territory of Washington. See 21 Pac. Rep. 388.
John H. Mitchell, for appellant. John B. Allen, for appellee.
No opinion. Dismissed, per stipulation, and cause remanded to the supreme court of the state of Washington.

PRICE v. PARKHURST.
(April 3, 1893.)
No. 1,314.

On a petition for a writ of certiorari to the United States circuit court of appeals for the eighth circuit. See 53 Fed. Rep. 312.

Henry Wise Garnett, Henry M. Teller, and H. W. Hobson, for petitioner. R. S. Morrison, for respondents.
No opinion. Petition denied.

RAILWAY REGISTER MANUF'G CO. v. CENTRAL PARK, N. & E. R. R. CO. SAME v. BROADWAY & S. A. R. CO.

(October 24, 1892.)

Nos. 17, 26.

Appeals from the circuit court of the United States for the southern district of New York. See 26 Fed. Rep. 522; 30 Fed. Rep. 238.
E. N. Dickerson, for appellant. John Dane, Jr., and John F. Dillon, for appellees.
No opinion. Dismissed, with costs, pursuant to the nineteenth rule.

RAILWAY REGISTER MANUF'G CO. v. THIRD AVE. R. CO. et al.

(March 24, 1893.)

No. 177.

Appeal from the circuit court of the United States for the southern district of New York. See 33 Fed. Rep. 31.
E. N. Dickerson, for appellant. Louis W. Frost, for appellees.
No opinion. Dismissed, with costs, pursuant to the tenth rule.

RAINEY v. BROWN et al.

(March 22, 1893.)

No. 155.

Appeal from the circuit court of the United States for the western district of Pennsylvania.
John Dalzell, for appellant. Hill Burgwin and George C. Burgwin, for appellees.
No opinion. Dismissed, with costs, pursuant to the sixteenth rule, on motion of A. P. Burgwin, for appellees.

RICHMOND & D. R. CO. v. KILLIAN.

(March 30, 1893.)

No. 201.

Error to the circuit court of the United States for the northern district of Georgia.
Linden Kent and Henry Jackson, for plaintiff in error.
No opinion. Dismissed, with costs, pursuant to the tenth rule.

ROBERTSON v. ATTERBURY.

(January 6, 1893.)

No. 115.

Error to the circuit court of the United States for the southern district of New York.
The Attorney General, for plaintiff in error. William Stanley, S. G. Clarke, and E. B. Smith, for defendant in error.
No opinion. Dismissed, with costs, on motion of the attorney general, for plaintiff in error.

ROYER v. COUPE et al.

(December 5, 1892.)

No. 83.

Appeal from the circuit court of the United States for the district of Massachusetts. See 38 Fed. Rep. 113, 115.
M. A. Wheaton, for appellant. B. F. Thurston and W. H. Thurston, for appellees.
No opinion. Dismissed, with costs, pursuant to the tenth rule.

ST. LOUIS, A. & T. RY. CO. v. UNION BRIDGE CO.

(November 14, 1892.)

No. 132.

Error to the circuit court of the United States for the eastern district of Arkansas.
J. M. Taylor and Jefferson Chandler, for plaintiff in error. U. M. Rose and G. B. Rose, for defendant in error.
No opinion. Dismissed, with costs, on authority of counsel for plaintiff in error.

ST. PAUL FIRE & MARINE INS. CO. v. PELZER MANUF'G CO.

(July 23, 1892.)

No. 482.

Error to the circuit court of the United States for the district of South Carolina. See 41 Fed. Rep. 271.
W. J. Hammond, for plaintiff in error. A. T. Smythe, for defendant in error.
No opinion. Dismissed, pursuant to the twenty-eighth rule.

SANGER et al. v. FLOW et al.

(January 18, 1893.)

No. 984.

Error to the United States circuit court of appeals for the eighth circuit. See 48 Fed. Rep. 152.
W. O. Davis, for plaintiffs in error.
No opinion. Dismissed, with costs, on motion of counsel for plaintiffs in error, and case remanded to United States court in Indian Territory.

SAVAGE v. UNITED STATES.

(November 11, 1892.)

No. 1,219.

Appeal from the court of claims.
The Attorney General, for the United States.
No opinion. Docketed and dismissed, on motion of Assistant Attorney General Cotton, for appellee

SAX v. TAYLOR IRON WORKS.

(March 23, 1893.)

No. 168.

Appeal from the circuit court of the United States for the district of New Jersey. See 30 Fed. Rep. 835.
David A. Burr, for appellant.
No opinion. Dismissed, with costs, pursuant to the tenth rule.

SAWYER-MAN ELECTRIC CO. v. EDISON ELECTRIC LIGHT CO.

(May 15, 1893.)

No. 1,339.

Petition for a writ of certiorari to the United States circuit court of appeals for the second circuit. See 53 Fed. Rep. 592.

Edmund Wetmore, Elihu Root, S. A. Duncan, L. E. Curtis, and B. H. Bristow, for petitioner. Joseph H. Choate, Frederic P. Fish, and R. N. Dyer, for respondent.

No opinion. Petition denied.

THE SAN DIEGO v. UNITED STATES.

(January 3, 1893.)

No. 1,268.

Appeal from the district court of the United States for the district of Alaska.

The Attorney General, for the United States.

No opinion. Docketed and dismissed, on motion of the solicitor general, for appellee.

SHANNON v. BRUNER.

(January 3, 1893.)

No. 96.

Appeal from the circuit court of the United States for the eastern district of Missouri. 33 Fed. Rep. 289, affirmed.

U. M. Young, for appellant. F. N. Judson, for appellee.

No opinion. Decree affirmed, with costs, by a divided court.

SHIELDS et al. v. McAULEY et al., (two cases.)

(February 2, 1893.)

Nos. 128, 129.

Appeals from the circuit court of the United States for the western district of Pennsylvania. See 37 Fed. Rep. 302.

James H. Reed, for appellants. George C. Burgwin, for one of the appellees.

No opinion. Dismissed, with costs, on authority of counsel for appellants.

SIMMS v. BAMBRICK et al.

(November 23, 1892.)

No. 67.

Appeal from the supreme court of the territory of Arizona.

William Pinkney Whyte, for appellant.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

SINGLEHURST et al. v. LA COMPAGNIE GENERALE TRANSATLANTIQUE et al.

(March 27, 1893.)

No. 1,309.

Petition for a writ of certiorari to the United States circuit court of appeals for the second circuit. See 53 Fed. Rep. 293.

E. K. Jones, for petitioner. R. D. Benedict, for Singlehurst et al., respondents.

No opinion. Petition denied.

SMITH v. THOMSON et al.

(December 1, 1892.)

No. 75.

Appeal from the circuit court of the United States for the northern district of New York. See 38 Fed. Rep. 604.

George E. Terry, for appellant.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

SPERRY v. LEVINS.

(April 10, 1893.)

No. 1,322.

Appeal from the supreme court of the territory of Washington. See 20 Pac. Rep. 309.

No opinion. Docketed and dismissed, with costs, on motion of Fillmore Beall, for appellee, and cause remanded to the supreme court of the state of Washington.

STAYTON WATER-DITCH & CANAL CO. et al. v. SALEM CAPITAL FLOUR-MILLS CO.

(March 21, 1893.)

No. 441.

Appeal from the circuit court of the United States for the district of Oregon. See 33 Fed. Rep. 146.

John H. Mitchell, for appellants. J. N. Dolph, for appellee.

No opinion. Dismissed, with costs, on motion of John H. Mitchell, for appellants.

STEM-WINDER MIN. CO. v. EMMA & LAST CHANCE CONSOL. MIN. CO. et al.

(December 19, 1892.)

No. 62.

Error to the supreme court of the territory of Idaho. 21 Pac. Rep. 1040, affirmed.

S. S. Burdett and Albert Hagen, for plaintiff in error. W. B. Heyburn, for defendants in error.

No opinion. Judgment affirmed, with costs, by a divided court, and cause remanded to the supreme court of the state of Idaho.

SUESSENBACH et al. v. FIRST NAT. BANK OF DEADWOOD.

(October 24, 1892.)

No. 68.

Appeal from the supreme court of the territory of Dakota. See 41 N. W. Rep. 662.

Daniel McLaughlin, for appellants. G. C. Moody and S. S. Burdett, for appellee.

No opinion. Dismissed, with costs, per stipulation, on motion of S. S. Burdett, for appellee, and cause remanded to the supreme court of the state of South Dakota.

SUN PRINTING & PUB. ASS'N v. SMITH.

(May 10, 1893.)

No. 1,341.

Petition for a writ of certiorari to the United States circuit court of appeals for the second circuit. See 55 Fed. Rep. 240.

Franklin Bartlett, for petitioner.

No opinion. Petition denied.

SWEET v. LA BELLE WAGON WORKS.

(April 3, 1893.)

No. 295.

Appeal from the circuit court of the United States for the eastern district of Wisconsin.

F. C. Winkler, for appellant. C. E. Shepard, for appellee.

No opinion. Dismissed, with costs, on authority of counsel for appellant.

TEXAS & P. RY. CO. v. NELSON

(October 28, 1892.)

No. 1,112.

Error to the United States circuit court of appeals for the fifth circuit. See 50 Fed. Rep. 814.

John F. Dillon and Winslow S. Pierce, for plaintiff in error.

No opinion. Dismissed, with costs, on authority of counsel for plaintiff in error.

THOMPSON v. CARLISLE et al.

(November 30, 1892.)

No. 73.

Error to the circuit court of the United States for the northern district of Texas.

Sawnie Robertson, for plaintiff in error.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

TODD v. KAUFFMAN et al.

(June 2, 1892.)

No. 937.

Appeal from the supreme court of the District of Columbia.

J. J. Johnson, for appellant. B. F. Leighton, for appellees.

No opinion. Dismissed, pursuant to the twenty-eighth rule.

TRAVERS v. BUCKLEY et al.

(April 24, 1893.)

No. 250.

Appeal from the circuit court of the United States for the district of Massachusetts. See 39 Fed. Rep. 605.

Arthur v. Briesen, for appellant. Causten Browne, for appellees.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

ULRICH v. McGOWAN.

(May 15, 1893.)

No. 601.

Appeal from the circuit court of the United States for the western district of Missouri. See 43 Fed. Rep. 661.

Edward H. Stiles, for appellant.

No opinion. Dismissed, with costs, on authority of counsel for appellant.

UNITED STATES v. FOWKES.

(February 6, 1893.)

No. 1,277.

Petition for a writ of certiorari to the United States circuit court of appeals for the third circuit. See 53 Fed. Rep. 13.

The Attorney General and Asst. Atty. Gen. Maury, for the United States. Thomas Hart, Jr., for respondent.

No opinion. Petition denied.

UNITED STATES v. GILBERT.

(January 3, 1893.)

No. 638.

Appeal from the court of claims.

The Attorney General, for the United States. C. C. Lancaster, for appellee.

No opinion. Dismissed, on motion of the solicitor general, for appellant.

UNITED STATES v. THE ITATA.

(October 31, 1892.)

No. 1,204.

Petition for a writ of certiorari to the United States circuit court of appeals for the ninth circuit. See 49 Fed. Rep. 646.

The Attorney General and The Solicitor General, for the United States.

No opinion. Petition denied, without prejudice.

UNITED STATES v. MARVIN.

(January 3, 1893.)

No. 667.

Appeal from the circuit court of the United States for the district of Connecticut. See 44 Fed. Rep. 405.

The Attorney General, for the United States. C. C. Lancaster, for appellee.

No opinion. Dismissed, on motion of the solicitor general, for appellant.

UNITED STATES v. MOCK.

(April 20, 1893.)

No. 234.

Error to the circuit court of the United States for the northern district of California. See 54 Fed. Rep. 490.

The Attorney General, for the United States.

No opinion. Dismissed, on authority of counsel for plaintiff in error.

VAN GUNDEN et al. v. VIRGINIA COAL & IRON CO.

December 5, 1892.)

No. 1,246.

Petition for a writ of certiorari to the United States circuit court of appeals for the fourth circuit. See 52 Fed. Rep. 838.

William C. Mayne, D. H. Chamberlain, and F. S. Blair, for petitioners. Richard C. Dale, J. F. Bullitt, and R. A. Ayers, for respondent.

No opinion. Petition denied.

VULCAN IRON WORKS et al. v. SKINNER.

(January 9, 1893.)

No. 228.

Appeal from the circuit court of the United States for the northern district of Illinois. See 39 Fed. Rep. 870.

Charles K. Offield, for appellants. L. L. Coburn, for appellee.

No opinion. Dismissed, per stipulation.

WALDIE v. HUBEL.

(April 13, 1893.)

No. 219.

Appeal from the circuit court of the United States for the southern district of New York. See 35 Fed. Rep. 414.

A. G. N. Vermilyea, for appellant.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

WATSON v. BELFIELD et al.

(March 23, 1893.)

No. 169.

Appeal from the circuit court of the United States for the district of New Jersey. See 26 Fed. Rep. 536.

Edward A. Day, for appellant. James Buchanan, for appellees.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

WIGHT FIREPROOFING CO. v. CHICAGO FIREPROOFING CO.

(April 26, 1893.)

No. 280.

Appeal from the circuit court of the United States for the northern district of Illinois. See 35 Fed. Rep. 582.

George L. Chapin, for appellant.

No opinion. Dismissed, with costs, pursuant to the tenth rule.

WILKINS et al. v. TOURTELOTT et al.

(April 3, 1893.)

No. 145.

Error to the supreme court of the state of Kansas. See 22 Pac. Rep. 11.

James M. Mason, William M. Springer, and J. W. Day, for plaintiffs in error. Jefferson Brumback and Wallace Pratt, for defendants in error.

No opinion. Judgment affirmed, with costs, by a divided court.

WILLIAMS v. ABEEL et al.

(March 7, 1893.)

No. 853.

Error to the circuit court of the United States for the northern district of Texas.

Eugene Williams, for plaintiff in error. E. H. Graham, for defendants in error.

No opinion. Dismissed, with costs, on motion of counsel for plaintiff in error.

WILLIAMS v. WILCOX et al.

(March 7, 1893.)

No. 854.

Error to the circuit court of the United States for the northern district of Texas.

Eugene Williams, for plaintiff in error. E. H. Graham, for defendants in error.

No opinion. Dismissed, with costs, on motion of counsel for plaintiff in error.

END OF CASES IN VOLUME 13.